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WHO: The Office of the Federal Register.

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3. The important elements of typical Federal Register documents.
4. An introduction to the finding aids of the FR/CFR system.

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

WASHINGTON, DC

WHEN: June 9, at 9 a.m.
WHERE: Office of the Federal Register,
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WHEN: July 15, at 9 a.m.
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Boston, MA.
RESERVATIONS: Call the Boston Federal Information Center, 617–565–8129

Contents

Federal Register

Vol. 52, No. 104

Monday, June 1, 1987

Separate Parts In This Issue

Reader Aids
Additional information, including a list of public laws, telephone numbers, and finding aids, appears in the Reader Aids section at the end of this issue.

CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

5 CFR
1640 20371

7 CFR
1d 20372
272 20376
273 20376
910 20380
923 20381
925 20382
1106 20383
1945 20384

Proposed Rules:
925 20402

8 CFR
214 20554

10 CFR
Proposed Rules:
1013 20403

14 CFR
Proposed Rules:
71 20412
121 20560
135 20560

20 CFR
654 20496
655 20496

Proposed Rules:
61 20536
62 20536

21 CFR
510 20385

22 CFR
224 20385

Proposed Rules:
224 20413

29 CFR
501 20524
511 20386

30 CFR
Proposed Rules:
700 20546
702 20546
750 20546
870 20546
910 20546
912 20546
921 20546
922 20546
933 20546
937 20546
939 20546
941 20546
942 20546
947 20546

33 CFR
100 20386

36 CFR
7 20387

39 CFR
111 20388

40 CFR
60 20391
61 20397

Proposed Rules:
52 20422
228 20429
700 20494

43 CFR
Proposed Rules:
2 20494

46 CFR
Proposed Rules:
558 20430
559 20430
560 20430
561 20430
562 20430
564 20430
566 20430
569 20430
586 20430

47 CFR
Proposed Rules:
73 (3 documents) 20430–20432

49 CFR
383 20574
391 20574
1206 20399
1249 20399

50 CFR
Proposed Rules:
23 20433

Rules and Regulations

Federal Register
Vol. 52, No. 104
Monday, June 1, 1987

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.

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

5 CFR Part 1640

Periodic Participant Statements

AGENCY: Federal Retirement Thrift Investment Board.

ACTION: Interim rule with request for comments.

SUMMARY: The Federal Retirement Thrift Investment Board (the Board) was established by Pub. L. No. 99-335 (June 6, 1986), the Federal Employees' Retirement System Act of 1986, 1986 U.S. Code Cong. & Ad. News (100 Stat.) 514 (codified principally at 5 U.S.C. 8401-8479), as amended by Pub. L. 99-509, the Omnibus Budget Reconciliation Act of 1986, and Pub. L. No. 99-556, the Federal Employee's Retirement System Technical Corrections Act of 1986, to administer the Thrift Savings Plan for Federal employees. Regulations of the Board are contained in Title 5, CFR, Chapter VI, Parts 1600-1699. The Executive Director is publishing in Part 1640 interim regulations concerning periodic information to be furnished to participants in the Thrift Savings Plan.

DATES: Interim rules effective June 1, 1987; comments must be received on or before July 1, 1987.

ADDRESS: Comments may be sent to: James B. Petrick, Federal Retirement Thrift Investment Board, Benjamin Franklin Station, P.O. Box 511, Washington, DC 20044.

FOR FURTHER INFORMATION CONTACT: James B. Petrick (202) 653-2573.

SUPPLEMENTARY INFORMATION: Part 1640 sets forth the information that the Thrift Savings Plan must provide to its participants on a periodic basis. Section 1640.2 requires information to be provided to each plan participant at least once every six months, no less than 30 days prior to a period established by the Executive Director pursuant to 5 U.S.C. 8432(b)(1) in which participants may make effective elections concerning contributions to or investments in the Plan. Sections 1640.3 and 1640.4 set forth the information which will be furnished to a participant concerning the status of his or her individual account at the beginning and end of the reporting period and the transactions affecting the account during the reporting period. Each section contains a provision allowing the Executive Director to furnish additional information. Section 1640.5 describes the information to be furnished to participants relating to investments and contemplated investments of the three investment funds described in 5 U.S.C. 8438. Two types of information will be provided: (1) A description of the investment and (2) a five year history of the performance of that type of investment.

Section 1640.6 requires individual account statements to be mailed directly to plan participants by the Board. Information concerning the plan investments may either be mailed directly to plan participants or included with any other informational material which is distributed in a way reasonably designed to reach plan participants.

Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities. They will affect only internal government procedures related to the Thrift Savings Plan.

Paperwork Reduction Act

I certify that these regulations do not require additional reporting under the criteria of the Paperwork Reduction Act of 1980.

Waiver of Notice of Proposed Rulemaking and 30-Day Delay of Effective Date

Pursuant to 5 U.S.C. 553 (b)(B) and (d)(3), I find that good cause exists for waiving the general notice of proposed rulemaking and for making these regulations effective in less than 30 days. The Board is required by law to issue initial statements and investment information to participants no later than June 1, 1987.

List of Subjects in 5 CFR Part 1640

Employee benefit plans, Government employees, Reporting and recordkeeping requirements, Retirement, Pensions.

Title 5 of the Code of Federal Regulations is amended to add Part 1640 to Chapter VI to read as follows:

PART 1640—PERIODIC PARTICIPANT STATEMENTS

Sec.

Authority: 5 U.S.C. 8439 (c)(1) and (c)(2), 5 U.S.C. 8474 (b)(5) and (c)(1).

§ 1640.1 Definitions.

As used in this Subpart:

"Board" means the Federal Retirement Thrift Investment Board, established pursuant to 5 U.S.C. 8472;

"C Fund" means the Common Stock Index Investment Fund established pursuant to 5 U.S.C. 8438(b)(1)(C);

"Employee contribution" means any contribution made pursuant to 5 U.S.C. 8432(a) or 5 U.S.C. 8351(a);

"Employer basic contribution" means any contribution made pursuant to 5 U.S.C. 8432(c)(1) or 5 U.S.C. 8432(c)(3);

"Employer matching contribution" means any contribution made pursuant to 5 U.S.C. 8432(c)(2);

"Executive Director" means the Executive Director of the Board, as defined in 5 U.S.C. 8401(11) and as further described in 5 U.S.C. 8474.

"F Fund" means the Fixed Income Investment Fund established pursuant to 5 U.S.C. 8438(b)(1)(B);

"G Fund" means the Government Securities Investment Fund established pursuant to 5 U.S.C. 8438(b)(1)(A);

"Individual account" means the account established for a participant in the Thrift Savings Fund pursuant to 5 U.S.C. 8439(a);

"Investment fund" means either the G Fund, the F Fund, or the C Fund, or all three collectively;

"Open season" means the period during which participants may make an election with respect to the Thrift Savings Plan.

"Participant" means any person with an individual account in the Thrift Savings Fund.

"Source," when used in reference to contributions, means any one of the three types of contributions which are made to the Fund on behalf of participants—employee contributions, employer basic contributions, or employer matching contributions.

"Thrift Savings Fund" means the Fund described in 5 U.S.C. 8437;

"Thrift Savings Plan" or "Plan" means the Federal Retirement Thrift Savings Plan established under Subchapter III of the Federal Employees' Retirement System Act of 1986, 5 U.S.C. 8431, *et seq.*

"Thrift Savings Plan Service Office" means the office established by the Board to service separated participants.

§ 1640.2 Duty to provide information.

At least once every six months, and not later than thirty (30) days prior to a period established by the Executive Director pursuant to 5 U.S.C. 8432(b)(1) in which participants may make effective elections concerning contributions to or investments in the Plan, the Executive Director shall provide the information prescribed in §§ 1640.3 and 1640.5.

§ 1640.3 Statement of individual account.

The Executive Director shall furnish each participant with the following information concerning that participant's individual account:

(a) Name and social security number under which the account is established;

(b) Beginning and ending dates of the period covered by the statement;

(c) As of the opening of business on the beginning date and the close of business on the ending date of the period covered by the statement:

(1) The balance of the account;

(2) The amounts of principal and earnings in the G Fund, the F Fund, and the C Fund by source of contribution;

(d) An itemization of all transactions affecting the account which occurred during the period covered by the statement, made in accordance with section 1640.4; and

(e) Any other information which the Executive Director determines should be included in the statement.

§ 1640.4 Account transactions.

(a) *Types of transactions contained in statement.* Where relevant, the following transactions shall be reported in each individual account statement:

(1) Contributions;
(2) Earnings posted;
(3) Withdrawals;
(4) Forfeitures;
(5) Loan activity;
(6) Transfers between investment funds;
(7) Adjustments to prior transactions; and
(8) Any other transaction which the Executive Director deems to affect the status of the individual account.

(b) *Information concerning each transaction.* Where relevant, the statement shall contain the following information concerning each transaction identified in paragraph (a) of this section:

(1) Type of transaction;
(2) Pay date of the pay period in which the transaction was reflected in the participant's salary payment;
(3) Investment fund affected;
(4) Date the transaction was processed;
(5) Source of contribution;
(6) Amount of the transaction; and
(7) Any other information which the Executive Director deems relevant.

§ 1640.5 Investment fund information.

For each open season, the Executive Director shall furnish each participant with a statement concerning each of the investment funds. This statement shall contain the following information concerning each investment fund:

(a) A summary description of the type of investments to be made by the particular investment fund, written in a manner designed to facilitate informed decision-making by the participant; and

(b) An evaluation of the performance history of the type of investments to be made by the particular investment fund covering the five year period preceding the date of the evaluation.

For the May 15, 1987 through July 31, 1987 open season, the statement described in this section shall only be provided for the G Fund.

§ 1640.6 Method of providing information.

(a) *Individual account statement.* The information concerning each participant's individual account described in § 1640.3 shall be sent to the participant at the participant's last known address, by first class mail, at least three business days before the date when such statement must be furnished under § 1640.2 It shall be the participant's responsibility to provide his or her current address to the employing office or, in the case of separated employees, to the Thrift Savings Plan Service Office.

(b) *Investment information.* The investment information described in § 1640.5 shall be furnished to each participant either by mailing the information to the participant by the method described in paragraph (a) of this section, or by including such information in material published by the Board to be distributed in any manner reasonably designed to reach the participant, including distribution through the participant's employing office or, in the case of separated employees, through the Thrift Savings Plan Service Office.

Dated: May 27, 1987.

Francis X. Cavanaugh,

Executive Director, Federal Retirement Thrift Investment Board.

[FR Doc. 87-12431 Filed 5-29-87; 8:45 am]

BILLING CODE 6760-01-M

DEPARTMENT OF AGRICULTURE

Office of the Secretary

7 CFR Part 1d

Rural Labor; Immigration Reform and Control Act

AGENCY: Office of the Secretary, USDA.

ACTION: Final rule.

SUMMARY: This final rule defines fruits, vegetables, and other perishable commodities as prescribed by section 302(a) of the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (hereinafter referred to as "the Act"). In addition, several other words and terms necessary to an understanding of the definitions of fruits, vegetables, and other perishable commodities are defined. The rule will assist the Immigration and Naturalization Service (INS) in determining the special agricultural workers to be admitted into the United States for temporary residence.

EFFECTIVE DATE: June 1, 1987.

FOR FURTHER INFORMATION CONTACT: Al French, Acting Special Assistant (for Labor Affairs to the Assistant Secretary for Economics), Room 227-E, Administration Building, United States Department of Agriculture, 14th and Independence Avenue SW., Washington, DC 20250, telephone (202) 447-4737.

SUPPLEMENTARY INFORMATION: Section 302(a) of the Act requires the Secretary of Agriculture to publish regulations defining the fruits, the vegetables, and the other perishable commodities in which field work related to planting, cultural practices, cultivating, growing, and harvesting will be considered "seasonal agricultural services." On April 22, 1987, the United States Department of Agriculture requested public comment on a proposed rule that defined eight terms necessary to implement section 302(a) of the Act. We have received numerous comments on the proposed rule. The comment period closed May 13, 1987, and the comments

received are discussed below. Several suggestions from commenters have been incorporated into the final rule.

Comments

Section 1d.1 Scope.

One commenter has suggested that the failure to make the lists in the rule exclusive might make it easier for smugglers of aliens to establish a defense based upon good faith impressions that smuggled aliens were eligible under the seasonal agricultural services program. This commenter suggests that the Department issue an exhaustive list of the commodities to be included within the program.

We are unable to perceive how this regulation would affect smugglers. Those eligible for the seasonal agricultural worker program may apply directly to the INS and have no need to be smuggled into this country. It is difficult to see how a smuggler could claim a good faith impression concerning eligibility when an eligible alien has no need for a smuggler.

As we stated in the proposed rule, consideration was given to creating an exhaustive list of the commodities to be included. While we did not propose that approach, upon reconsideration we have determined that an exhaustive listing of the commodities included within the definition of other perishable commodities, combined with the adoption of botanical definitions of fruits and vegetables, appears to be the most efficacious approach for the timely processing of applications for adjustment of status.

Section 1d. 2 Critical and unpredictable labor demands.

Some commenters found that the meaning of "critical and unpredictable labor demands" was unclear. A review of the definition indicates that this is possible. Therefore, we have revised the definition of "critical and unpredictable labor demands" to clarify that the critical and unpredictable nature of seasonal agricultural services means that it is not possible to make a determination of labor needs 60 days in advance of those needs and the time of the labor needs cannot be forecast with reasonable certainty.

Section 1d. 3 Field work.

Most of the comments received on this definition urged that it be expanded to include various livestock operations noting that they were "perishable", subject to "critical and unpredictable labor demands" and that they historically had been dependent upon alien workers. Many commenters expressed concern that they would be excluded from both the seasonal agricultural worker and the H–2A programs provided by the Act. We recognize that there may be dependence by livestock producers upon alien workers and the real possibility of labor shortages. However, these concerns do not meet the eligibility criteria established by the Act and its legislative history. These criteria are "the performance of field work relating to planting, cultural practices, cultivating, growing and harvesting"; all of which are clearly distinguished from animal husbandry. Moreover, none of the hundreds of commenters cited any expression of congressional intent that livestock was to be included in the special agricultural workers program. To the contrary, congressional reports and colloquies consistently referred to "crops", a clear indication that the meaning was plant crops rather than livestock.

Several commenters noted that our proposed definition of field work irrationally distinguished between workers engaged in "on farm" packing and workers performing the identical activity at some other location. Commenters also pointed out that since many families were divided between harvest work and packing that our definition would result in splitting up families merely because they had worked across the road from one another. These comments have merit. The legislative history suggests that Congress did not intend to include packinghouses or canneries within field work; at the same time, Congress did recognize that processing activities associated with field work would be covered. In light of these comments, we think that the most reasonable way of achieving congressional intent and harmonizing the tension between these concepts is to look at a normal farming operation as an integrated whole. We have sought to clarify this definition by adding a definition of "agricultural lands" and clarifying language to the definition of "field work".

Several commenters mentioned that the term "agricultural lands" was ambiguous and perhaps should be defined to determine the extent of the term "field work". We agree that the definition of the term "agricultural lands" would clarify the definition of "field work". Therefore, we have defined "agricultural lands" as follows:

"Agricultural lands" means any land, cave, or structure, except packinghouses or canneries, used for the purpose of performing field work.

This definition will appear in the rule as section 1d.2 and the subsequent sections will be renumbered accordingly.

Several commenters requested clarification and one questioned whether activities performed in greenhouses or mushroom houses constituted field work. Such operations have long been considered farms and the activities clearly relate to "planting, cultural practices, cultivating, growing and harvesting" as specified by the Act so they are properly considered to be engaged in field work. In order to clarify this point further, we have defined "agricultural lands" to include caves or structures, other than packinghouses or canneries, where field work is performed.

Section 1d.4 Fruits.

One commenter suggested that the definition of fruits should be limited to perisahable crops only in conformity with "other perishable commodities." The word perishable is a modifier of commodities rather than of fruits and vegetables. The unambiguous language of the statute requires the inclusion of "fruits and vegetables of every kind", meaning fruits and vegetables without exception. It is estimated that few additional workers will be admitted as a result of the inclusion of all fruits and vegetables.

Section 1d.5 Horticultural specialties.

Several commenters questioned a perceived ambiguity due to the inclusion of "juvenile trees" as a perishable commodity under horticultural specialties and the exclusion of "trees" under other perishable commodities. We have clarified this by changing the term "trees" to "forest products" so as to make clear that the growing of juvenile trees of any kind, including forest trees, in a nursery is to be included, while forestry operations, including the planting of trees in a forest, is associated with forest products and is to be excluded.

Section 1d.6 Other perishable commodities.

One commenter thought that the definition of "other perishable commodities" was too narrow and felt that its focus should be on the need to harvest a maturity to prevent deterioration. Since anything organic deteriorates, we think that this standard is too vague. Many commenters questioned both the list of commodities included and the list of commodities excluded. The following includes a discussion of the most pertinent

characteristics of each of these commodities which are not fruits and vegetables, but that are included within the definition.

Christmas trees require 100–120 man-hours/acre/year. To produce a marketable grade tree, considerable labor is required for shearing and shaping of the individual trees. Shaping should be done during a ten day period when the candles (new growth) are succulent, which may occur as many as five times during the growing season. Shearing done too early will cause too heavy a bud set and irregular growth, whereas shearing performed too late can cause small buds, few buds, and many dead studs. Pruning may also be required in order to stimulate growth where needed for symmetry. In most cases, the final shearing must be done in the year prior to the year of anticipated harvest. If the tree cannot be harvested when ready, reshaping the tree for sale in another year is not feasible. Shearing and pruning are cultural practices within the meaning of the Act. The above activities are all within the definition of field work, and Christmas trees are subject to critical and unpredictable labor demand. Therefore, the criteria for other perishable commodities is satisfied, and workers engaged in cultural practices to produce Christmas trees are performing seasonal agricultural services.

Cut flowers are grown in much the same way as many fruits and vegetables. In many instances, the timing of the planting and harvesting is dependent upon uncontrollable factors and is, therefore, critical. The report of the House Committee on the Judiciary on July 16, 1986, explicitly noted that cut flowers were intended to be covered by the definition of seasonal agricultural services. Since cut flowers are grown in greenhouses as well as in open fields, greenhouses are necessarily covered by the definition of seasonal agricultural services. In view of the legislative history, and in light of the fact that cut flowers are neither fruits nor vegetables, we have defined them appropriately as other perishable commodities.

Herbs, spices, and sugar beets are produced by seasonal field work, but are not necessarily fruits or vegetables. In some instances, on the other hand, the same species may be a fruit or vegetable depending upon how it is processed or used. For instance, the chili pepper used for making dye is identical to the edible chili pepper.

These crops require labor at critical periods for thinning, blocking, and hoeing, as well as for irrigation in most of the areas in which they are grown. We have determined that these crops are sufficiently subject to critical and unpredictable labor demand and, therefore, workers engaged in seasonal field work in these crops are performing seasonal agricultural services. Because of the difficulty of classifying these commodities as fruits or vegetables, for purposes of this rule we are classifying them as other perishable commodities.

Hops require more labor than most fruits and vegetables. The Director of the Oregon Department of Agriculture advises us that a hop farm is a very labor intensive operation. The planting requires hand labor. Typically, labor is required to twine the young plant, weed, train, and harvest the hops. Labor is required to provide about 36 inches of irrigation in a normal year. The harvest period had a span of only 20–25 days. The vines are pulled down and loaded into trailers to carry them to the picker, which is usually located at a central location on the farm. Each picker requires a crew of eight to operate. The training of the vines and the harvesting must be done during a short unpredictable span of time depending upon weather and other growing conditions. It is clear that the field work is seasonal and subject to critical and unpredictable labor demands and, therefore, workers engaged in seasonal field work in hop production and harvesting are performing seasonal agricultural services.

Horticultural specialties, frequently called nursery products, involves seasonal and labor intensive field work including seed preparation and sowing, making of cuttings, pruning, staking, tying trees and vines, potting of rooted cuttings, and grafting and budding. These activities are highly subject to unpredictable weather influences. Thus, we have determined that they are other perishable commodities. This determination is consistent with the expression of congressional intent in the report of the House Committee on the Judiciary of July 16, 1986.

Spanish reed (arundo donax) is used to make reeds for musical instruments. It is grown along 25 miles of ditchbanks and must be individually selected for size and hand harvested during a three week period each year. Harvesting at an exact maturity is critical to this industry and the maturity date will vary over a period of six weeks from year to year. Thus, the timing of the harvest is both critical and unpredictable and workers engaged in spanish reed production and harvesting are performing "seasonal agricultural services".

A few commenters questioned the inclusion of tobacco as a perishable commodity. Tobacco is grown much like a vegetable except that the plant is live transplanted, and must be trained to a single stalk by "suckering" (removing unwanted shoots) and "topping" (removing unwanted flowers). Tobacco leaves mature at different times so that selective harvesting must be practiced at approximately ten day intervals. When the leaves are mature and ready for harvest, there is a short period of about three days when they should be harvested. Approximately 160 and 230 man-hours/acre/year are required for flue-cured and burley tobaccos, respectively. The timing of the harvest is quite critical. Tobacco is produced as a result of seasonal field work, has critical and unpredictable labor demands, and meets the criteria established for other perishable commodities.

Animal aquacultural products, birds, dairy products, earthworms, feed lots, fish including oysters and shellfish, fur bearing animals and rabbits, game birds, honey, horses and other equines, livestock of all kinds including animal specialities, poultry and poultry products, sheep shearing, turkey hatching eggs, wildlife, and wool do not meet the statutory description of applicable field work relating to planting, cultural practices, cultivation, growing and harvesting; nor are they crops as that term was used in congressional reports and debate. Some of these commodities, particularly game birds and turkey hatching eggs, may well be subject to critical and unpredictable labor demands to an extent equal to or greater than most fruits and vegetables. However, the Act requires that other perishable commodities must be produced as a result of seasonal field work. The experiencing of critical and unpredictable labor demands is irrelevant if this threshold established by the Act is not met. Accordingly, for these reasons, we have determined that these commodities are not perishable commodities.

Cotton, as well as hay and other forage and silage are not fruits or vegetables, but they are produced by seasonal field work. However, the labor requirements for these crops have been met largely by the use of herbicides and mechanization. As a result, these commodities do not meet the criteria of critical and unpredictable labor demands. Therefore, we believe that these commodities are excluded properly from the definition of other perishable commodities. While soybean was excluded in the proposed rule from the coverage of other perishable commodities, the proper basis for not treating soybean as an other perishable

commodity is that soybean fits within the botanical definition of "fruit."

About 150 commenters urged the inclusion of sod and turfgrass as an "other perishable commodity" or as a "horticultural specialty". Many of these commenters stated that sod required "Multi-years to reach maturity" and "it is not always mature within a single growing season", which indicates that the commodity is not "seasonal". Many other commenters wrote: "Within reasonable limits, the seasonal nature of labor requirements are quite predictable. Based upon past experience, we can forecast our labor requirements both in terms of dates and number of workers". This statement, by sod producers from various regions, indicates that sod fails to meet the criteria for critical and unpredictable labor demands. Accordingly, we have not included sod and turfgrass as an "other perishable commodity" or as a "horticultural specialty".

Sugar cane is a perennial grass, not a fruit or vegetable, which is normally harvested between one to two years of growth. It is mature during most of this period. The timing of the harvest is not critical, but is scheduled over a period of several months for the efficient operation of the processing mill. On occasion, sugar cane has not been harvested during the current season and has been carried over to be harvested the following year. Harvest dates are quite predictable and may be scheduled several months in advance. Within the context of the Act, from planting to harvesting, sugar cane does not have the critical and unpredictable labor demand concerning its production as do fruits and vegetables, and other perishable commodities.

Some commenters have cited *Wirtz* v. *Osceola Farms Company* and *Maneja v. Waialua Agricultural Company* as an adjudication that sugar cane is a perishable commodity. It is true that in these cases the courts noted the perishability of sugar cane, but only after being harvested. These cases were interpreting a different statute. Within the context of the Act, these cases are inapposite. The legislative history of the Act evinces a congressional intent that while seasonal agricultural services may cover activities that are subsequent to, but an integral part of harvesting, the perishability of the commodities are to be considered up to the point of harvesting.

Sugar cane, like all plant crops, will die or "perish" when cut from its roots. Cultivation is the primary means by which weeds are killed on farms. If that standard were to be used to determine perishability under the Act, all crops would be considered perishable and thus defeat congressional intent to limit the eligibility of commodities to certain standards. Since the timing of the harvest of sugar cane is completely under the control of the farmer, and sugar cane would not perish if not cut down, we find that it does not meet the criteria of being subject to critical and unpredictable labor demands. Thus, sugar cane has not been included as a perishable commodity.

According to several commenters, the inclusion of sugar cane as an "other perishable commodity" is required by the legislative history of the Act. This view is incorrect. The only reference to sugar cane in the legislative history was made by Senator Wilson, who introduced the definition of "Seasonal Agricultural Services" in the Senate, and used sugar cane as an example of a commodity which was not a perishable commodity. (CR 9/12/86 P–11323).

Seven comments were received urging the inclusion of certain seed crops as perishable commodities meeting the requirements of the law. Some of the seed crops urged for inclusion were Kleingrass, rhodesgrass, green panic, beet, cabbage, carrot, collard, kale, mustard, radish, rutabaga, spinach, turnip, and alfalfa. None of the comments was so specific or informative as to present a convincing case that any of these seed crops meet the standards for criticality and unpredictability which we have deemed necessary to measure the inclusion or exclusion of any commodity as perishable. Therefore, no change has been made in the regulation with respect to the inclusion of seed crops.

Section 1d.9 Vegetables.

One commenter suggested that the definition of vegetables should be limited to perishable crops only in conformity with "other perishable commodities." We do not agree. The word perishable is a modifier of commodities, rather than of fruits and vegetables. The unambiguous language of the statute requires the inclusion of "fruits and vegetables of every kind", meaning fruits and vegetables without exception.

Good Cause

Section 553 of Title 5 of the United States Code requires generally that a rule be published not less than 30 days before the effective date of the rule. 5 U.S.C. 553(d). An exception to this general rule exists if good cause for foregoing this requirement is found and published with the rule. 5 U.S.C. 553(d)(3).

Section 210 of the Immigration and Naturalization Act, as added by section 302(a) of the Act, establishes June 1, 1987, as the first day that an alien may apply as a special agricultural worker for adjustment of status to that of temporary resident. The INS will determine the eligibility of an applicant for temporary resident status as a special agricultural worker. On May 1, 1987, INS published regulations establishing procedures for the adjustment of status of a special agricultural worker to that of temporary resident, and ultimately to that of a permanent resident. (52 FR 16195). The INS regulations provide for an immediate determination regarding the status of an alien who has applied for an adjustment of status as a special agricultural worker on the day that an application is filed.

In order to make final determinations beginning June 1, 1987, it is necessary that the INS know which fruits, vegetables, and other perishable commodities are to be included within the definition of seasonal agricultural services. The Act requires, and INS must rely upon, a rule supplied by the Secretary of Agriculture for such definitions. Without a complete definition of seasonal agricultural services on June 1, 1987, all determinations regarding status would be tentative, subject to change at a later date, and could prejudice the rights of the individuals involved.

In addition, we note that the INS has apprehended some aliens since November 6, 1986, the date of enactment of the Act, who may be eligible to apply as special agricultural workers for an adjustment of status to that of temporary resident. Section 210(d) of the Immigration and Naturalization Act provides a temporary stay of exclusion or deportation for apprehended aliens, and allows them 30 days from the first day that the application period begins to complete an application for adjustment of status.

The apprehended aliens would have until June 30, 1987, to complete an application; but without a rule for INS to make a final determination, these aliens could be excluded or deported, although subsequently determined to be eligible and readmitted to the United States as temporary residents. A rule effective June 1, 1987, could save the INS expenses associated with the detention and deportation of apprehended aliens who are eligible as special agricultural workers to have their status adjusted to that of temporary residents. Also, due process rights of the apprehended aliens are better preserved by a prompt

determination of adjustment status by the INS.

We believe that these reasons constitute good cause to make this rule effective in less than 30 days after its publication. This rule should become effective on the first day that aliens may apply for an adjustment of status so that INS can determine whether to adjust the status or to stay an exclusion or deportation. Therefore, this rule shall become effective June 1, 1987.

USDA has reviewed this rule in accordance with Executive Order No. 12291 and has determined that it is not a major rule.

List of Subjects in 7 CFR Part 1d

Immigration, Rural labor.

1. In 7 CFR a new Part 1d "Rural Labor—Immigration Reform and Control Act of 1986—Definitions" is added after Part 1c, to read as follows:

PART 1d—RURAL LABOR—IMMIGRATION REFORM AND CONTROL ACT OF 1986—DEFINITIONS

Sec.
1d.1 Scope.
1d.2 Agricultural lands.
1d.3 Critical and unpredictable labor demands.
1d.4 Field work.
1d.5 Fruits.
1d.6 Horticultural specialties.
1d.7 Other perishable commodities.
1d.8 Seasonal.
1d.9 Seasonal agricultural services.
1d.10 Vegetables.

Authority: 8 U.S.C. 1160.

§ 1d.1 Scope.

The following definitions are applicable only to the Immigration Control and Reform Act of 1986, Pub. L. No. 99–603, and are published to fulfill the Secretary's responsibilities under that Act.

§ 1d.2 Agricultural lands.

"Agricultural lands" means any land, cave, or structure, except packinghouses or canneries, used for the purpose of performing field work.

§ 1d.3 Critical and unpredictable labor demands.

"Critical and unpredictable labor demands" means that the period during which field work is to be initiated cannot be predicted with any certainty 60 days in advance of need.

§ 1d.4 Field work.

"Field work" means any employment performed on agricultural lands for the purpose of planting, cultural practices, cultivating, growing, harvesting, drying, processing, or packing any fruits, vegetables, or other perishable commodities. These activities have to be performed on agricultural land in order to produce fruits, vegetables, and other perishable commodities, as opposed to those activities that occur in a processing plant or packinghouse not on agricultural lands. Thus, the drying, processing, or packing of fruits, vegetables, and other perishable commodities in the field and the "on the field" loading of transportation vehicles are included. Operations using a machine, such as a picker or a tractor, to perform these activities on agricultural land are included. Supervising any of these activities shall be considered performing the activities.

§ 1d.5 Fruits.

"Fruits" means the human edible parts of plants which consist of the mature ovaries and fused other parts or structures, which develop from flowers or inflorescence.

§ 1d.6 Horticultural specialties.

"Horticultural specialties" means field grown, containerized, and greenhouse produced nursery crops which include juvenile trees, shrubs, seedlings, budding, grafting and understock, fruit and nut trees, fruit plants, vines, ground covers, foliage and potted plants, cut flowers, herbaceous annuals, biennials and perennials, bulbs, corms, and tubers.

§ 1d.7 Other perishable commodities

"Other perishable commodities" means those commodities which do not meet the definition of fruits or vegetables, that are produced as a result of seasonal field work, and have critical and unpredictable labor demands. This is limited to Christmas trees, cut flowers, herbs, hops, horticultural specialties, spanish reeds (arundo donax), spices, sugar beets, and tobacco. This is an exclusive list, and anything not listed is excluded. Examples of commodities that are not included as perishable commodities are animal aquacultural products, birds, cotton, dairy products, earthworms, fish including oysters and shellfish, forest products, fur bearing animals and rabbits, hay and other forage and silage, honey, horses and other equines, livestock of all kinds including animal specialties, poultry and poultry products, sod, sugar cane, wildlife, and wool.

§ 1d.8 Seasonal.

"Seasonal" means the employment pertains to or is of the kind performed exclusively at certain seasons or periods of the year. A worker who moves from one seasonal activity to another, while employed in agriculture or performing agricultural labor, is employed on a seasonal basis even though he or she may continue to be employed during the year.

§ 1d.9 Seasonal agricultural services.

"Seasonal agricultural services" means the performance of field work related to planting, cultural practices, cultivating, growing, and harvesting of fruits and vegetables of every kind and other perishable commodities.

§ 1d.10 Vegetables.

"Vegetables" means the human edible leaves, stems, roots, or tubers of herbaceous plants.

Done at Washington, DC, this 27th day of May 1987.

Richard E. Lyng,

Secretary of Agriculture.

[FR Doc. 87–12403 Filed 5–29–87; 8:45 am]

BILLING CODE 3410–01–M

Food and Nutrition Service

7 CFR Parts 272 and 273

[Amdt. No. 293]

Food Stamp Program; Higher Education Amendments of 1986

AGENCY: Food and Nutrition Service, USDA.

ACTION: Interim rule.

SUMMARY: This action amends Food Stamp Program regulations to address a provision of the Higher Education Amendments of 1986 which amended the Higher Education Act of 1965. That Act now prohibits counting certain Federal educational assistance when determining the eligibility of students for benfits under any other federally funded program. This action provides specific requirements for applying the provision of the Higher Education Act for Food Stamp Program purposes. This action also includes a technical amendment to correct an error which appeared in a final rule published April 13, 1987, entitled *"Food Stamp Program: Community Mental Health Centers, Credit Unions and Farm Self-Employment Losses.*

DATES: This action is effective retroactive to October 17, 1986 and must be implemented by State agencies immediately. Comments must be received on or before July 31, 1987 to be assured of consideration.

ADDRESS: Comments should be submitted to Bruce Clutter, Chief, Eligibility and Monitoring Branch,

Program Development Division, Family Nutrition Program, Food and Nutrition Service, USDA, 3101 Park Center Drive, Alexandria, Virginia 22302. All written comments shall be open to public inspection at the office of the Food and Nurtition Service during regular business hours (8:30 a.m. to 5:00 p.m., Monday through Friday) at 3101 Park Center Drive, Alexandria, Virginia, Room 708.

FOR FURTHER INFORMATION CONTACT: Questions regarding this rulemaking should be addressed to Judith M. Seymour, Supervisor, Certification Rulemakinng Section at the above address or by telephone at (703) 756–3429.

SUPPLEMENTARY INFORMATION:

Classification

Executive Order 12291

This final action has been reviewed under Executive Order 12291 and Secretary's Memorandum No. 1512–1. The Department has classified this action as nonmajor. The annual effect of this action on the economy will be less than $100 million. This final action will have no effect on costs or prices. Competition, employment investment, productivity, and innovation will remain unaffected. There will be no effect on the competition of United States-based enterprises with foreign-based enterprises.

Executive Order 12372

The Food Stamp Program is listed in the catalog of Federal Domestic Assistance under No. 10.551. For the reasons set forth in the Final rule and related Notice to 7 CFR Part 3015, Subpart V (48 FR 29115, June 24, 1983), this Program is excluded from the scope of Executive Order 12372 which requires intergovernmental consultation with State and local officials.

Regulatory Flexibility Act

This action has been reviewed with regard to the requirements of the Regulatory Flexibility Act of 1980 (Pub. L. 96–354, 94 Stat. 1164, September 19, 1980). S. Anna Kondratas, Acting Administrator of the Food and Nurtition Service, has certified that this rule does not have a significant economic impact on a substantial number of small entities. State welfare agencies are affected to the extent that they must implement the provisions described in this action. Potentially eligible and currently participating households are affected to the extent that they contain student members receiving Title IV funds under the Higher Education Act. Some currently ineligible households may become eligible for program benefits. Other households could receive increased benefits.

Interim Rule

S. Anna Kondratas, Acting Administrator for the Food and Nutrition Service (FNS), has determined, pursuant to 5 U.S.C. 553, that public comment on this rulemaking prior to implementation is impracticable and contrary to the public interest. This rule is effective retroactive to October 17, 1986 because Pub. L. 99–498 specifically provides that section 406 of that law (which contains new sections 479B, 472(1) and 471(2) of the Higher Education Act) was effective on the date the law was enacted, October 17, 1986. Food Stamp Program (FSP) administrators could not wait for specific Departmental regulations before applying this statutory mandate for FSP purposes. The additional specific requirements contained in this rule for applying the statutory mandate of section 406 of Pub. L. 99–498 for FSP purposes must also be effective retroactive to October 17, 1986 to ensure fair and equitable treatment of the affected public FSP administrators.

Paperwork Reduction Act

Information collection requirements for documentating verification of entries on FSP applications are approved under OMB No. 0584–0064. This action does not alter the methodologies used to determine the burden estimates currently approved for OMB No. 0584–0064.

Background

Federal Educational Assistance—273.8(e)(11) and 273.9(c)(10)

Until the amendment made by Pub. L. 99–498 were enacted on October 17, 1986, the Food Stamp Act alone governed the treatment of Federal educational assistance for Food Stamp Program purposes. The Food Stamp Act did not permit an income exclusion for Federal educational assistance provided for expenses other than tuition and mandatory school fees and to the extent that any loan included any origination fees and insurance premiums. Section 479B of the Higher Education Act (amended by Pub. L. 99–498) supersedes the Food Stamp Act with regard to the treatment of certain Federal educational assistance funded under Title IV of the Higher Education Act. Section 479B provides that:

> No portion of any student financial assistance received by an individual from any program funded in whole or part under title IV of this act which is used by that individual for costs described in section 472(1) and (2) of this title, shall be considered as income or resources when determining eligibility for assistance under any other program funded in whole or part with Federal funds.

The Pell Grant Program, the Supplemental Educational Opportunity Grant (SEOG) Program, the State Student Incentive Grant (SSIG) Program, the National Direct Student Loan (NDSL) Program, the PLUS Program, the College Work Study Program, and the Byrd Honor Scholarship programs are among the programs funded under Title IV of the Higher Education Act. The specific costs governed by the exclusion under sections 472(1) and (2) of the Act are:

> (1) tuition and fees normally assessed a student carrying the same academic workload as determined by the institution, and including costs for rental or purchase of any equipment, materials, or supplies required of all students in the same course of study;
>
> (2) an allowance for books, supplies, transportation, and miscellaneous personal expenses for a student attending the institution on at least a half-time basis, as determined by the institution;

In defining "cost of attendance", the new section of the Higher Education Act sets forth specific categories of educational costs including those described in section 472(1) and (2). Section 472 lists seven other categories of costs including room and board (472(3)) and dependent care expenses (472(7)). Since the exclusionary provision of section 479(B) applies, by its terms, only to costs described in section 472(1) and (2), this rule makes it clear that the treatment of other costs such as room and board and dependent care expenses for FSP purposes remains unaffected.

It is the responsibility of this Department to ensure that any statutory amendment which affects the Food Stamp Program (FSP) is implemented in a manner consistent with the requirement of the Food Stamp Act to establish uniform national standards of eligibility.

In light of this requirement, the Department has determined that more specific guidance is necessitated for applying the provisions of Pub. L. 99–498 to ensure that only the specific costs outlined in section 472(1) and 472(2) of the Act are excluded when determining FSP eligibility and benefit levels for affected student households.

Income Exclusion—Tuition and Fees

Regarding the specific costs described in section 472(1) of the Higher Education

Act, the statute provides and income exclusion for assistance funded under Title IV of the Higher Education Act for tuition and fees normally assessed students carrying the same academic workload, including the cost of rental or purchase of any equipment, materials or supplies required of all students in the same course of study. Current regulations at 7 CFR 273.9(c)(3) provide an income exclusion for Federal and nonfederal educational assistance used for tuition and mandatory school fees at institutions of post secondary education. Generally, mandatory school fees are defined as those charged uniformly to all students or all students in the same course of study. This definition would include the cost of rental or purchase of equipment, materials or supplies of students in the same course of study. The Department believes that this definition of mandatory school fees is consistent with the intent of Pub. L. 99–498 to exclude "fees normally assessed a student carrying the same academic workload, including the cost for rental or purchase of any equipment, materials or supplies required of all students in the same course of study." Therefore, the Department is adopting, by regulatory reference, the current definition of mandatory school fees as the definition of "fees" contained in section 472(1) of the Higher Education Act. The current regulatory section at 7 CFR 2739(c)(10) addresses income exclusions required by other Federal statutes. Accordingly, this action amends 7 CFR 2739((c)(10) to add a new provision which excludes, as income, assistance provided by a program funded in whole or in part under Title IV of the Higher Education Act for tuition and mandatory school fees (as defined at 7 CFR 273.9(c)(3)).

Income Exclusion—Other Expenses

Current regulations at 7 CFR 273.9(c)(5) prohibit an exclusion for Federal assistance to cover specific educational expenses such as routine books, supplies or transportation. However, the amendments made by Pub. L. 99–498 provide an income exclusion for assistance funded under Title IV of the Higher Education Act for books, supplies, transportation and miscellaneous personal expenses for a student attending the institution on at least a half-time basis, as determined by the institution. Accordingly, this action amends FSP regulations to add a new provision at 7 CFR 273.9(c)(10) that excludes, as income, assistance provided by a program funded in whole or in part under Title IV of the Higher Education Act for books, supplies, transportation and miscellaneous personal expenses for students attending school on at least a half-time basis (as determined by the institution).

Verification

Assistance for the cost of tuition, mandatory school fees, books, supplies transportation and miscellaneous personal expenses described in this action are the only costs that may be considered for exclusion under the provisions of Pub. L. 99–498. Expenses for room, board and/or dependent care are not excludible under the amendments made by Pub. L. 99–498. In order to ensure that only allowable expenses are excluded, this action established certain verification requirements.

The Department issued a memorandum on December 11, 1986, requiring all regional offices of the Food and Nutrition to inform their respective State agencies that they should not wait for specific FSP regulations to implement the provisions of Pub. L. 99–498. Those State agencies which have implemented the amendments made by Pub. L. 99–498 have established verification procedures which require that the educational institution specifically earmark educational assistance as provided for the excludible costs covered by the statute. It has come to the Department's attention that such "earmarking" policy has been difficult to administer. It has been reported, for instance, that some institutions cannot or will not earmark the assistance. Others are earmarking the assistance in such a manner that the State agency cannot sufficiently idenitfy excludible amounts. Thus, additional burden is placed on the State agency and client alike to substantiate amounts claimed for the purpose of an income exclusion under Pub. L. 99–498.

Based on these reported instances, the Department has determined that the only feasible means of ensuring compliance with the statutory mandate is to place the burden of verification on the student. However, the Department does not intend that State agencies require students to present identifiable receipts for each and every excludible expense. The State agency can accept other forms of verification. For example, a student who uses public transportation to and from school would probably not have receipts to substantiate transportation expenses. In this case, an exclusion can still be granted for daily commuting costs based on public transportation rate charts, rather than a specific receipt. Accordingly, this action amends FSP regulations to add a new provision at 7 CFR 273.9(c)(10) to require the State agency to verify all factors affecting this provision. The student shall be responsible for providing information to the State agency to document that the assistance he/she receives is from a program funded, in whole or in part, under Title IV of the Higher Education Act and that the institution the student is attending considers the student to be attending on at least a half time basis. The rule also provides that the student is responsible for providing information to document amounts claimed for tuition, mandatory school fees (as defined at 7 CFR 273.9(c)(3)), books, supplies, transportation and miscellaneous personal expenses (other than room, board and/or dependent care) that are related to the cost of attendance at the educational institution. Expenses claimed for room, board and/or dependent care are not excludible under this provision. Additionally, the rule clarifies that excludible expenses claimed by a student cannot exceed the value of the assistance granted.

The rule also clarifies that the term "institution" for the purpose of this provision shall mean an institution of post-secondary education as defined at 7 CFR 273.9(c)(3). It is the Department's view that this definition is consistent with congressional intent under Pub. L. 99–498 and provides equal treatment of the affected public.

This action further provides that, until such time as appropriate verification is presented to the State agency, the current provisions at 7 CFR 273.9(c)(1)(iv), (c)(3), (c)(4) and (c)(5)(ii)(B) shall be applied when determining the income of student households. The current regulatory provisions are also amended by this action to clarify the application of these provisions for Federal educational assistance which may not be funded under Title IV of the Higher Education Act.

Resource Exclusion

In accordance with Pub. L. 99–498, this action amends 7 CFR 273.9 to add a corresponding resource exclusion provision for education assistance received from a program funded in whole or in part under Title IV of the Higher Education Act

Clarification—Student Eligibility

It is important to clarify that under section 6(e) of the Food Stamp Act (7 U.S.C. 2015(e)) and current regulations at 7 CFR 273.5 students between the ages of 18 and 60, physically and mentally fit, and enrolled at least half-time in an institution of higher

education, as defined at 7 CFR 271.2, are ineligible to participate in the Program, with some exceptions. This eligibility factor is not affected by the provisions of Pub. L. 99–498. The provisions of Pub. L. 99–498 are applicable only for determining the income and resources of student households. Therefore, the provisions of this rule clarify that individuals who are ineligible under section 6(e) of the Food Stamp Act (i.e., because of their student status) shall continue to be ineligible.

Implementation

It had been determined, in consultation with the Department of Eucation that section 406 of Pub. L. 99–498 was effective on the date the law was enacted, October 17, 1986. Therefore, State welfare agencies were informed that they could not wait for specific FSP regulations to begin applying the provision in their State for FSP purposes. For State agencies which have already implemented Pub. L. 99–498, this action requires State agencies to convert affected cases to the specific provisions of this rule at the household's request, at recertification, or when the case is next reviewed, whichever occurs first. Restored benefits shall be provided, if appropriate, back to the date of application or October 17, 1986, whichever is later. All other States are to implement the provisions of this action on the date of publication for all new applicants and provide restored benefits, if appropriate, back to October 17, 1986. Any student household that applied for Program benefits from October 17, 1986 until the State implemented this rule and was denied benefits on the basis of income or resources which should have been excluded under Pub. L. 99–498 shall receive restored benefits back to October 17, 1986, if otherwise eligible, and if the household requests a review of its case or the State otherwise becomes aware that a review is needed.

We recognize, however, that this immediate implementation schedule causes difficulties for quality control reviews. Quality control reviews are conducted in accordance with the statute and the regulations. Once Pub. L. 99–498 became effective, current regulations at 7 CFR 273.9(c)(10) required States to implement the income exclusion provision of Pub. L. 99–498. That section requires exclusion of any income that is specifically excluded by any other Federal statute from consideraton as income for FSP purposes. However, at the same time, current regulations at 7 CFR 273.9(c)(5) specifically prohibited an income exclusion for the type of expenses addressed under Pub. L. 99–498. Although regulations were being drafted to implement the provisions of Pub. L. 99–498 and resolve the current regulatory inconsistency, State agencies were informed (as explained earlier in this preamble) that the provisions of Pub. L. 99–498 were effective October 17, 1986 and that States should not wait for specific FSP regulations to begin implementation. As a result, prior to publication of this regulation there was a statute in effect which provided for one means of handing educational assistance and a regulation in effect which required a totally different means of handling this assistance. Therefore, for quality control purposes only, this action provides that quality control reviewers shall not identify variances resulting solely from either implementation or non-implementation of this action in cases with review dates between October 17, 1986 (the date of enactment of Pub. L. 99–498) and August 31, 1987.

List of Subjects

7 CFR Part 272

Alaska, Civil rights, Food stamps, Grant programs-Social programs, Reporting and recordkeeping requirements.

7 CFR Part 273

Administrative practice and procedure, Aliens, Claims, Food stamp, Fraud, Grant programs-Social programs, Penalties, Reporting and recordkeeping requirements, Social security, Students.

Accordingly, 7 CFR Parts 272 and 273 are amended as follows:

1. The authority citation for Parts 272 and 273 continues to read as follows:

Authority: U.S.C. 2011–2029

PART 272—REQUIREMENTS FOR PARTICIPATING STATE AGENCIES

2. In FR Doc. 87–8040, appearing at page 11811, in the issue of April 13, 1987, correct the following error:

The amendment published at 52 FR 11814, third column, April 13, 1987, to add a new paragraph (g)(86) to § 272.1 contains an error. The reference to paragraph "(86)" contained in amendatory statement no. 5 should read "(87)" and the regulatory designation which precedes the new paragraph should also read "(87)". A new paragraph (g)(86) was added to § 272.1 by a previous rulemaking. The April 13, 1987 amendment to add a new paragraph to § 272.1(g) is intended to follow in numerical order and is hereby corrected.

3. In § 272.1, a new paragraph (g)(89) is added in numerical order to read as follows:

§ 272.1 General terms and conditions.

* * * * *

(g) *Implementation.* * * *

(89) *Amendment No. 293.* The provisions of Amendment No. 293 are effective retroactively to October 17, 1986 and shall be implemented as follows:

(i) State agencies shall implement the provisions of this amendment for new applicant households which apply for program benefits on or after June 1, 1987.

(ii) State agencies shall convert their affected current caseload to the provisions of this amendment at household request, at recertification, or when the case is next reviewed, whichever occurs first and provide restored benefits, if appropriate, back to the date of application of October 17, 1986, whichever occurred later.

(iii) Any affected household that applied for Program benefits from October 17, 1986 until implementation of this rule and was denied benefits is entitled to restored benefits back to the date of application or October 17, 1986, whichever occurred later, if the household:

(A) Is otherwise entitled to benefits, and

(B) Requests a review of its case or the State agency otherwise becomes aware that review is needed.

(iv) For quality control (QC) purposes only, QC shall not identify variances resulting solely from either implementation or nonimplementation of the provisions of this amendment for cases with review dates between October 17, 1986 (the date of enactment of Pub. L. 99–498) and August 31, 1987.

PART 273—CERTIFICATION OF ELIGIBLE HOUSEHOLDS

4. In § 273.8, a new paragraph (e)(11)(xi) is added to read as follows:

§ 273.8 Resource eligibility standards.

(e) *Exclusions from resources.* * * *

(11) * * *

(xi) Financial assistance provided by a program funded in whole or in part under Title IV of the Higher Education Act in accordance with Pub. L. 99–498.

* * * * *

4. In § 273.9: a. A new sentence is added to the end of paragraph (c)(3).

b. The second sentence of paragraph (c)(4) is amended by removing the words "such as, but not limited to National Direct Student Loans or Guaranteed Student Loans," and a new sentence is

added after the second sentence in paragraph (c)(4).

c. The last sentence of paragraph (c)(5)(ii)(B) is revised.

d. A new paragraph (c)(10)(xi) is added.

The additions read as follows:

§ 273.9 Income and deductions.

* * * * *

(c) *Income exclusions.* * * *

(3) * * * If the educational assistance is provided by a program funded in whole or in part under Title IV of the Higher Education Act, see the provisions of paragraph (c)(10)(xi) of this section for determining an income exclusion for tuition and mandatory school fees.

(4) * * * If the deferred education loan is provided by a program funded in whole or in part under Title IV of the Higher Education Act, see the provisions of paragraph (c)(10)(xi) of this section for determining an income exclusion for portions of such loan.

* * * * *

(5) * * *

(ii) * * *

(B) * * * This provision does not apply to educational assistance provided by a program funded in whole or in part under Title IV of the Higher Education Act, except as otherwise specified under paragraph (c)(10)(xi) of this section.

* * * * *

(10) * * *

(xi) Financial assistance (payments, loans, reimbursements or allowances) to students determined by an institution of post-secondary education (as defined in paragraph (c)(3) of this section) to be attending the institution on at least a half time basis and who are determined to be eligible to participate in the Program in accordance with § 273.5, where such assistance is provided by a program funded in whole or in part under Title IV of the Higher Education Act of 1965 (as amended by Pub. L. 99–498) for tuition and mandatory school fees (as defined in paragraph (c)(3) of this section), books supplies, transportation and miscellaneous personal expenses (other than room, board and/or dependent care). The State Agency shall verify all factors affecting this provision. The student shall be responsible for providing the State agency with information to document that the institution (as defined in paragraph (c)(3) of this section) considers the student to be attending the institution on at least a half time basis and that the educational assistance received is from a program funded in whole or in part under Title IV of the Higher Education Act. The student shall also be responsible for providing the State agency with information to document amounts claimed for tuition, mandatory school fees (as defined in paragraph (c)(3) of this section), books, supplies, transportation and miscellaneous personal expenses (other than room, board and/or dependent care) that are related to the cost of attendance at the educational institution. Expenses claimed for room, board and/or dependent care are not excludible under this provision. Excludible expenses claimed by the student shall not exceed the value of the total amount of educational assistance granted from a program funded under Title IV of the Higher Education Act. Until such time as appropriate verification is presented to the State agency, assistance received from a program funded in whole or in part under Title IV of the Higher Education Act shall be subject to the provisions of paragraphs (c)(1)(iv), (c)(3), (c)(4) and (c)(5)(ii)(B) of this section when determining the income of student households.

* * * * *

Dated: May 27, 1987.

S. Anna Kondratas,

Acting Administrator, Food and Nutrition Service.

[FR Doc. 87–12383 Filed 5–29–87; 8:45 am]

BILLING CODE 3410–30–M

Agricultural Marketing Service

7 CFR Part 910

[Lemon Regulation 563]

Lemons Grown in California and Arizona; Limitation of Handling

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: Regulation 563 establishes the quantity of fresh California-Arizona lemons that may be shipped to market at 360,000 cartons during the period May 31 through June 6, 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.

DATES: Regulation 563 (§ 910.863) is effective for the period May 31 through June 6, 1987.

FOR FURTHER INFORMATION CONTACT: James M. Scanlon, Acting 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 May 27, 1987, in Los Angeles, California, to consider the current and prospective conditions of supply and demand and unanimously recommended (with one abstention) a quantity of lemons deemed advisable to be handled during the specified week. The committee reports that the market is very active.

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.

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

PART 910—LEMONS GROWN IN CALIFORNIA AND ARIZONA

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

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

2. Section 910.863 is added to read as follows:

§ 910.863 Lemon Regulation 563.

The quantity of lemons grown in California and Arizona which may be handled during the period May 31, 1987, through June 6, 1987, is established at 360,000 cartons.

Dated: May 28, 1987.

Ronald L. Cioffi,

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

[FR Doc. 87–12500 Filed 5–29–87; 8:45 am]

BILLING CODE 3410–02–M

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7 CFR Part 923

[Washington Cherry Regulation 22; Amendment 3]

Sweet Cherries Grown in Designated Counties of Washington; Amendment of Minimum Size Requirements

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This action, recommended by the Washington Cherry Marketing Committee, increases the minimum size of sweet cherries that can be shipped by handlers from 5/64 to 5/64 inch in diameter. Such an increase will provide fresh markets and consumers with slightly larger fruit. The change is intended to enhance the image of Washington sweet cherries and help improve sales and returns to growers. The marketing of undesirable sizes undermines buyer confidence in the fruit sold in the market and does not encourage repeat purchases. Hence, requiring handlers to market more desirable sizes of sweet cherries should have a positive effect on sales and industry returns. The committee works with the Department in administering the marketing order. The rule will apply during the 1987 and subsequent seasons.

EFFECTIVE DATE: This rule becomes effective June 1, 1987.

FOR FURTHER INFORMATION CONTACT: James M. Scanlon, Acting Chief, Marketing Order Administration Branch, F&V, AMS, USDA, Washington, DC 20250–1400; telephone (202) 475–3914.

SUPPLEMENTARY INFORMATION: This rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512–1 and has been designated as "non-major" under criteria contained therein.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) 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 of 1937, as amended (The Act, 7 U.S.C. 601–674), and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

It is estimated that 62 Washington sweet cherry handlers will be subject to this regulation during the current season. In addition, there are approximately 1,100 producers in the production area. The majority of these handlers and producers may be classified as small entities as defined by the Small Business Administration (SBA). The SBA defines agricultural service firms, like handlers, as those whose gross annual receipts are less than $3.5 million and small agricultural producers as those having average annual gross revenues for the last three years of less than $100,000 (13 CFR 121.2).

This rule is issued under marketing agreement and Marketing Order No. 923, both as amended, regulating the handling of sweet cherries produced within the counties of Okanogan, Chelan, Douglas, Grant, Yakima, and Benton within the State of Washington. It is based upon the unanimous recommendation and information submitted by the Washington Cherry Marketing Committee (WCMC) and upon other available information.

A proposed rule inviting comments on this action was published in the April 27, 1987, **Federal Register** (52 FR 13843). Interested persons were given until May 12, 1987, to file written comments. No comments were received.

At its meeting on February 12, 1987, the WCMC recommended an increase in the smallest size allowed to be marketed under the marketing order. The increase of 1/32 inch in diameter, from 5/64 to 5/64, will more accurately reflect the true cherry size designated as 13 row size. This change will improve the image of the 13 row size pack in the marketplace and provide buyers with slightly larger size fruit overall, thus encouraging repeat purchases and increasing cherry sales, shipments, and grower returns.

Approximately 79.32 million pounds of sweet cherries were shipped during the 1986 season. Shipments of fruit 5/64 inch in diameter normally account for less than two percent of total industry shipments. Approximately one percent of 1986 shipments consisted of fruit designated as 13 row size; that is, fruit generally measuring between 5/64 and 5/64 inch in diameter. The remaining shipments of 5/64 inch fruit consisted of containers marked with a minimum diameter. A 1/32 of an inch increase in the size of marketable sweet cherries grown in designated counties of Washington will have a negligble impact on industry supplies and should improve the overall fruit size and quality of the pack. In addition, immature cherries tend to occur in the smaller sizes.

Approximately 86 percent of the total shipments of 13 row size fruit were shipped during the first four weeks of the 1986 season. Initial offerings of sweet cherries set the market tone for the remainder of the season. Purchases of large, high quality fruit at the beginning of the season encourage consumers to make subsequent purchases, thus expanding and stabilizing market demand and increasing returns to growers and handlers.

It is the Department's view that this action will benefit growers and handlers. The anticipated increase in demand and grower returns will significantly offset the costs of compliance with the regulations. In addition, the WCMC believes that the regulatory change is needed to improve returns to growers in the production area while consistently providing fresh markets with slightly larger, good quality sweet cherries.

Therefore, after consideration of all relevant matter presented, including that in the notice, the information and recommendation submitted by the committee, and other information, it is hereby found and determined that the amendment, as hereinafter set forth, will

tend to effectuate the declared policy of the Act.

It is further found that good cause exists for not postponing the effective date of this action until 30 days after publication in the **Federal Register** (5 U.S.C. 553). The harvest and shipment of these cherries is expected to begin soon. Hence, this action must be made effective promptly to be in effect at the beginning of the 1987 shipping season. Moreover, the provisions in this final rule are the same as those contained in the proposal which was published in the **Federal Register** on April 27, 1987. Handlers are prepared to conduct their operations in accordance with this rule and do not require any additional time for preparation. No useful purpose would be served by delaying the effective date of this action.

List of Subjects in 7 CFR Part 923

Marketing agreements and orders, Cherries, Washington.

For the reasons set forth in the preamble, 7 CFR Part 923 is amended as follows:

PART 923—SWEET CHERRIES GROWN IN DESIGNATED COUNTIES IN WASHINGTON

1. The authority citation for 7 CFR Part 923 continues to read as follows:

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

§ 923.322 [Amended]

2. Therefore, § 923.322 is amended by removing the size designation "5⁹⁄₆₄" and inserting the size designation "5²⁄₆₄" in paragraphs (a)(2), (a)(3), (b)(2)(ii), (c)(2), and in the Table in (c)(1) under column 2 opposite the 13 row count/row size designation in column 1.

Dated: May 26, 1987.

Ronald L. Cioffi,

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

[FR Doc. 87–12499 Filed 5–29–87; 8:45 am]

BILLING CODE 3410–02–M

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7 CFR Part 925

Grapes Grown in a Designated Area of Southeastern California; Amendment to Handling Regulation

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule adds a 5 kilogram container, for export shipments only, to the container and pack regulations (§ 925.304(b)) under Marketing Order 925. This change will help to improve exports by making available for general use a container which currently can be used only on an experimental basis. The proposal was recommended by the California Desert Grape Administrative Committee, which works with the Department in administering the Federal marketing order for California desert grapes.

EFFECTIVE DATE: June 1, 1987.

FOR FURTHER INFORMATION CONTACT: James M. Scanlon, Acting Chief, Marketing Order Administration Branch, F&V, AMS, USDA, Washington, DC 20250–1400, Telephone (202) 475–3914.

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

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

The purpose of the RFA is to fit regulatory 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 own behalf. Thus, both statutes have small entity orientation and compatibility.

Grapes grown in the production area are marketed in the major market areas of the United States. Shipments of California desert grapes totaled 8,189,994 lugs (22 pound equivalent) in 1986. This compared to 7,491,364 lugs in 1985 and the three year (1983–85) average of 6,899,377 lugs. Since 1982 bearing acreage of California desert grapes has increased moderately. Bearing acreage was reported at 18,073 acres in 1986, slightly more than the 15,994 acres reported in 1985. Total grape pack-out figures from the production area as defined in 7 CFR 925.5 for export are unavailable.

There are approximately 22 handlers of California desert grapes subject to regulation under the marketing order handling regulation. There are approximately 88 growers of dessert grapes in the production area. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.2) as those having annual gross revenues for the last three years of less than $100,000, and agricultural service firms are defined as those whose gross annual receipts are less than $3,500,000. The majority of handlers and producers of table grapes may be classified as small entities.

The Administrator of the Agricultural Marketing Service (AMS) has considered the impact of this action on small entities. The regulatory action in this instance is a final rule which adds a 5 kilogram container to the list of containers presently permitted under the handling regulation (§ 925.304(b)) for export shipments of desert grapes. It is the Department's view that the increased flexibility provided by the regulation will be advantageous to growers and handlers.

Marketing Order No. 925 regulates the handling of grapes grown in a designated area in southeastern California. The program is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 through 674). The California Desert Grape Administrative Committee, established under the order, is responsible for its local administration.

At a public meeting on January 28, 1987, the committee recommended adding a new container to be used for export shipments only. The new container will contain 5 kilograms (approximately 11 pounds) of grapes. The industry has been using the container on an experimental basis, primarily for shipments to Europe, and has found general trade acceptance. Permitting handlers to use the 5 kilogram container for export shipments only, thus eliminating the need to file for experimental container exemptions, a procedure used in the past for making export shipments in 5 kilogram containers, will encourage the domestic industry to increase export shipments abroad. This action is expected to have a positive effect on export shipments which will be beneficial to both domestic producers and handlers.

Since this action will add a new container to the handling regulation (7 CFR 925.304(b)), no action is necessary for table grape imports under section 608e–1 of the Act. A change in the import regulation (7 CFR 944.503) is applicable where there is a change in the grade, size, quality, and maturity of a domestically produced commodity. Therefore, since container and pack regulations are not included in the requirements of section 8e, no change is necessary to the applicable import regulations.

Although the seasonal regulations will be effective at certain times each season

indefinitely, the committee will continue to meet prior to or during each season to consider recommendations for modification, suspension, or termination of the regulation. Prior to making any such recommendations, the committee would submit to the Secretary a marketing policy for the season including an analysis of supply and demand factors having a bearing on the marketing of the California desert grape crop. Committee meetings are open to the public and interested persons may express their views at these meetings. The Department would evaluate committee recommendations and information submitted by the committee, and other available information and determine whether changes in the regulations for desert grapes would tend to effectuate the declared policy of the Act.

Notice was given in the April 23, 1987, **Federal Register** (52 FR 13457), affording interested persons 10 days in which to submit written comments. None were submitted.

It is hereby found that adding an additional container (5 kilograms) for export shipments only of table grapes during the effective period of the table grape regulations from April 20 through August 15, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

It is hereby further found that good cause exists for not postponing the effective date of this action until 30 days after publication in the **Federal Register** (5 U.S.C. 553) in that the handling regulation became effective on April 20, and this rule should be implemented immediately to maximize benefits to the industry by permitting use of this container for as many export shipments as possible this season.

List of Subjects in 7 CFR Part 925

Marketing agreements and orders, Grapes, California.

For the reasons set forth in the preamble, Part 925 is amended as follows:

PART 925—GRAPES GROWN IN A DESIGNATED AREA OF SOUTHEASTERN CALIFORNIA

1. The authority citation for 7 CFR Part 925 continues to read as follows:

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

2. Section 925.304 is hereby amended by redesignating paragraph (b)(1)(vi) as paragraph (vii) and adding a new (b)(1)(vi) to read as follows:

§ 925.304 California desert grape regulation 6.

* * * * *

(b)(1) * * *

(vi) Containers with a net weight of 5 kilograms (approximately 11 pounds) shall be for export only.

* * * * *

Dated: May 22, 1987.

William J. Doyle,

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

[FR Doc. 87–12357 Filed 5–29–87; 8:45 am]

BILLING CODE 3410–02–M

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7 CFR Part 1106

Milk in the Southwest Plains Marketing Area; Order Suspending a Certain Provision

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Suspension of a rule.

SUMMARY: This action suspends a portion of the "producer" definition of the Southwest Plains order for the months of April-July 1987. The provisions prevents dairy farmers from being producers under the order during the spring and summer months if they have not sufficiently supplied the market during the previous fall months when fluid milk needs are greater seasonally. The suspension was requested by Mid-America Dairymen, Inc. (Mid-Am), a cooperative association that represents a substantial number of producers who supply the Southwest Plains market. The action is necessary to permit the efficient use of advantageously located milk supplies to furnish the fluid needs of the market.

EFFECTIVE DATE: June 1, 1987, for the months of April–July 1987.

FOR FURTHER INFORMATION CONTACT: John F. Borovies, Marketing Specialist, Dairy Division, Agricultural Marketing Service, U.S. Department of Agriculture, Washington, DC 20250, (202) 447–2089.

SUPPLEMENTARY INFORMATION: Prior document in this proceeding:

Notice of Proposed Suspension: Issued April 10, 1987; published April 17, 1987 (52 FR 12538).

The Regulatory Flexibility Act (5 U.S.C. 601–612) requires the Agency to examine the impact of a proposed rule on small entities. Pursuant to 5 U.S.C. 605(b), the Administrator of the Agricultural Marketing Service has certified that this action will not have a significant economic impact on a substantial number of small entities. Such action lessens the regulatory impact of the order on certain milk handlers by promoting hauling efficiencies and tends to ensure that dairy farmers who supply the market's fluid milk needs will have their milk priced under the order and thereby receive the benefits that accrue from such pricing.

This order of suspension is issued pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), and of the order regulating the handling of milk in the Southwest Plains marketing area.

Notice of proposed rulemaking was published in the **Federal Register** on April 17, 1987 (52 FR 12538) concerning a proposed suspension of a certain provision of the order. Interested persons were given an opportunity to file written data, views and arguments thereon. Comments in opposition to the suspension were received from one person.

After consideration of all relevant material, including the proposal in the notice and other available information, it is hereby found and determined that for the months of April-July 1987 the following provision of the order does not tend to effectuate the declared policy of the Act:

In § 1106.12, paragraph (b)(5) in its entirety.

Statement of Consideration

This action suspends a portion of the "producer" definition for the months of April–July 1987. The suspended provision prevents dairy farmers from being producers under the order during the spring and summer months if they have not sufficiently supplied the market during the previous fall months when fluid demand is greater seasonally. Specifically, the provision provides that during the months of February-July a dairy farmer can not be a producer under the Southwest Plains order unless during each of the immediately preceding months of September-November at least two-thirds of the producer's milk was regulated under the order.

The suspension was requested by Mid-America Dairymen, Inc. (Mid-Am), a cooperative association that represents a substantial number of producers who supply the market. As Mid-Am contends, the action is needed to reflect recent changes in the market's structure that are causing marketing problems for suppliers of milk for Class I purposes.

The closing of a distributing plant in Springfield, Missouri, in the fall of 1986 has resulted in an increase in the Class I sales by a Southwest Plains distributing

plant located at Fayetteville, Arkansas. There are dairy farmers located in the vicinity of the Arkansas plant that could supply these increased fluid milk needs. However, because these dairy farmers were associated with plants regulated under the Central Arkansas and Texas orders during September-November 1986, such dairy farmers do not have the required prior association with the Southwest Plains market to be considered producers under such order for the months of February–July 1987. As a result of the application of the provision in February, over 500,000 pounds of Mid-Am's milk that was shipped to supply the increased fluid milk needs of the Fayetteville distributing plant was not eligible for pool status under the Southwest Plains or other Federal orders. Absent a suspension, uneconomic movements of more distant supplies of milk would have to be used to meet fluid milk needs. Thus, the suspension is necessary to permit the efficient use of advantageously located supplies of milk to furnish the increased fluid milk needs of the market's distributing plants.

Comments opposing the suspension were received from one person. The comments state that the suspension would restrict the handling of milk and be adverse to dairy farmers. Actually, this action will make any dairy farmer's milk available to any handler. Furthermore, failure to grant the suspension would result in greater milk handling and hauling costs to supply the market's fluid needs and reduce dairy farmer returns.

It is hereby found and determined that thirty days' notice of the effective date hereof is impractical, unnecessary and contrary to the public interest in that:

(a) The suspension is necessary to reflect current marketing conditions and to assure orderly marketing conditions in the marketing area in that it will ensure that dairy farmers who are supplying the market's fluid needs will have their milk priced under the order and thereby receive the benefits that accrue from such pricing;

(b) This suspension does not require of persons affected substantial or extensive preparation prior to the effective date; and

(c) Notice of proposed rulemaking was given interested parties and they were afforded an opportunity to file written data, views or arguments concerning this suspension action.

Therefore, good cause exists for making this order effective upon publication in the **Federal Register.**

List of Subjects in 7 CFR Part 1106

Milk marketing orders, Milk, Dairy products.

It is therefore ordered, That the aforesaid provision of § 1106.12(b)(5) of the Southwest Plains order is hereby suspended for the months of April–July 1987.

PART 1106—MILK IN THE SOUTHWEST PLAINS MARKETING AREA

1. The authority citation for 7 CFR Part 1106 continues to read as follows:

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

§ 1106.12 [Amended]

2. Paragraph (b)(5) of § 1106.12 is suspended in its entirety.

Signed at Washington, DC, on May 6, 1987.

Kenneth A. Gilles,

Assistant Secretary for Marketing and Inspection Services.

[FR Doc. 87–12419 Filed 5–29–87; 8:45 am]

BILLING CODE 3410–02–M

Farmers Home Administration

7 CFR Part 1945

Emergency Loan Policies, Procedures and Authorizations

AGENCY: Farmers Home Administration, USDA.

ACTION: Final rule.

SUMMARY: The Farmers Home Administration (FmHA) adopts a portion of its proposed rule which was published on January 15, 1987 (52 FR 1706). This action is being taken to authorize the use of replacement cost in calculating physical property losses to farm buildings and essential household contents which are damaged or destroyed in disaster areas declared by the President or designated by the Secretary of Agriculture of FmHA Administrator. This action is needed to enable FmHA to make emergency (EM) physical loss loans available to eligible family farmers suffering damages and losses to their farm buildings and household contents to help them rehabilitate or maintain their farming operations in designated/declared disaster areas.

EFFECTIVE DATE: June 1, 1987.

FOR FURTHER INFORMATION CONTACT: William Krause, Director, Emergency Division, Farmers Home Administration, USDA, Room 5420, Washington, DC 20250, telephone: (202) 382–1632.

SUPPLEMENTARY INFORMATION: This action has been reviewed under USDA procedures established in Departmental Regulation 1512–1, which implements Executive Order 12291, and has been determined to be non-major because there is no substantial change from practices under existing rules that would have an annual effect on the economy of $100 million or more. There is no major increase in cost or prices for consumers, individual industries, Federal, State, or local government agencies or geographical region or significant adverse effects on competition, employment, investment, productivity, innovation, or in the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

No comments were received on the January 15, 1987, proposed rule as it relates to this action. However, the Agency has decided not to adopt in its entirety the "replacement cost" concept as it relates to § 1945.163(b)(6) (i) through (v) of Subpart D, Part 1945 of Chapter XVIII, Title 7. It has been determined that the existing method of calculating physical losses on the basis of "market value" is sufficient for the items listed in this paragraph to meet the EM physical loss loan needs of most family farmers who can also qualify for regular FmHA farm loan assistance.

The program/activity of this action is listed in the catalog of Federal Domestic Assistance under No. 10.404.

For the reasons set forth in the Final Rule related to Notice 7 CFR Part 3015, Subpart V, 48 FR 29115, June 24, 1983, this program/activity is excluded from the Scope of Executive Order 12372, which require intergovernmental consultation with the State and local officials.

This document has been reviewed in accordance with 7 CFR Part 1940, Subpart G, "Environmental Program." It is the determination of FmHA that this action does not constitute a major Federal action significantly affecting the quality of the human environment and in accordance with the National Environmental Policy Act of 1969, Pub. L. 91–190, as Environmental Impact Statement is not required.

List of Subjects in 7 CFR Part 1945

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

Accordingly, Subpart D, Part 1945 of Chapter XVIII, Title 7, is amended as follows:

PART 1945—EMERGENCY

1. The authority citation for Part 1945 continues to read as follows:

Authority: 7 U.S.C. 1989; 7 CFR 2.23; 7 CFR 2.70.

Subpart D—Emergency Loan Policies, Procedures, and Authorization

2. Section 1945.163 is amended by revising paragraphs (b) (6), (7) and (8) to read as follows:

§ 1945.163 Determining qualifying losses, eligibility for EM loan(s) and the maximum amount of each.

* * * * *

(b) * * *

(6) The physical loss equals the market value at the time of the disaster for items lost, damaged or destroyed by or as a result of the disaster. Such items include:

(i) * * *

(A) * * *

(B) Disaster related damage to an animal'(s') health, which has impaired or reduced its normal production capability and its market value. This includes forced reductions of foundation breeding stock caused by the disaster. Physical losses, under these conditions, would be calculated by establishing a dollar value per head, or unit, at the time the disaster occurred, and deducting the reduced dollar value received from the disaster-caused sale of the animals. The difference in the two values would be considered a physical loss. (*THE ANIMALS SOLD MUST BE OVER AND ABOVE THE NUMBERS NORMALLY CULLED EACH YEAR.)*

Example:

A physical loss would be calculated as follows:

Predisaster market value—50 cows × $600/cow = $30,000

Price received for cull cows—50 cows × 1100 lbs. ×35¢ = $19,250

Physical loss = $10,750 ($30,000—$19,250)

(ii) Livestock products on hand or stored.

(iii) Harvested crops on hand or stored.

(iv) Supplies on hand.

(v) Essential machinery and equipment.

(7) The actual physical loss for farm dwellings and essential household contents to be used by the operator and existing labor is the amount required to repair or replace the dwelling and/or household contents with a dwelling and/or contents of like standards, size and quality of that being replaced which will meet all applicable code requirements; and which will provide permanent, adequate, decent, safe, sanitary and modest living quarters.

(8) The actual physical loss for farm service buildings and farm real estate other than buildings is the amount required to repair the property or replace it with a building or property of like standards, size, quality and capacity of that being replaced which will meet all applicable code requirements and which will adequately meet the needs of the farming operation.

* * * * *

Dated: May 18, 1987.

LaVerne Ausman,

Acting Under Secretary for Small Community and Rural Development.

[FR Doc. 87-12312 Filed 5-29-87; 8:45 am]

BILLING CODE 3410-07-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 510

Animal Drugs, Feeds, and Related Products; Change of Sponsor Address

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect a change of sponsor address for Farnam Companies, Inc.

EFFECTIVE DATE: June 1, 1987.

FOR FURTHER INFORMATION CONTACT: David L. Gordon, Center for Veternary Medicine (HFV-238), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-6243.

SUPPLEMENTARY INFORMATION: Farnam Companies, Inc., sponsor of several approved new animal drug applications (NADA's), advised FDA of a change of address from 2230 East Magnolia St., Phoenix, AZ 85036, to 301 West Osborn, Phoenix, AZ 85013-3928. The agency is amending § 510.600(c) (1) and (2) to reflect the sponsor address change.

List of Subjects in 21 CFR Part 510

Administrative practice and procedure, Animal drugs, Labeling, Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, Part 510 is amended as follows:

PART 510—NEW ANIMAL DRUGS

1. The authority citation for 21 CFR Part 510 continues to read as follows:

Authority: Secs. 512, 701(a), 52 Stat. 1055, 82 Stat. 343-351 (21 U.S.C. 360b, 371(a)); 21 CFR 5.10, 5.83.

§ 510.600 [Amended]

2. Section 510.600 *Names, addresses, and drug labeler codes of sponsors of approved applications* is amended in paragraph (c)(1) in the entry for "Farnam Companies, Inc.," and in paragraph (c)(2) in the entry for "017135" by revising the sponsor address to read "301 West Osborn, Phoenix, AZ 85013-3928."

Dated: May 22, 1987.

Richard A. Carnevale,

Acting Associate Director for Scientific Evaluation Center for Veterinary Medicine.

[FR Doc. 87-12341 Filed 5-29-87; 8:45 am]

BILLING CODE 4160-01-M

INTERNATIONAL DEVELOPMENT COOPERATION AGENCY

Agency for International Development

22 CFR Part 224

Implementation of the Program Fraud Civil Remedies Act

AGENCY: Agency for International Development.

ACTION: Interim rule with request for comments; removal.

SUMMARY: The Agency for International Development is removing the interim rule with request for comments which appeared in the **Federal Register** on April 21, 1987 (52 FR 13071-13079). After consulting with OMB, it was determined that it was more appropriate to publish the regulations as a proposed rule. The regulations implementing the Program Fraud Civil Remedies Act are being reissued as a proposed rule in a companion document.

For the reasons stated above, 22 CFR is amended by removing Part 224.

EFFECTIVE DATE: June 1, 1987.

FOR FURTHER INFORMATION CONTACT: Jan Miller (202) 647-8218.

PART 224—[REMOVED]

Dated: May 14, 1987.

R. T. Rollis, Jr.,

Assistant to the Administrator for Management.

[FR Doc. 87-12204 Filed 5-29-87; 8:45 am]

BILLING CODE 6116-01-M

DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Part 511

Wage Order Procedure for Puerto Rico, the Virgin Islands and American Samoa; Compensation of Committee Members

AGENCY: Employment Standards Administration, Labor.

ACTION: Final rule.

SUMMARY: This document increases from $182 to $186 a day the per diem allowance to which members of industry committees in Puerto Rico, the Virgin Islands, and American Samoa are entitled. The industry committees, whose members include representatives of employees, employers, and the public, as appointed by the Secretary of Labor, meet periodically to review the wage rates in various industries and to recommend wage increases where appropriate. The committees meet pursuant to the Fair Labor Standards Act which authorized the establishment of minimum wage rates in Puerto Rico, the Virgin Islands, and American Samoa which may be lower than the mainland minimum wage rate. This increase is in accord with changes in General Schedule salary rates effective January 4, 1987 for regular employees of the U.S. Department of Labor.

EFFECTIVE DATE: June 1, 1987.

FOR FURTHER INFORMATION CONTACT: Paula V. Smith, Administrator, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S3502, Washington, DC 20210, 202–523–8305.

SUPPLEMENTARY INFORMATION: It is the standard practice to adjust compensation for Industry Committee members in accordance with changes in General Schedule salary rates. The purpose of this amendment is to increase the compensation of each member of an industry committee from $182 to $186 for each day spent in the work of the committee. It accords with changes in General Schedule salary effective January 4, 1987 for regular employees of the U.S. Department of Labor.

As this amendment concerns only a rule of agency practice, and is not substantive, notice of proposed rule making, opportunity for public participation, and delay in effective date are not required by 5 U.S.C. 553. It does not appear that such participation or delay would serve a useful purpose. Accordingly, this revision shall be effective immediately.

Drafting Information

This document was prepared under the direction and control of Herbert J. Cohen, Deputy Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S3502, 200 Constitution Avenue, NW., Washington, DC 20210, Telephone: 202–523–8305.

Classification

This rule relates to agency organization, management, or personnel pursuant to section 1(a)(3) of Executive Order 12291. Accordingly, it does not fall within the definition of "rule" under section 1(a) of the Executive Order.

Regulatory Flexibility Act

Because no notice of proposed rulemaking is required for this rule under 5 U.S.C. 553(b), the requirements of the Regulatory analyses do not apply to this rule.

Paperwork Reduction Act

This rule is not subject to section 3504(H) of the Paperwork Reduction Act, since it would not require the collection or retention of information.

List of Subjects in 29 CFR Part 511

Administrative Practice and procedure, Minimum wages, Wage and Hour Division, Puerto Rico, Virgin Islands, American Samoa.

Pursuant to authority in section 5 of the Fair Labor Standards Act of 1938 (52 Stat. 1062 as amended; 29 U.S.C. 205) and Reorganization Plan No. 6 of 1950 (3 CFR 1949–53 Comp. p. 1004), 29 CFR Part 511 is amended as follows:

PART 511—WAGE ORDER PROCEDURE FOR PUERTO RICO, THE VIRGIN ISLANDS AND AMERICAN SAMOA

1. The authority citation for Part 511 continues to read as follows:

Authority: Secs. 5, 6, 8, 52 Stat. 1062, 1064 (29 U.S.C. 205, 206, 208); secs. 2–12, 60 Stat. 237–244; (5 U.S.C. 1001–1011). Section 511.4 is issued under sec. 5, 52 Stat. 1062, as amended (29 U.S.C. 205).

2. Section 511.4 is revised to read as follows:

§ 511.4 Compensation of Committee members.

Each member of an industry committee will be allowed a per diem of $186 for each day actually spent in the work of the committee, and will, in addition, be reimbursed for necessary transportation and other expenses incident to traveling in accordance with Standard Government Travel Regulations then in effect. All travel expenses will be paid on travel vouchers certified by the Administrator or an authorized representative. Any other necessary expenses which are incidental to the work of the committee may be incurred by the committee upon approval of, and shall be paid upon, certification of the Administrator or an authorized representative.

Signed at Washington, DC, this 26th day of May 1987.

Paula V. Smith,

Administrator Wage and Hour Division.

[FR Doc. 87–12350 Filed 5–29–87; 8:45 am]

BILLING CODE 4510–27–M

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 100

[CGD1 87–08]

Regatta; Harvard-Yale Regatta, Thames River, New London, CT

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

SUMMARY: This rule provides notice that the 1987 Harvard-Yale Regatta will be held on June 6, 1987 beginning at 3:30 p.m. and ending at 7:30 p.m. The permanent regulations for this regatta specify that the regulations will be in effect on either the first or second Saturday in June as published in the Coast Guard Local Notice to Mariners and a **Federal Register** notice. This document notifies the affected public of the effective period for the 1987 regatta. In addition, the Coast Guard is amending the permanent special local regulations governing this event to expand the area where spectator craft are permitted to anchor to allow additional access to view these popular crew races. This regulation is needed to provide for the safety of participants and spectators on navigable waters during this event.

EFFECTIVE DATE: These regulations are effective on June 6, 1987 beginning at 3:30 p.m. and ending the same day at 7:30 p.m. In case of postponement due to weather, these regulations will be in effect the following day.

FOR FURTHER INFORMATION CONTACT: Mr. Lucas A. Dlhopolsky, (212) 668–7974.

SUPPLEMENTARY INFORMATION: A Notice of Proposed Rulemaking has not been published for this regulation and it is being made effective in less than 30 days from the date of publication. Following normal rule making procedures would have been

impracticable. The date for this year's event was not determined until early April and additional details concerning the expansion of the spectator area had to be developed before this rule could be written. As a result there was not sufficient time remaining to publish proposed rules in advance of the event or to provide for a delayed effective date.

Drafting Information

The drafters of this notice are Mr. Lucas A. Dlhopolsky, project officer, Third Coast Guard District Boating Safety Office, and LCDR R. F. Duncan, project attorney, First Coast Guard District Legal Office.

Discussion of Regulations

The annual Harvard-Yale Regatta is a crew race event held on the Thames River in New London, Connecticut. It is sponsored by the Harvard-Yale Regatta Committee and is well known to the boaters and residents of that area. Since this event is traditionally held each year on the first or second Saturday in June the Coast Guard promulgated a permanent amendment to Title 33, Code of Federal Regulations, § 100.304. This year the event will take place between the hours of 3:30 p.m. and 7:30 p.m. on June 6, 1987 which is the first Saturday in June. If it becomes necessary to postpone the races due to inclement weather this event will be held on Sunday, June 7, 1987 between the hours of 7:30 a.m. and 11:30 a.m. This year the spectator area described in the permanent regulation is being changed to allow more vessels to be positioned in locations close to the race course. Previously, the zone west of the race course on the Thames River from Mamacoke Hill north to Bartlett Point Light has been closed to spectator craft. Experience revealed that this restricted areas could be safety altered to include only the waters from Scotch Cap north to Bartlett Piont Light. This will open the vicinity around Smith Cove to spectator vessels which should relieve congestion in other established spectator locations along the race course. No unfavorable impact is expected from this change since it improves conditions for both spectators and participants while adding no new adverse effects on other marine traffic. In order to provide for the safety of spectators and participants, the Coast Guard will continue to restrict vessel movement in the race course area and to establish spectator anchorages for what is expected to be a large spectator fleet.

List of Subjects in 33 CFR Part 100

Marine safety, Navigation (water).

Regulations

PART 100—[AMENDED]

In consideration of the foregoing, Part 100 of Title 33, Code of Federal Regulations is amended as follows:

1.The authority citation for Part 100 continues to read as follows:

Authority: 33 U.S.C. 1233; 49 CFR 1.46 and 33 CFR 100.35

2. Section 100.304 is amended by revising paragraphs (b) and (c)(6)(i) to read as follows:

§ 100.304 Harvard-Yale Regatta, Thames River, New London, CT.

* * * * *

(b) *Effective Period:* This regulation will be effective from 3:30 p.m. to 7:30 p.m. on June 6, 1987, and thereafter annually on the first or second Saturday in June as published in the Coast Guard District Local Notice to Mariners and in a **Federal Register** notice. In case of postponement due to weather, this regulation will be in effect the following day from 7:30 a.m. to 11:30 a.m.

(c) * * *

(6) * * *

(i) To the west of the race course, between Scotch Cap and Bartlett Point Light.

* * * * *

Dated: May 20, 1987.

R.L. Johanson,

Rear Admiral, U.S. Coast Guard, Commander, First Coast Guard District.

[FR Doc. 87-12380 Filed 5-29-87; 8:45 am]

BILLING CODE 4910-14-M

DEPARTMENT OF THE INTERIOR

National Park Service

36 CFR Part 7

Blue Ridge Parkway, Virginia and North Carolina; Commercial Hauling and Commercial Vehicle Regulations

AGENCY: National Park Service, Interior.

ACTION: Final rule.

SUMMARY: This rulemaking is an administrative change deleting the special regulations pertaining to commercial hauling and the use of commercial vehicles on the Blue Ridge Parkway. Commercial activities are adequately addressed in the general regulations that apply to all units of the National Park System; therefore the special regulations are duplicative and unnecessary. Deletion of these regulations will result in no reduction in the levels of park and visitor protection measures provided.

EFFECTIVE DATE: July 1, 1987.

FOR FURTHER INFORMATION CONTACT: Art Allen, Assistant Superintendent, Blue Ridge Parkway, 700 Northwestern Plaza, Asheville, North Carolina 28801, Telephone: 704–259–0769.

SUPPLEMENTARY INFORMATION:

Background

On August 5, 1986, the National Park Service (NPS) published in the **Federal Register** (51 FR 28107) a proposed rule deleting the special regulations pertaining to commercial hauling activities and the use of commercial vehicles on the Blue Ridge Parkway. Portions of these regulations duplicate provisions of the general regulations codified in 36 CFR 5.6 and are therefore unnecessary. The NPS has also determined that other provisions of these regulations are no longer necessary or appropriate, being needlessly restrictive of vehicle type, cargo and purpose of travel. Those restrictions that remain necessary can be imposed by the superintendent without a rulemaking by establishing public use limits in accordance with 36 CFR 1.5. The various permits authorized by the special regulations are also authorized by the general regulations codified at 36 CFR 1.5 and 1.6 and are therefore duplicative and being deleted.

Deletion of these regulations will not result in a reduction in the levels of protection afforded visitors or the resources of the Blue Ridge Parkway. The provisions that are important to public safety or resource protection will remain in effect but are either codified in NPS general regulations or will be imposed pursuant to the superintendent's discretionary authority.

No comments were received in response to publication of the proposed rule. The regulation is therefore published unchanged as a final rule except for the absence of a reference to paragraph (k) which was deleted in another rulemaking.

Drafting Information

The primary author of this rulemaking is Art Allen, Assistant Superintendent, Blue Ridge Parkway.

Paperwork Reduction Act

This rulemaking does not contain information collection requirements that require approval by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.*

Compliance with Other Laws

The Department of the Interior has determined that this document constitutes an administrative change,

not subject to the provisions of Executive Order 12291, and certifies that this document 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.*). This rulemaking has no economic effect since it neither removes substantive restrictions nor imposes new ones.

The NPS has determined that this rulemaking will not have a significant effect on the quality of the human environment, health and safety because it is not expected to:

(a) Increase public use to the extent of compromising the nature and character of the area or causing physical damage to it;

(b) Introduce noncompatible uses which might compromise the nature and characteristics of the area, or cause physical damage to it;

(c) Conflict with adjacent ownerships or land uses; or

(d) Cause a nuisance to adjacent owners or occupants.

Based in this determination, this rulemaking is categorically excluded from the procedural requirements of the National Environmental Policy Act (NEPA) by Departmental regulations in 516 DM 6, (49 FR 21438). As such, neither an Environmental Assessment nor an Environmental Impact Statement has been prepared.

List of Subjects in 36 CFR Part 7

National parks, Reporting and recordkeeping requirements.

In consideration of the foregoing, 36 CFR Chapter I is amended as follows:

PART 7—SPECIAL REGULATIONS, AREAS OF THE NATIONAL PARK SYSTEM

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

Authority: 16 U.S.C. 1, 3, 9a, 462(k); § 7.96 also issued under D.C. Code 8–137 (1981) and D.C. Code 40–721 (1981).

§ 7.34 [Amended]

2. In § 7.34, Blue Ridge Parkway, by removing paragraphs (f) and (g) and redesignating paragraph (l) as (d).

Dated: July 21, 1987.

Susan Recce,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 87–12360 Filed 5–29–87; 8:45 am]

BILLING CODE 4310-70-M

POSTAL SERVICE

39 CFR Part 111

Change to Collect on Delivery Service (COD)

AGENCY: Postal Service.

ACTION: Final rule.

SUMMARY: This final rule amends postal regulations governing Collect On Delivery Service (COD) to implement a change in COD payment procedures designed to discourage fraudulent use of COD service. Under the amended rule the recipient of a COD package will be able to pay the charges with cash or with a check payable to the COD mailer. In the past payment could be made either in cash or by check payable only to the Postal Service, which cashed the check and forwarded payment to the mailer with a postal money order. A description of the proceedings leading to this change was presented in the Supplementary Information provided with the proposed rule (52 FR 12432).

EFFECTIVE DATE: June 7, 1987.

FOR FURTHER INFORMATION CONTACT: Edmund J. Wronski, (202) 268–5320.

SUPPLEMENTARY INFORMATION: On April 16, 1987, the Postal Service published for comment in the **Federal Register** proposed amendments to 914 of the Domestic Mail Manual to implement a recently approved change in the Domestic Mail Classification Schedule (52 FR 12432). A full explanation of the background and reasons for the change was published at that time and is not repeated here. Interested persons were invited to submit written comments concerning the proposed implementing regulations by May 18, 1987.

The Postal Service received written comments and one telephone call from a total of eight organizations. Two commenters completely agreed with the proposal. Five commenters opposed changing COD service, but made no comment on the implementing regulations. The change in COD service underlying the implementing regulations proposed by this rule was considered extensively before the Postal Rate Commission and by the Governors of the Postal Service and cannot be reconsidered in this rulemaking. See 52 FR 12103, April 14, 1987, for a discussion of that proceeding.

One commenter suggested that two forms of identification should be recorded on the checks regardless of whether the recipient is known to the delivery employee. Current regulations provide for the employee making the identification to note the words "Customer Known" on the back of the check and sign it. We are adopting the commenter's suggestion in part. When the customer is known to the delivery employee, the employee is to write "Customer Known" on the back of the check and sign it. The final rule, in 914.54, adds a requirement that one form of identification be recorded, preferably a driver's license.

The same commenter suggested that the name of the bank on which the recipient's check is drawn be noted on the back of the COD tag, which the Postal Service files. The purpose of this would be, in the event the mailer for some reason doesn't receive the check, and a claim is filed against the Postal Service, to obtain documentation on the missing check from the bank in order to prove non-payment of the check. Several banks have informed us that it is against bank policy to give information on checks to any person other than the account holder. Since knowledge of the name of the bank would not entitle anyone but the account holder to information about a check, it would not necessarily help the mailer to have the requested information on the COD tag. Accordingly, this proposed change is not adopted.

Two additional changes are made. First, references to "personal" checks in proposed 914.54 and 914.622 have been eliminated. The Postal Service had not intended to differentiate between personal and business checks. Second, 914.531j has been amended and references throughout the regulation to addressees' and customers' checks have been changed to allow family members and other individuals who normally receive an addressee's mail to receive and pay for COD articles. Limiting delivery solely to the addressee is not presently part of COD service, and would have the effect of requiring Restricted Delivery Service for COD parcels. It would also unnecessarily inconvenience addressees when someone was available to pay for the article.

In ordinary circumstances, a final rule is not put into effect until 30 days after its publication. An exception is appropriate in this case where notice of public proceedings on the substance of the change was published by the Postal Rate Commission last year, with a subsequent opportunity by all interested parties to participate in the proceedings (51 FR 6842). The Board of Governors announced on April 7, 1987, that the change would be made effective June 7. For these reasons, the Postal Service believes further delay in implementation of the rule change is unnecessary. The rule will become effective on June 7, 1987.

After full consideration of all the comments, the Postal Service hereby adopts the following changes to 149 and 914 of the Domestic Mail Manual, which is incorporated by reference in the Code of Federal Regulations. 39 CFR 111.1.

List of Subjects in 39 CFR Part 111

Postal Service.

PART 111—[AMENDED]

1. The authority citation for 39 CFR Part 111 continues to read as follows:

Authority: 5 U.S.C. 552(a); 39 U.S.C. 101, 401, 403, 404, 3001–3011, 3201–3219, 3403–3406, 3621, 5001.

PART 1—DOMESTIC MAIL SERVICES

2. Change section 149.343b(1)(b), as follows:

149—Indemnity Claims

* * * * *

149.3 Insured and COD Claims.

* * * * *

.343 Verifying Delivery.

* * * * *

b. Postmaster at Post Office of Address.

* * * * *

(1)(b) *Record is found.* If there is a record of delivery, date stamp, write the date of delivery, to whom delivered, indicate any unusual delivery conditions, whether payment was made by check, the check number, and the date the check was mailed. Where appropriate, furnish the money order number(s). If none were issued, so indicate. Attach a copy of Form 3818 if applicable.

* * * * *

PART 9—SPECIAL SERVICES

3. Change section 914, as follows:

914 Collect On Delivery Mail

914.1 Description

.11 Purpose. Customers may mail an article for which they have not been paid and have the price and the cost of the postage collected from the recipient when the article is delivered. This is collect-on-delivery or COD service. The recipient has the option of remitting the amount due sender either by cash or by check made payable to the mailer. The Postal Service will forward the check to the mailer if payment is made by check. If the recipient pays by cash, a postal money order will be sent to the mailer. The fees for COD service include insurance against loss, rifling, or damage to the article, or failure to receive a postal money order if payment has been made by cash, or the recipient's check if payment is made by check. Postal liability for failure to receive the recipient's check or a postal money order is limited to loss in transit. Return receipt and restricted delivery services are available upon payment of the prescribed fees (see 932 and 933).

* * * * *

.17 Additional Services.

* * * * *

.174 Registered COD Mail. Sealed domestic mail of any class bearing postage at the First-Class rate may be sent as registered COD mail. Such mail is handled in the same manner as other registered mail. The maximum amount collectible from the recipient on an individual parcel is $500. Indemnity may be purchased up to the registry limit of $25,000, by payment of the registry fee from column A, Exhibit 911.21, corresponding to the value declared. Payment of a registry fee from column B, Exhibit 911.21, will not provide any indemnity coverage. The total fees charged for registered COD service will include the appropriate registry fee for the value declared plus the registered COD fee (see 914.21). The mailer must declare the full value of the article being mailed regardless of the amount to be collected from the recipient.

* * * * *

.18 Delays in Remittance. Mailers are encouraged to report instances in which there has been undue delay in receiving money orders or recipient's checks in payment for COD articles. The mailer should normally receive payment within 45 days of the day of mailing (75 days for parcels sent by surface ocean transportation). Delays in excess of these periods should be reported to the local postal inspector-in-charge giving the date of mailing, parcel number, address of delivery, whether payment was by check or money order, date payment was received, and the number and date of the payment. Payment not received within these periods may be considered a loss for the purposes of filing a claim in accordance with 149.

* * * * *

.33 Nursery Stock Shipments. Firms mailing nursery stock may print special COD tags bearing instructions as to disposition of shipments that are not immediately delivered. These tags must contain a remittance coupon that will be returned with the money order, or recipient's check.

(The remainder of 914.33 is unchanged).

.33b(2) Return this coupon with money order, or recipient's check.

(The remainder of 914.33b(2) is unchanged).

914.4 Mailing

.41 Preparation of Mailing.

* * * * *

.413 The sender must securely affix a COD tag to each COD article. The tag must show article number, names and addresses of sender and recipient, amount due sender, and amount of money order fee necessary to make remittance. Delivery employees will not collect the money order fee if the recipient pays by check made payable to the mailer.

(The remainder of 914.413 is unchanged).

* * * * *

.53 Delivery.

.531 At Office With Carrier Delivery.

Deliver COD mail as follows:

* * * * *

j. The recipient must have the amount of the COD charges as the carrier is not furnished change. The carrier will also accept a check from the recipient, made payable to the mailer, for the amount of the COD charges. When the recipient pays by check, the carrier does not collect a money order fee. Unless otherwise directed, the COD article may be delivered to the addressee's employee, to a competent member of his family, or to other persons (see 153.2).

* * * * *

.533 On Highway Contract Routes Affording Delivery Service.

Highway contract route carriers will deliver COD mail if required by the contract. Customers should present either the exact amount of money needed to pay the COD charges and the money order fee or a check made payable to the mailer for the amount due sender. No money order fee will be collected if the recipient presents a check.

* * * * *

.54 Collection of Charges.

Collect charges as follows:

a. Collect at time of delivery the charges entered on the tags. The recipient has the option of paying the charges either by cash (in which case a money order fee will be collected), or by check made payable to the mailer (no money order fee is collected). Do not accept checks made payable to the U.S. Postal Service. Delivery employees must accept checks and see identification as follows:

(1) The recipient's name and complete address must be printed on the check. The recipient's telephone number must be recorded on the check.

(2) When a recipient is known by name to the postal employee delivering the COD article, the employee making

the identification should note "Customer Known" on the back of the check, sign it, and also record one of the current forms of identification listed in (3) below, preferably, a driver's license.

(3) If the recipient is unknown, two current forms of identification from the following list must be recorded on the check:

(a) Driver's license;

(b) Military identification card;

(c) Passport;

(d) Credit card; or,

(e) Other credentials showing the signature and having serial number or other indicia that can be traced to the bearer. Social security cards are not acceptable identification.

(4) Compare the signature on the check with the signature on the identification. If signatures do not match, do not accept the check.

(5) Record the COD number on the check.

(The remainder of 914.54 is unchanged).

.62 Payment By Money Order.

* * * * *

.622 Remitting to Sender.

Mail checks in a penalty envelope and money orders in an EM03 penalty envelope on the day of issue or not later than the following workday. Use prepaid (or business reply) envelopes, when furnished by mailer. Enclose any extra COD tag coupons to be returned.

* * * * *

.4 Delete 914.624, add new .63 and .64 as follows, and renumber .63 through .67 as .65 through .68.

.63 Payment by check.

.631 The recipient's check must be made payable to the mailer. Checks must be processed daily as provided in 914.621. Prepare as follows:

a. Examine check for completeness.

b. Enter COD number in memo portion of check if recipient has not already done so.

c. Correct the address printed in the check, if necessary.

d. Annotate the back of the COD form to show that payment was made by check. Enter the check number and date the check was mailed.

.632 Remitting to sender.

Return check to mailer in accordance with 914.622. File COD tag in accordance with 914.621f.

.633 Missing or illegible name of sender.

Obtain the name and address of the sender from the recipient and request the postmaster at the office of mailing to review the sender's mailing receipt in order to verify that the package was mailed by him. If the sender cannot be verified, and the recipient desires to pay cash, deliver the article in accordance with 914.623. Otherwise, handle the article in accordance with 159.5c.

.64 Returned Money Orders and Checks.

Try to obtain the correct address for money orders and checks returned as unclaimed. If the payee cannot be located, handle as follows:

a. Forward the money order and a statement of the facts to the Money Order Division, Postal Data Center, P.O. Box 14795, St. Louis, MO 63182–9400.

b. Send money orders returned to postmasters endorsed "Refused, Out of Business, or Fictitious," to the same address.

c. Annotate the back of the COD tag to show when a check has been returned and forward the returned check to the customer.

d. If money orders or checks are returned to postmasters "Fraudulent," make every effort to return the check to the customer, or the amount of the money order to the purchaser. If this cannot be accomplished, forward money orders to the Money Order Division and attach checks to the COD tag and file the tag. In each instance, note the disposition of the money order or check on the COD tag and file the tag.

* * * * *

5. Move the text in existing 914.66 to the end of renumbered 914.66 as follows:

.66 Loose or Tape-on Tags.

* * * * *

d. When tape-on tags, Form 3816a–S have been used on the parcels, fasten the loose ends down before forwarding or returning the parcels.

* * * * *

6. Add new 914.69 as follows:

.69 Claims and Inquiries Regarding Nonreceipt of Checks or Money Orders.

a. Inquiries or claims involving the nonreceipt of recipient's checks or money orders must be submitted on Form 3812 in accordance with the provisions of DMM 149.2 and 149.3.

b. The postmaster at the office of address will indicate whether or not post office records show delivery incuding the date of delivery, to whom delivered, whether payment was made by either check or money order, and the check or money order number (see 149.343b(1)(b)).

c. Postmasters will not participate in any disputes regarding the recipient's check.

* * * * *

7. Change 914.7, as follows:

914.7 Special Instructions.

.71 Office With 950 or More Revenue Units.

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.712 Recording Section.

* * * * *

b. Clear carriers as follows:

(1) At the end of each trip, or daily, give the carrier a receipt, in duplicate, on the right side of Form 3821. Show number of receipted tags, total amount collected (including the amounts to be remitted by check, by money order, and the money order fees), and number of returned packages.

* * * * *

.715 Remitting Units.

* * * * *

e. At office operating under system B:

* * * * *

8. Add the following section (e) to .715e(2):

(e) Process COD tags with checks made payable to the mailer in accordance with 914.63.

9. Make the following change to .715e(3):

(3) The station or branch superintendent, or designee, will receive the receipted original Form 3822 from the COD clerk and compare the amounts thereon with the totals on Forms 3821. These must agree. This individual will also receive the COD tags from the money order clerk with customers' receipts attached. Verify separately, all COD tags annotated to show payment by check.

(The remainder of 914.715 is unchanged)

* * * * *

10. Make the following changes to 914.71 through 914.73, as follows:

.716 Main Office Window Unit.

a. Issue the money orders and mail recipient's checks to the mailer, if paid by check (see 914.62).

b. Staple the customer's receipt to the COD tag if appropriate, or annotate the back of the COD tag as required in 914.631d.

* * * * *

g. Check one day's COD business each month to make sure money orders are being properly prepared and promptly issued, and that COD tags are properly annotated when paid by check.

(The remainder of 914.716 is unchanged).

* * * * *

.72 Offices Having From 190 Through 949 Revenue Units.

.721 Assignment of Clerks.

Assign different clerks to the following work if possible:

* * * * *

C. Money order clerk. To issue money orders in payment of COD charges and to mail customer's checks to the mailer, if paid by check.

* * * * *

.725 Check of COD Business.

* * * * *

b. Method. Perform the examination as follows:

* * * * *

(3) Check the COD tag file to verify that packages shown on Form 3814–C have been delivered. Where applicable, compare dates of money orders with dates of delivery as shown on the COD tags and Form 3814–C.

* * * * *

(5) Select at random several delivering employees' receipts and, if paid by money order, compare dates of delivery with recorded dates of COD money orders.

* * * * *

.735 Delivery From Rural Station.

* * * * *

c. Process the money orders and checks in accordance with 914.62 and 914.63

* * * * *

e. When appropriate, attach customer's receipt portions of money orders to delivery office portions of COD tags and send them to the main post office.

f. The main post office will complete Form 3850 to show delivery and file COD tags. Customers receipt portions of money orders will be attached to the tags if this method of payment was chosen.

A transmittal letter making these changes in the pages of the Domestic Mail Manual will be published and will be transmitted to subscribers automatically. Notice of issuance of the transmittal letter will be published in the **Federal Register** as provided by 39 CFR 111.3.

Fred Eggleston,

Assistant General Counsel, Legislative Division.

[FR Doc. 87–12375 Filed 5–29–87; 8:45 am]

BILLING CODE 7710-12-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

[AD–FRL–3197–3]

Standards of Performance for New Stationary Sources; Reference Methods; Method 15A for the Determination of Total Reduced Sulfur Emissions From Sulfur Recovery Plants in Petroleum Refineries

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Method 15A for the determination of total reduced sulfur (TRS) emissions in petroleum refineries was proposed in the **Federal Register** on July 11, 1986 (51 FR 25212). This action promulgates "Method 15A, Determination of Total Reduced Sulfur Emissions from Sulfur Recovery Plants in Petroleum Refineries," which is to be added to Appendix A of 40 CFR Part 60. The intended effect is to allow all sources in petroleum refineries that are subject to standards of performance requiring the use of Method 15 to use this as an alternative method. Method 15A employs a simpler and less expensive procedure than Method 15. Revisions to § 60.106 of Subpart J are also being made to cite Method 15A and to specify the required sampling conditions.

Under section 307(b)(1) of the Clean Air Act, judicial review of the actions taken by this notice is available *only* by the filing of a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit within 60 days of today's publication of this rule. Under section 307(b)(2) of the Clean Air Act, the requirements that are the subject of today's notice may not be challenged later in civil or criminal proceedings brought by EPA to enforce these requirements.

EFFECTIVE DATE: June 1, 1987.

ADDRESSES: *Docket.* Docket No. A–86–06, containing materials relevant to this rulemaking, is available for public inspection and copying between 8:00 a.m. and 4:00 p.m., Monday through Friday, at EPA's Central Docket Section, South Conference Center, Room 4, 401 M Street, SW., Washington, DC 20460. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Foston Curtis or Roger Shigehara, Emission Measurement Branch, Emission Standards and Engineering Division (MD–19), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone (919) 541–2237.

SUPPLEMENTARY INFORMATION:

I. The Rulemaking

Method 15A incorporates the Method 6 analysis procedure for determining TRS compounds that have been oxidized to sulfur dioxide.

This rulemaking does not impose emission measurement requirements beyond those specified in the current regulations, nor does it change any emission standard. Rather, the rulemaking would simply add an alternative test method associated with emission measurement requirements that would apply irrespective of this rulemaking.

Mention of trade names or commercial products in this publication does not constitute the endorsement or recommendation for use by EPA.

II. Public Participation

The opportunity to hold a public hearing on August 25, 1986, at 10:00 a.m., was presented in the proposal notice, but no one desired to make an oral presentation. The public comment period was from July 11 to September 24, 1986. No significant comments were received from the proposed rule, and consequently, only minor, typographical method changes have been made.

III. Administrative

The docket is an organized and complete file of all the information considered by EPA in the development of this rulemaking. The docket is a dynamic file, since material is added throughout the rulemaking development. The docketing system is intended to allow members of the public and industries involved to identify readily and locate documents so that they can effectively participate in the rulemaking process. Along with the statement of basis and purpose of the proposed and promulgated test method and EPA responses to significant comments, the contents of the docket, except for interagency review materials, will serve as the record in case of judicial review [section 307(d)(7)(A)].

Under Executive Order 12291, EPA is required to judge whether a regulation is a "major rule" and, therefore, subject to the requirements of a regulatory impact analysis. The Agency has determined that this regulation would result in none of the adverse economic effects set forth in Section 1 of the Order as grounds for finding a regulation to be a "major role." The Agency has, therefore, concluded that this regulation is not a "major rule" under Executive Order 12291.

The Regulatory Flexibility Act of 1980 requires the identification of potentially adverse impacts of Federal regulations upon small business entities. The Act specifically requires the completion of a Regulatory Flexibility Analysis in those instances where small business impacts are possible. Because this test method imposes no adverse economic impacts, a Regulatory Flexibility Analysis has not been conducted.

This rule does not contain any information collection requirements subject to OMB review under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.* This rulemaking does not impose any additional emission measurement requirements on facilities affected by this rulemaking. Rather, this rulemaking adds an alternative test method associated with emission measurement requirements that would apply irrespective of this rulemaking.

Pursuant to provisions of 5 U.S.C. 605(b), I hereby certify that the promulgated rule will not have an impact on small entities.

List of Subjects in 40 CFR Part 60

Air pollution control, Intergovernmental relations, Petroleum refineries, Reporting and recordkeeping requirements, Incorporation by reference.

Dated: May 21, 1987.

Lee M. Thomas,

Administrator.

PART 60—[AMENDED]

40 CFR Part 60 is amended as follows:

1. The authority for 40 CFR Part 60 continues to read as follows:

Authority: Secs. 101, 111, 114, 116, and 301 of the Clean Air Act, as amended (42 U.S.C. 7401, 7411, 7414, 7416, 7601).

2. By amending § 60.106 by adding a sentence to the end of paragraph (d) introductory text, and by revising paragraph (d)(2) to read as follows:

§ 60.106 Test methods and procedures.

* * * * *

(d) * * * Method 15A may be used as an alternative method for determining reduced sulfur compounds.

* * * * *

(2) If Method 15 is used, each run shall consist of 16 samples taken over a minimum of 3 hours. If Method 15A is used, each run shall consist of one 3-hour sample or three 1-hour samples. The sampling point shall be at the centroid of the cross section of the duct if the cross-sectional area is less than 5 m^2 (54 ft^2) or at a point no closer to the walls than 1 m (39 in.) if the cross-sectional area is 5 m^2 or more and the centroid is more than 1 m from the wall. For Method 15, to ensure minimum residence time for the sample inside the sample lines, the sampling rate shall be at least 3 liters/min (0.1 ft^3/min). The SO_2 equivalent for each run shall be calculated as the arithmetic average of the SO_2 equivalent of each sample during the run. Method 4 shall be used to determine the moisture content of the gases when using Method 15. The sampling point for Method 4 shall be adjacent to the sampling point for Method 15. The sample shall be extracted at a rate proportional to the gas velocity at the sampling point. Each run shall span a minimum of 4 consecutive hours of continuous sampling. A number of separate samples may be taken for each run provided the total sampling time of these samples adds up to a minimum of 4 consecutive hours. Where more than one sample is used, the average moisture content for the run shall be calculated as the time weighted average of the moisture content of each sample according to the formula:

$$B_{wo} = \sum_{i}^{N} = 1 \quad B_{si} \quad \frac{t_{si}}{T}$$

where:

B_{wo} = Proportion by volume of water vapor in the gas stream for the run.
N = Number of samples.
B_{si} = Proportion by volume of water vapor in the gas stream for the sample i.
t_{si} = Continuous sampling time for sample i.
T = Total continuous sampling time of all N samples.

3. By adding Method 15A to Appendix A to read as follows:

Appendix A—Reference Methods

* * * * *

Method 15A—Determination of Total Reduced Sulfur Emissions From Sulfur Recovery Plants in Petroleum Refineries

1. Applicability, Principle, Interferences, Precision, and Bias

1.1 *Applicability.* This method is applicable to the determination of total reduced sulfur (TRS) emissions from sulfur recovery plants where the emissions are in a reducing atmosphere, such as in Stretford units. The lower detectable limit is 0.1 ppm of sulfur dioxide (SO_2) when sampling at 2 liters/min for 3 hours or 0.3 ppm when sampling at 2 liters/min for 1 hour. The upper concentration limit of the method exceeds TRS levels generally encountered in sulfur recovery plants.

1.2 *Principle.* An integrated gas sample is extracted from the stack, and combustion air is added to the oxygen (O_2)-deficient gas at a known rate. The TRS compounds (hydrogen sulfide, carbonyl sulfide, and carbon disulfide) are thermally oxidized to sulfur dioxide, collected in hydrogen peroxide as sulfate ion, and then analyzed according to the Method 6 barium-thorin titration procedure.

1.3 *Interferences.* Reduced sulfur compounds, other than TRS, that are present in the emissions will also be oxidized to SO_2. For example, thiophene has been identified in emissions from a Stretford unit and produced a positive bias of 30 percent in the Method 15A result. However, these biases may not affect the outcome of the test at units where emissions are low relative to the standard.

Calcium and aluminum have been shown to interfere in the Method 6 titration procedure. Since these metals have been identified in particulate matter emissions from Stretford units, a Teflon filter is required to remove this interference.

Note.—Mention of trade name or commercial products in this publication does not constitute the endorsement or recommendation for use by the Environmental Protection Agency.

When used to sample emissions containing 7 percent moisture or less, the midget impingers have sufficient volume to contain the condensate collected during sampling. Dilution of the H_2O_2 does not affect the collection of SO_2. At higher moisture contents, the potassium citrate-citric acid buffer system used with Method 16A should be used to collect the condensate.

1.4 *Precision and bias.* Relative standard deviations of 2.8 and 6.9 percent at 41 ppm TRS have been obtained when sampling for 1 and 3 hours, respectively. Results obtained with this method are likely to contain a positive bias due to the presence of nonregulated sulfur compounds (that are present in petroleum) in the emissions.

2. Apparatus

2.1 *Sampling.* The sampling train is shown in Figure 15A–1, and component parts are discussed below. Modifications to this sampling train are acceptable provided that the system performance check is met.

BILLING CODE 6560-50-M

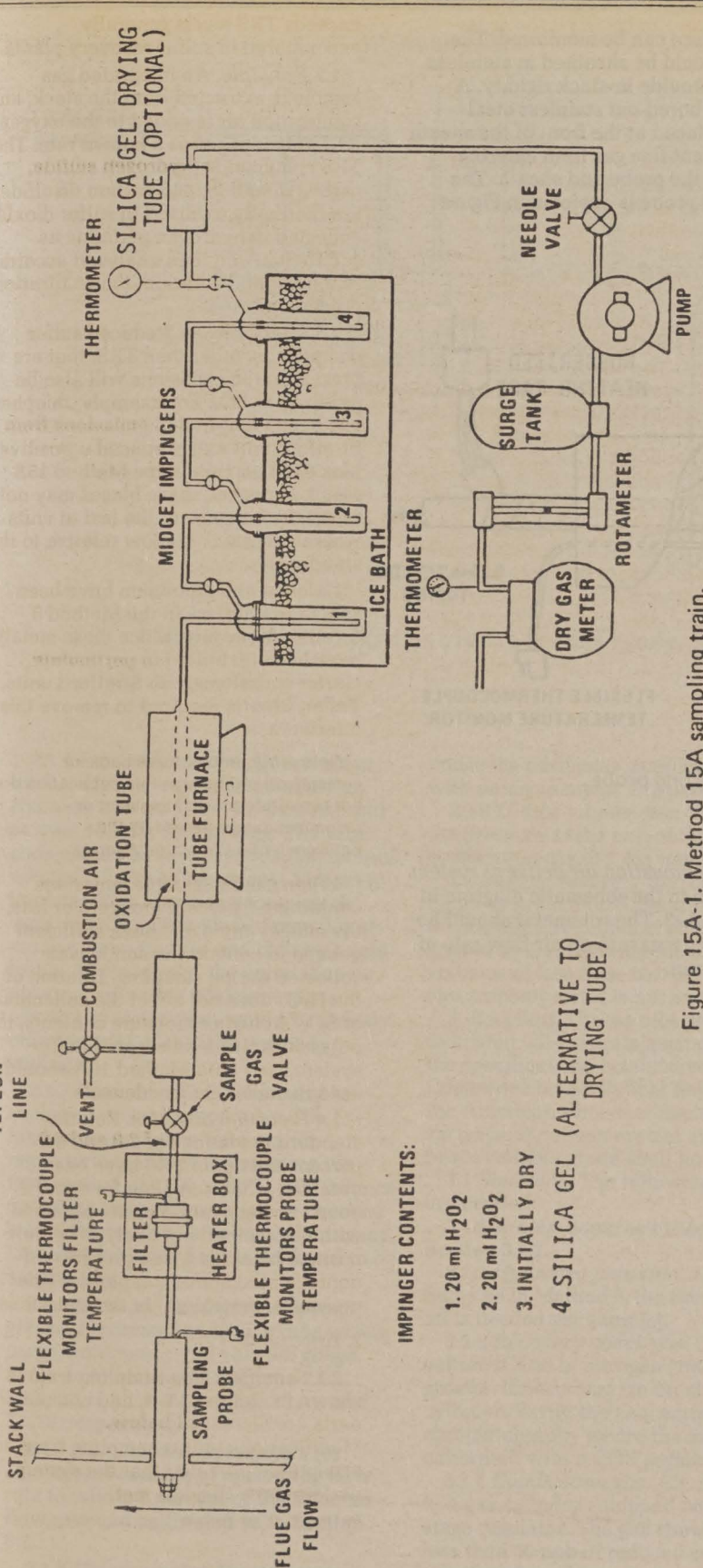

Figure 15A-1. Method 15A sampling train.

BILLING CODE 6560-50-C

2.1.1 *Probe.* 0.6-cm (¼-in.) OD Teflon tubing sequentially wrapped with heat-resistant fiber strips, a rubberized heating tape (with a plug at one end), and heat-resistant adhesive tape. A flexible thermocouple or some other suitable temperature-measuring device shall be placed between the Teflon tubing and the fiber strips so that the temperature can be monitored. The probe should be sheathed in stainless steel to provide in-stack rigidity. A series of bored-out stainless steel fittings placed at the front of the sheath will prevent flue gas from entering between the probe and sheath. The sampling probe is depicted in Figure 15A–2.

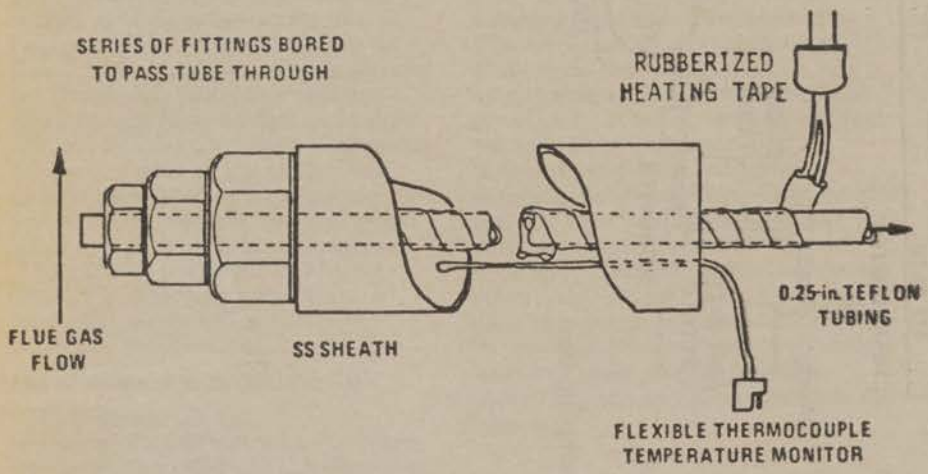

Figure 15A-2. Method 15A sampling probe.

2.1.2 *Particulate filter.* A 50-mm Teflon filter holder and a 1- to 2-μm porosity Teflon filter (available through Savillex Corporation, 5325 Highway 101, Minnetonka, Minnesota 55345). The filter holder must be maintained in a hot box at a high enough temperature to prevent condensation.

2.1.3 *Combustion air delivery system.* As shown in the schematic diagram in Figure 15A–3. The rotameter should be selected to measure an air flow rate of 0.5 liter/min.

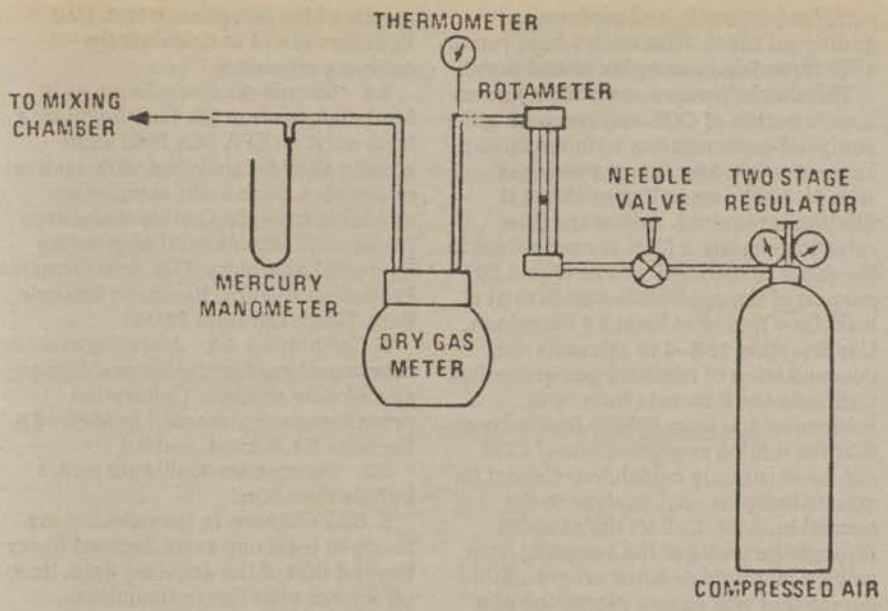

Figure 15A-3. Combustion air delivery system.

2.1.4 *Combustion tube.* Quartz glass tubing with an expanded combustion chamber 2.54 cm (1 in.) in diameter and at least 30.5 cm (12 in.) long. The tube ends should have an outside diameter of 0.6 cm (¼ in.) and be at least 15.3 cm (6 in.) long. This length is necessary to maintain the quartz-glass connector at ambient temperature and thereby avoid leaks. Alternatively, the outlet may be constructed with a 90-degree glass elbow and socket that would fit directly onto the inlet of the first peroxide impinger.

2.1.5 *Furnace.* Of sufficient size to enclose the combustion tube. The furnace shall have a temperature regulator capable of maintaining the temperature at 1100 ± 50°C. The furnace operating temperature shall be checked with a thermocouple to ensure accuracy. Lindberg furnaces have been found to be satisfactory.

2.1.6 *Peroxide impingers, stopcock grease, thermometer, drying tube, valve, pump, barometer, and vacuum gauge.* Same as in Method 6, Sections 2.1.2, 2.1.4, 2.1.5, 2.1.6, 2.1.7, 2.1.8, 2.1.11, and 2.1.12, respectively.

2.1.7 *Rate meters.* Rotameters (or equivalent) capable of measuring flow rate to within 5 percent of the selected flow rate and calibrated as in Section 5.2.

2.1.8 *Volume meter.* Dry gas meter capable of measuring the sample volume under the particular sampling conditions with an accuracy of ± 2 percent.

2.1.9 *U-tube manometer.* To measure the pressure at the exit of the combustion gas dry gas meter.

2.2 *Sample recovery and analysis.* Same as in Method 6, Sections 2.2 and 2.3, except a 10-ml buret with 0.05-ml graduations is required for titrant volumes of less than 10.0 ml, and the spectrophotometer is not needed.

3. *Reagents.* Unless otherwise indicated, all reagents must conform to the specifications established by the Committee on Analytical Reagents of the American Chemical Society. When such specifications are not available, the best available grade shall be used.

3.1 *Sampling.* The following reagents are needed:

3.1.1 *Water.* Same as in Method 6, Section 3.1.1.

3.1.2 *Hydrogen peroxide, 3 percent.* Same as in Method 6, Section 3.1.5 (40 ml is needed per sample).

3.1.3 *Recovery check gas.* Carbonyl sulfide (COS) in nitrogen (100 ppm or greater, if necessary) in an aluminum cylinder. Verify the concentration by gas chromatography where the instrument is calibrated with a COS permeation tube.

3.1.4 *Combustion gas.* Air, contained in a gas cylinder equipped with a two-stage regulator. The gas should contain less than 50 ppb of reduced sulfur compounds and less than 10 ppm total hydrocarbons.

3.2 *Sample recovery and analysis.* Same as in Method 6, Sections 3.2 and 3.3.

4. *Procedure.* 4.1 *Sampling.* Before any source sampling is done, conduct two 30-minute system performance checks in the field, as detailed in Section 4.3, to validate the sampling train components and procedures (optional).

4.1.1 *Preparation of sampling train.* For the Method 6 part of the train, measure 20 ml of 3 percent hydrogen peroxide into the first and second midget impingers. Leave the third midget impinger empty and add silica gel to the fourth impinger. Alternatively, a silica gel drying tube may be used in place of the fourth impinger. Place crushed ice and water around all impingers. Maintain the oxidation furnace at 1100 ± 50°C to ensure 100 percent oxidation of COS. Maintain the probe and filter temperatures at a high enough level (no visible condensation) to prevent moisture condensation and monitor the temperatures with a thermocouple.

4.1.2 *Leak-check procedure.* Assemble the sampling train and leak-check as described in Method 6, Section 4.1.2. Include the combustion air delivery system from the needle valve forward in the leak-check.

4.1.3 *Sample collection.* Adjust the pressure on the second stage of the regulator on the combustion air cylinder to 10 psig. Adjust the combustion air flow rate to 0.50 liter/min (±10 percent) before injecting combustion air into the sampling train. Then inject combustion air into the sampling train, start the sample pump, and open the stack sample gas valve. Carry out these three operations within 15 to 30 seconds to avoid pressurizing the sampling train. Adjust the total sample flow rate to 2.0 liters/min (±10 percent). The combustion air flow rate of 0.50 liter/min and the total sample flow rate of 2.0 liters/min produce an O_2 concentration of 5.0 percent in the stack gas. This O_2 concentration must be maintained constantly to allow oxidation of TRS to SO_2. Adjust these flow rates during sampling as necessary. Monitor and record the combustion air manometer reading at regular intervals during the sampling period. Sample for 1 or 3 hours. At the end of sampling, turn off the sample pump and combustion air simultaneously (within 15 to 30 seconds of each other). All other procedures are the same as in Method 6, Section 4.1.3, except that the sampling train should not be purged. After collecting the sample, remove the probe from the stack and conduct a leak-check (mandatory).

After each 3-hour test run (or after three 1-hour samples), conduct one

system performance check (see Section 4.3). After this system performance check and before the next test run, it is recommended that the probe be rinsed and brushed and the filter replaced.

In Method 15, a test run is composed of 16 individual analyses (injects) performed over a period of not less than 3 hours or more than 6 hours. For Method 15A to be consistent with Method 15, the following may be used to obtain a test run: (1) Collect three 60-minute samples or (2) collect one 3-hour sample. (Three test runs constitute a test.)

4.2 *Sample recovery.* Recover the hydrogen peroxide-containing impingers as detailed in Method 6, Section 4.2.

4.3 *System performance check.* A system performance check is done (1) to validate the sampling train components and procedure (before testing, optional) and (2) to validate a test run (after a run). Perform a check in the field before testing consisting of at least two samples (optional), and perform an additional check after each 3-hour run or after three 1-hour samples (mandatory).

The checks involve sampling a known concentration of COS and comparing the analyzed concentration with the known concentration. Mix the recovery gas with N_2 as shown in Figure 15A–4 if dilution is required. Adjust the flow rates to generate a COS concentration in the range of the stack gas or within 20 percent of the applicable standard at a total flow rate of at least 2.5 liters/min. Use Equation 15A–4 to calculate the concentration of recovery gas generated. Calibrate the flow rate from both sources with a soap bubble flow tube so that the diluted concentration of COS can be accurately calculated. Collect 30-minute samples, and analyze in the normal manner. Collect the samples through the probe of the sampling train using a manifold or some other suitable device that will ensure extraction of a representative sample.

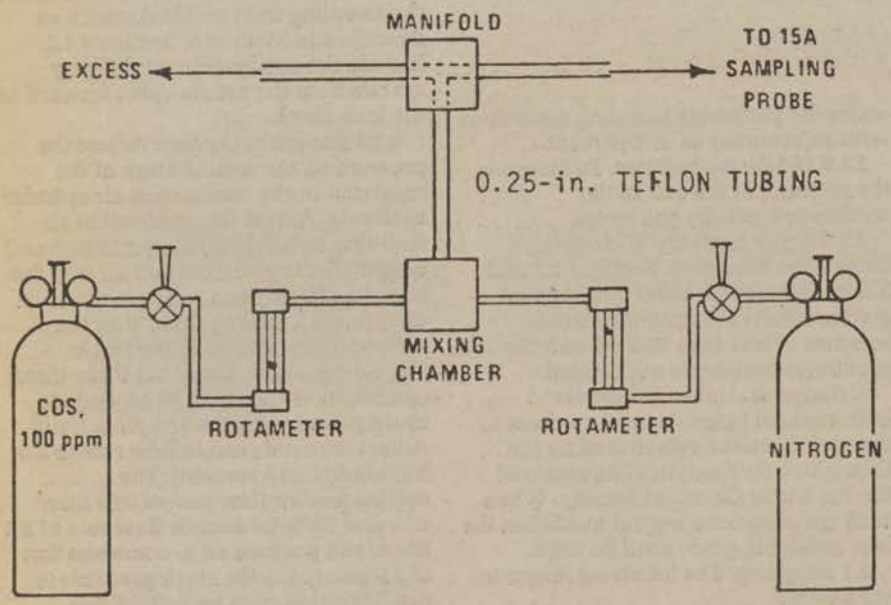

Figure 15A-4. COS recovery gas generator system.

The recovery check must be performed in the field before replacing the particulate filter and before cleaning the probe. A sample recovery of 100 ± 20 percent must be obtained for the data to be valid and should be reported with the emission data, but should not be used to correct the data. However, if the performance check results do not affect the compliance or noncompliance status of the affected facility, the Administrator may decide to accept the results of the compliance test. Use Equation 15A–5 to calculate the recovery efficiency.

4.4 *Sample analysis.* Same as in Method 6, Section 4.3. For compliance tests only, an EPA SO_2 field audit sample shall be analyzed with each set of samples. Such audit samples are available from the Quality Assurance Division, Environmental Monitoring Systems Laboratory, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711.

5. *Calibration.* 5.1 *Metering system, thermometers, barometer, and barium perchlorate solution.* Calibration procedures are presented in Method 6, Sections 5.1, 5.2, 5.4, and 5.5.

5.2 *Rotameters.* Calibrate with a bubble flow tube.

6. *Calculations.* In the calculations, retain at least one extra decimal figure beyond that of the acquired data. Round off figures after final calculations.

6.1 *Nomenclature.*

C_{TRS} = Concentration of TRS as SO_2, dry basis, corrected to standard conditions, ppm.
N = Normality of barium perchlorate titrant, milliequivalents/ml.
P_{bar} = Barometric pressure at exit orifice of the dry gas meter, mm Hg.
P_{std} = Standard absolute pressure, 760 mm Hg.
T_m = Average dry gas meter absolute temperature, °.
T_{std} = Standard absolute temperature, 293°.
V_a = Volume of sample aliquot titrated, ml.
V_{ms} = Dry gas volume as measured by the sample train dry gas meter, liters.
V_{mc} = Dry gas volume as measured by the combustion air dry gas meter, liters.
$V_{ms(std)}$ = Dry gas volume measured by the sample train dry gas meter, corrected to standard conditions, liters.
$V_{mc(std)}$ = Dry gas volume measured by the combustion air dry gas meter, corrected to standard conditions, liters.
V_{soln} = Total volume of solution in which the sulfur dioxide sample is contained, 100 ml.
V_t = Volume of barium perchlorate titrant used for the sample (average of replicate titrations), ml.
V_{tb} = Volume of barium perchlorate titrant used for the blank, ml.
Y = Calibration factor for sampling train dry gas meter.
Yc = Calibration factor for combustion air dry gas meter.
C_{RG} = Concentration of generated recovery gas, ppm.
C_{COS} = Concentration of COS recovery gas, ppm.
Q_{COS} = Flow rate of COS recovery gas, liters/min.
Q_{N2} = Flow rate of diluent N_2, liters/min.
R = Recovery efficiency for the system performance check, percent.
32.03 = Equivalent weight of sulfur dioxide, mg/meq.

$$12025\ \frac{\mu l}{meq} = \frac{(32.03\ mg)}{(meq)}\ \frac{(24.05\ liters)}{(mole)}\ \frac{(mole)\ (1\ g)\ (10^3\ ml)\ (10^3\ \mu l)}{(64.06\ g)\ (10_3\ g)\ (liter)\ (ml)}$$

6.2 *Dry Sample Gas Volume, Corrected to Standard Conditions.*

$$V_{ms(std)} = \frac{V_{ms}Y(T_{std})\ (P_{bar})}{(T_m)\ (P_{std})} = \frac{K_1\ Y\ (V_m)\ (P_{bar})}{T_m} \qquad \text{Eq. 15A-1}$$

where: $K_1 = 0.3858^{\circ}/mm\ Hg$ for metric units.

6.3 *Combustion Air Gas Volume, Corrected to Standard Conditions.*

$$V_{mc(std)} = \frac{k_1\ Y_c\ (V_{mc})\ (P_{bar})}{T_m} \qquad \text{Eq. 15A-2}$$

Note.—Correct P_{bar} for the average pressure of the manometer during the sampling period.

6.4 *Concentration of TRS as ppm SO_2.*

$$C_{TRS} = \frac{K_2\ (V_t - V_{tb})\ N\ (V_{soln}/V_a)}{V_{ms(std)} - V_{mc(std)}} \qquad \text{Eq. 15A-3}$$

where: $K_2 = 12025\ \mu l/meq$ for metric units.

6.5 *Concentration of Generated Recovery Gas.*

$$C_{RG} = \frac{(C_{COS})\ (Q_{COS})}{Q_{COS} + Q_{N^2}} \qquad \text{Eq. 15A-4}$$

6.6 *Recovery Efficiency.*

$$R = \frac{C_{TRS}}{C_{RG}} \times 100 \qquad \text{Eq. 15A-5}$$

7. Bibliography

1. American Society for Testing and Materials

Annual Book of ASTM Standards. Part 31: Water, Atmospheric Analysis. Philadelphia, Pennsylvania. 1974. p. 40–42.

2. Blosser, R.O., H.S. Oglesby, and A.K. Jain

A Study of Alternate SO_2 Scrubber Designs Used for TRS Monitoring. National Council of the Paper Industry for Air and Stream Improvement, Inc., New York, New York. Special Report 77–05. July 1977.

3. Curtis, F., and G.D. McAlister

Development and Evaluation of an Oxidation/Method 6 TRS Emission Sampling Procedure. Emission Measurement Branch, Emission Standards and Engineering Division, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711. February 1980.

4. Gellman, I. A Laboratory and Field Study of Reduced Sulfur Sampling and Monitoring Systems.

National Council of the Paper Industry for Air and Stream Improvement, Inc., New York, New York. Atmospheric Quality Improvement Technical Bulletin No. 81. October 1975.

5. Margeson, J.H., J.E. Knoll, M.R. Midgett, B.B. Ferguson, and P.J. Schworer

A Manual Method for TRS Determination. Journal of Air Pollution Control Association. *35*:1280–1286. December 1985.

[FR Doc. 87-12366 Filed 5-29-87; 8:45 am]

BILLING CODE 6560-50-M

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40 CFR Part 61

[AD-FRL-3165-9]

National Emission Standards for Hazardous Air Pollutants; Alternative Calibration Procedure; Amendments to Test Method 107

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: On April 21, 1986, EPA proposed amendments to Method 107 of Appendix B of 40 CFR Part 61 that included clarification of previous procedural and equipment requirements and the addition of an alternative calibration procedure (51 FR 13528). This action promulgates the amendments. Procedural and equipment requirements are now more performance oriented, and a protocol for judging the acceptability of doing the multipoint calibration on a monthly rather than daily basis is provided. The intended effect of these amendments is to facilitate the execution of Method 107.

EFFECTIVE DATE: June 1, 1987.

Under section 307(b)(1) of the Clean Air Act, judicial review of the actions taken by this notice is available *only* by the filing of a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit within 60 days of today's publication of this notice. Under section 307(b)(2) of the Clean Air Act, the requirements that are the subject of today's notice may not be challenged later in civil or criminal proceedings

brought by EPA to enforce these requirements.

ADDRESSES: Docket. A docket, number A–85–29, containing information considered by EPA in development of the promulgated standards is available for public inspection between 8:00 a.m. and 4:00 p.m., Monday through Friday, at EPA's Central Docket Section (LE–131), South Conference Center, Room 4, 401 M Street SW., Washington, DC 20460. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Mr. William Grimley or Mr. Roger T. Shigehara, Emission Measurement Branch, Emission Standards and Engineering Division (MD–19), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone (919) 541–2237.

SUPPLEMENTARY INFORMATION:

I. The Rulemaking

This rulemaking provides amendments to an existing test method for determination of vinyl chloride content of inprocess wastewater samples, and vinyl chloride content of polyvinyl chloride resin, slurry, wet cake, and latex samples, in order to facilitate the execution of the method. The rulemaking does not impose emission measurement requirements beyond those specified in the current regulations, nor does it change any emission standard.

II. Public Participation

The proposed amendments to Method 107 were published in the **Federal Register** on April 21, 1986 (51 FR 13528). Public comments were solicited at the time of proposal. To provide interested persons the opportunity for oral presentation of data, views, or arguments concerning the proposed procedures, a public hearing was scheduled for June 5, 1986, beginning at 10:00 a.m. The hearing was not held because no one requested to speak. The public comment period was from April 21, 1986, to July 27, 1986. No comment letters were received.

III. Comments and Changes to the Proposed Rulemaking

No comment letters were received on the proposed amendments. Two additions have been made to the rulemaking between proposal and promulgation to include revisions to correct two minor typographical errors.

IV. Administrative

The docket is an organized and complete file of all the information considered by EPA in the development of this rulemaking. The docket is a dynamic file, since material is added throughout the rulemaking development. The docketing system is intended to allow members of the public and industries involved to identify readily and locate documents so that they can effectively participate in the rulemaking process. Along with the statement of basis and purpose of the proposed and promulgated standards, and EPA responses to significant comments, the contents of the docket, except for interagency review materials, will serve as the record in case of judicial review [Clean Air Act, section 307(d)(7)(A)].

Under Executive Order 12291, EPA is required to judge whether a regulation is a "major rule" and, therefore, subject to the requirements of a regulatory impact analysis. The Agency has determined that this regulation would result in none of the adverse economic effects set forth in section 1 of the Order as grounds for finding a regulation to be a "major rule." The rulemaking does not impose emission measurement requirements beyond those specified in the current regulations, but, instead, provide supplementary information and an alternative calibration procedure for an existing test method in order to facilitate the execution of the method. The Agency has, therefore, concluded that this regulation is not a "major rule" under Executive Order 12291.

The Regulatory Flexibility Act of 1980 requires the indentification of potentially adverse impacts of Federal regulations upon small business entities. The Act specifically requires the completion of a regulatory flexibility analysis (RFA) in those instances where small business impacts are possible. Because these standards impose no adverse economic impacts, an RFA has not been conducted.

Pursuant to the provisions of 5 U.S.C. 605(b), I hereby certify that the promulgated rule will not have any economic impact on small entities, because no additional testing costs will be incurred.

This regulation was submitted to the Office of Management and Budget (OMB) for review as required by Executive Order 12291. Any written comments from OMB and any written EPA responses are available in the docket.

List of Subjects in 40 CFR Part 61

Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements, Incorporation by reference, Vinyl chloride.

Date: May 21, 1987.

Lee M. Thomas,

Administrator.

Appendix B—[Amended]

40 CFR Part 61, Appendix B. Method 107, is amended as follows:

1. The authority citation for Part 61 continues to read as follows:

Authority: Sections 101, 112, 114, 116, and 301 of the Clean Air Act, as amended (42 U.S.C. 7401, 7412, 7414, 7416, 7601).

2. By revising the first sentence of section 1.2 to read as follows:

The basis for this method relates to the vapor equilibrium that is established at a constant known temperature in a closed system between RVCM, PVC resin, water, and air.

3. By revising Section 2 to read as follows:

2. Range and Sensitivity

The lower limit of detection of vinyl chloride will vary according to the sampling and chromatographic system. The system should be capable of producing a measurement for a 50-ppm vinyl chloride standard that is at least 10 times the standard deviation of the system background noise level.

4. By revising Section 6.1.2 to read as follows:

6.1.2 Glass Vials. Headspace vials, with Teflon-faced butyl rubber sealing discs, for water samples.

5. By revising Section 6.2 to read as follows:

6.2 Sample Recovery. The following equipment is required:

6.2.1 Glass Vials. Headspace vials, with butyl rubber septa and aluminum caps. Silicone rubber is not acceptable.

6.2.2 Analytical Balance. Capable of determining sample weight within an accuracy of ± 1 percent.

6.2.3 Vial Sealer. To seal headspace vials.

6.2.4 Syringe. 100-μl capacity.

6. By revising Section 6.3.1 to read as follows:

6.3.1 Headspace Sampler and Chromatograph. Capable of sampling and analyzing a constant amount of headspace gas from a sealed vial, while maintaining that vial at a temperature of 90°C± 0.5°C. The chromatograph shall be equipped with a flame ionization detector. Perkin-Elmer Corporation Models F–40, F–42, F–45, HS–6, and HS–100, and Hewlett-Packard Corporation Model 19395A have been found satisfactory. Chromatograph backflush capability may be required.

7. By revising Section 6.3.3 to read as follows:

6.3.3 Thermometer. 0 to 100°C, accurate to ± 0.1°C.

8. By removing Sections 6.3.4, 6.3.5, 6.3.7, and 6.3.8.

9. By redesignating Section 6.3.6 as section 6.3.4 and revising it to read as follows:

6.3.4 Integrator-Recorder. To record chromatograms.

10. By adding a new Section 6.3.5 that reads as follows:

6.3.5 Barometer. Accurate to ± 1 mm Hg.

11. By redesignating Section 6.3.9 as Section 6.3.6.

12. By redesignating Section 6.3.10 as Section 6.3.7.

13. By revising Section 7.1.2 to read as follows:

7.1.2 Nitrogen or Helium. Zero grade.

14. By adding Section 7.1.4 that reads as follows:

7.1.4. Water. Interference free.

15. By removing the plus sign in the second sentence of Section 7.2.1.2.

16. By adding the following sentence to the end of Section 8.1.1:

All samples should be kept refrigerated.

17. By removing the first sentence of Section 8.1.2.

18. By revising the first two sentences of Section 8.2.1 to read as follows:

The weight of the resin used must be between 0.1 and 4.5 grams. An exact weight must be obtained (±1 percent) for each sample.

19. By removing the word "distilled" from the fifth sentence of Section 8.2.1.

20. By adding the following paragraph after the first paragraph of Sectioin 8.2.1:

Prepressurization is not required if the sample weight, as analyzed, does not exceed 0.2 gram. It is also not required if solution of the prepressurization equation yields an absolute prepressurization value that is within 30 percent of the atmospheric pressure.

21. By revising the third and fourth sentences of Section 8.2.2. to read as follows:

Then determine the sample weight (±1 percent). All samples, weighing over 0.2 gram, must be prepressurized prior to conditioning for 1 hour at 90°C, except as noted in Section 8.2.1.

22. By revising the sixth and seventh sentences of Section 8.2.3 to read as follows:

Determine sample weight (±1 percent). Condition the vial for 1 hour at 90° C in the analyzer bath.

23. By revising the third and fourth sentences of Section 8.2.4 to read as follows:

Determine sample weight (±1 percent). Condition the vial for 1 hour at 90°C in the analyzer bath.

24. By removing the second sentence of Section 8.3.3.

25. By revising the first paragraph of Section 9 to read as follows:

Calibration is to be performed each 8-hour period the chromatograph is used. Alternatively, calibration with duplicate 50-, 500-, 2,000-, and 4,000-ppm standards (hereafter described as a four-point calibration) may be performed on a monthly basis, provided that a calibration confirmation test consisting of duplicate analyses of an appropriate standard is performed once per plant shift, or once per chromatograph carrousel operation (if the chromatograph operation is less frequent than once per shift). The criterion for acceptance of each calibration confirmation test is that both analyses of 500-ppm standards [2,000-ppm standards if dispersion resin (excluding latex resin) samples are being analyzed] must be within 5 percent of the most recent four-point calibration curve. If this criterion is not met, then a complete four-point calibration must be performed before sample analyses can proceed.

26. By adding the following sentence at the end of Section 9.1:

Prepressurization of standards is not required unless samples have been prepressurized.

27. By revising the first sentence of Section 9.2 to read as follows:

Prepare two vials each of 50-, 500-, 2,000-, and 4,000-ppm standards.

28. By revising Section 10.1 to read as follows:

10.1 Response Factor. If the calibration curve described in Section 9.2 passes through zero, an average response factor, R_f, may be used to facilitate computation of vinyl chloride sample concentrations. To compute R_f, first compute a response factor, R_s, for each sample as follows:

$$R_s = \frac{A_s}{C_c} \qquad \text{Eq. 107-1}$$

Sum the individual response factors, and calculate R_f. If the calibration curve does not pass through zero, use the calibration curve to determine each sample concentration.

29. By removing the following paragraph in Section 10.2:

Assuming the following conditions are met, these values can be substituted into Equation 107-2:

P_a = 750 mm Hg.
V_s = Vial volume—sample volume (Fisher vials are 22.0 cm^3 and Perkin-Elmer vials are 21.8 cm^3).
T_1 = 23°C or 296°K.
T_2 = 90°C or 363°K.

30. By removing the last equation in Section 10.2.

31. By revising the definition of the term V_g in Section 10.2 to read as follows:

V_g = Volume of the vapor phase, cm^3.

$$= V_v - \frac{m(TS)}{1.36} - \frac{m(1-TS)}{0.9653}$$

32. By adding the following terms to the terminology list in Section 10.2:

V_v = Vial volume, cm^3.
1.36 = Density of PVC at 90°C, g/cm^3.
0.9653 = Density of water at 90°C, g/cm^3.

33. By revising the following terms to read as follows in the terminology list in Section 10.2:

A_s = Chromatogram area counts of vinyl chloride for the sample.
R = Gas constant, (62360 cm^3) (mm Hg)/(mole)(°K).

34. By revising the title of Section 11 to read as follows:

11. *Bibliography*

[FR Doc. 87-12369 Filed 5-29-87; 8:45 am]
BILLING CODE 6560-50-M

INTERSTATE COMMERCE COMMISSION

49 CFR Parts 1206 and 1249

[Docket No. 39953]

Eliminating of Accounting and Reporting Requirements for Motor Carriers of Passengers

AGENCY: Interstate Commerce Commission.

ACTION: Final rule.

SUMMARY: Subsequent to Notice of Proposed Rulemaking and comments under Docket No. 39953, Elimination of Accounting and Reporting Requirements for Motor Carriers of Passengers, served June 26, 1985 (50 FR 26594, June 27, 1985), the Commission has decided to adopt new accounting and reporting regulations for motor carriers of passengers (motor carriers). The Uniform System of Accounts (49 CFR Part 1206) will remain in the Code of Federal Regulations for reference purposes but no longer will be prescribed as the basis for motor carrier accounting. The quarterly and annual reports will be reduced to a one-page format with only summary data elements. Only Class I motor carriers will be required to file the new report forms with the Commission. Motor carriers not currently designated as Class I shall notify the Commission when annual operating revenues reach the Class I level.

The effect of these changes is to assure that only financial disclosures

used regularly and frequently by the Commission are reported. This should result in significant cost savings and the reduction of burden hours in Commission reporting.

DATE: The new rules are effective for the reporting year begining January 1, 1987.

FOR FURTHER INFORMATION CONTACT: Andrew J. Lee, (202) 275–7510.

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).

This action will not significantly affect either the quality of the human environment or energy conservation. This rule will not have a significant economic impact on a substantial number of small entities.

List of Subjects

49 CFR Part 1206

Motor carriers, Uniform System of Accounts.

49 CFR Part 1249

Motor carriers; Reporting requirements.

Decided: May 12, 1987.

By the Commission, Chairman Gradison, Vice Chairman Lamboley, Commissioners Sterrett, Andre and Simmons. Vice Chairman Lamboley and Commissioner Simmons dissented with separate expressions.

Noreta R. McGee,

Secretary

Accordingly, Parts 1206 and 1249 of Title 49 of the Code of Federal Regulations are amended as follows:

PART 1206—PASSENGERS

1. In 49 CFR Part 1206, the authority citations following Definitions, Number 1–44; Instructions, Numbers 2–1, 2–2, 2–7 2–18, 2–19, 2–27, 2–31, 2–32, 2–35, 2–36, and 2–37; and Account Numbers 1000, 1043, 1195, 1500, 1501, 1511, 1541, 1550, 1781, 1895, 2000, 2030, 2185, 2190, 2200, 2300, 2310, 2330, 2360, 2410, 2460, 2680, 2900, 2999, 3000, 3700, 3800, 4520, 4530, 4541, 4546, 4550, 4560, 4570, 4580, 4656, and 7500 are removed, and the authority citation for Part 1206 are revised to read as follows:

Authority: 49 U.S.C. 10321, 11142 and 11145; 5 U.S.C. 553.

2. New § 1206.1, "Uniform System of Accounts for motor carriers of passengers not prescribed," is added to Part 1206 to precede "Definitions" as follows:

§ 1206.1 Uniform System of Accounts for common and contract motor carrier of passengers not prescribed.

The Uniform System of Accounts for motor carriers of passengers found at § 1206.2, Uniform System of Accounts for common and contract motor carriers of passengers, shall no longer be prescribed for regulated motor carriers. The Uniform System of Accounts is herein left in place for reference purposes only as the basis of motor carrier accounting and reporting. Motor carriers may follow generally accepted accounting principles for all accounting and reporting matters. For reporting requirements, see § 1249.3 and § 1249.4 of Title 49, Code of Federal Regulations. This provision is effectively beginning January 1, 1987 and thereafter.

3. In Part 1206, *Introduction, 0–1 General,* is removed.

4. The remaining text of Part 1206 is designated as § 1206.2, the new heading for which reads as follows:

§ 1206.2 Uniform System of Accounts for common and contract motor carriers of passengers.

PART 1249—REPORTS OF MOTOR CARRIERS

1. In 49 CFR Part 1249, the authority citation for Part 1249 would continue to read as follows:

Authority: 49 U.S.C. 11142 and 11145 and 5 U.S.C. 553

2. Section 1249.3 is added to read as follows:

§ 1249.3 Classification of carriers—motor carriers of passengers.

(a) Common and contract carriers of passengers subject to the Interstate Commerce Act are grouped into the following two classes:

(1) Class I—Carriers having average annual gross operating revenues (including intrastate and interstate) of $3 million or more from passenger motor carrier operations.

(2) Other than Class I—Carriers having average annual gross operating revenues (including interstate and intrastate) of less than $3 million from passenger motor carrier operations.

(b)(1) The class to which any carrier belongs shall be determined by annual carrier operating revenues. Upward and downward reclassification will be effected as of January 1 of the year immediately following the third consecutive year of revenue qualification.

(2) Any carrier which begins new operations (obtains operating authority not previously held) or extends its existing authority (obtains additional operating rights) shall be classified in accordance with a reasonable estimate of its annual carrier operating revenues.

(3) When a business combination occurs, such as a merger reorganization, or consolidation, the surviving carrier shall be reclassified effective as of January 1 of the next calendar year on the basis of the combined revenues for the year when the combination occurred.

(4) Carriers shall notify the Commission of any change in classification or when their annual operating revenues exceeds the Class I limit by writing to the Bureau of Accounts, Interstate Commerce Commission, Washington, DC 20423. In unusual circumstances where the classification regulations and reporting requirements will unduly burden the carrier, the carrier may request from the Commission a waiver from these regulations. This request shall be in writing specifying the conditions justifying the waiver. The Commission then shall notify carriers of any change in classification or reporting requirements.

3. Section 1249.4 is revised to read as follows:

§ 1249.4 Annual and quarterly reports of Class I carriers of passengers.

(a) All Class I motor carriers of passengers shall complete and file Motor Carrier Quarterly and Annual Report Form MP–1 for Motor Carriers of Passengers (Form MP–1). Other than Class I carriers are not required to file Form MP–1.

(b) Motor Carrier Quarterly and Annual Report Form MP–1 shall be used to file both quarterly and annual selected motor carrier data. The annual accounting period shall be based either (1) on the 31st day of December in each year, or (2) an accounting year of thirteen 4-week periods ending at the close of the last 7 days of each calendar year. A carrier electing to adopt an accounting year of thirteen 4-week periods shall file with the Commission a statement showing the day on which its accounting year will close. A subsequent change in the accounting period may not be made except by authority of the Commission. The quarterly accounting period shall end on March 31, June 30, September 30, and December 31. The quarterly report shall be filed within 30 days after the end of the reporting quarter. The annual report shall be filed on or before March 31 of the year following the year to which it relates.

(c) The quarterly and annual report shall be filed in duplicate to The Bureau of Accounts, Interstate Commerce Commission, Washington, DC 20423. Copies of Form MP–1 may be obtained from the Bureau of Accounts.

BILLING CODE 7035–01–M

Note.—The following form will not appear in the Code of Federal Regulations.

Docket No. 39953

APPENDIX B

Motor Carrier Quarterly and
Annual Report Form MP-1
Motor Carrier of Passengers

Approved By:
Expires:

QUARTERLY AND ANNUAL REPORT TO THE
INTERSTATE COMMERCE COMMISSION

_____
Carrier Name and Address

_____(Attach address label here, if available)_____
MC Number _____ Report Year ____

1. Period Covered (Check Box) (Quarter)

First ☐ Second ☐ Third ☐ Fourth ☐ Annual ☐

2. Type of Operation Based on Major Sources of Revenues (Check One)

[ ] Regular route service
[ ] Charter Service

3. If respondent is a consolidated group, list and describe all entities making up the consolidation. _____

4. If a merger, consolidation or change in the company or consolidated group ocurred during the year, please describe._____

5. Number of Passengers:

	Respondent only		Consolidated	
	This period	YTD	This period	YTD
(a) intercity regular route				
(b) charter or special				
(c) local or commuter				
(d) total passengers				
6. Revenues				
(a) intercity regular price	$	$	$	$
(b) charter or special	$	$	$	$
(c) local or suburban	$	$	$	$
(d) express and other property	$	$	$	$
7. Total Operating Revenues	$	$	$	$
8. Total Operating Expenses	$	$	$	$
9. Net Carrier Operating Income	$	$	$	$
10. Extraordinary Items, Net of Taxes	$	$	$	$
11. Total Provision for Income Taxes	$	$	$	$
12. Net Income	$	$	$	$
13. Total Assets	$	XXXXXX	$	XXXXX
14. Total Liabilities	$	XXXXXX	$	XXXXX
15. Shareholders Equity	$	XXXXXX	$	XXXXX
16. Operating Ratio				

CERTIFICATION

I hereby certify that this report was prepared by me or under my supervision, that I have examined it, and the items herein reported on the basis of my knowledge and belief are correctly shown.

_____
Name and Title Date

_____
Address (Street address, City, State & Zip Code Telephone No.(Including area code)

[FR Doc. 87-12259 Filed 5-29-87; 8:45 am]
BILLING CODE 7035-01-C

Proposed Rules

Federal Register
Vol. 52, No. 104
Monday, June 1, 1987

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

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 925

Grapes Grown in a Designated Area of Southeastern California; Proposed Change in Fiscal Period

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This proposed rule would change the fiscal period from December 1 through November 30 to January 1 through December 31 (calendar year). This action would simplify and reduce the committee's bookkeeping and accounting procedures. The proposal was recommended by the California Desert Grape Administrative Committee, which works with the Department in administering the Federal marketing order for California desert grapes.

DATE: Comments due July 1, 1987.

ADDRESS: Comments should be sent to: Docket Clerk, F&V, AMS, Room 2085–S, U.S. Department of Agriculture, Washington, DC 20250–1400. Two copies of all written materials should be submitted, and they will be made available for public inspection at the Office of the Docket Clerk during regular business hours.

FOR FURTHER INFORMATION CONTACT: James M. Scanlon, Acting Chief, Marketing Order Administration Branch, F&V, AMS, USDA, Washington, DC 20250–1400, telephone (202) 475–3914.

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

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service has determined that this action would 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 of 1937, as amended (the Act, 7 U.S.C. 601–674), and rules promulgated thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

Grapes grown in the production area are marketed in the major market areas of the United States. Shipments of California desert grapes totaled 8,189,994 lugs (22 pound equivalent) in 1986. This compared to 7,491,364 lugs in 1985 and the three year (1983–85) average of 6,899,377 lugs. Since 1982, bearing acreage of California desert grapes has increased moderately. Bearing acreage was reported at 18,073 acres in 1986, 2,079 acres more than the 15,994 acres reported in 1985.

There are approximately 22 handlers of California desert grapes subject to regulation under the marketing order handling regulation. There are approximately 88 growers of desert grapes in the production area. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.2) as those having annual gross revenues for the last three years of less than $100,000, and agricultural service firms are defined as those whose gross annual receipts are less than $3,500,000. The majority of handlers and producers of table grapes may be classified as small entities.

The Administrator of the Agricultural Marketing Service (AMS) has considered the impact of this action on small entities. The regulatory action in this instance is a proposed rule which would make the fiscal period the same as the calendar year. It is the Department's view that the proposed rules is of an administrative nature, which would improve program efficiency. Thus, there is no impact on small businesses.

Marketing Order No. 925 regulates the handling of grapes grown in a designated area in southeastern California. The program is effective under the Act. The California Desert Grape Administrative Committee, established under the order, is responsible for its local administration.

At a public meeting on April 9, 1987, the committee recommended changing the fiscal period which would allow the committee to operate on a calendar year basis. Currently, the fiscal period is December 1 through November 30 of the following year. Under the proposed change, the fiscal period would begin January 1 and end December 31. Section 925.12 authorizes the committee, with the Secretary of Agriculture's approval, to set the fiscal period.

Committee management has to maintain two separate sets of bookkeeping and accounting records: one to comply with committee operations for the December through November fiscal period, the other to comply with Federal and State accounting and employee tax reports which are required on a calendar year basis.

This action is necessary in order to allow the committee to simplify and reduce its bookkeeping and accounting procedures on a calendar year basis to coincide with Federal and State accounting procedures. Hence, a change in the fiscal period to coincide with the calendar year (January–December) is considered necessary. This action would enable the committee to operate more efficiently.

Since this action would change the fiscal period under the marketing order (7 CFR 925.12), no action is necessary for table grape imports under Section 608e-1 of the Act. A change in the import regulation (7 CFR 944.503) is applicable when there is a change in the grade, size, quality, and maturity of a domestically produced commodity. Therefore, since fiscal period guidelines are not included in the requirements of § 8e, no change is necessary to the applicable import regulations.

A 30-day comment period is allowed to receive written comments with repect to this proposal. All written comments timely received in response to this proposal for comments will be considered before a final determination is made on this matter.

List of Subjects in 7 CFR Part 925

Marketing agreements and orders, Grapes, California.

For the reasons set forth in the preamble, Part 925 is proposed to be amended as follows:

PART 925—GRAPES GROWN IN A DESIGNATED AREA OF SOUTHEASTERN CALIFORNIA

1. The authority citation for 7 CFR Part 925 continues to read as follows:

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

2. Section 925.112 would be added to read as follows:

§ 925.112 Fiscal period.

Beginning January 1, 1988, "fiscal period" will mean January 1 through December 31 of each year.

Dated: May 22, 1987.

William J. Doyle,

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

[FR Doc. 87–12356 Filed 5–29–87; 8:45 am]

BILLING CODE 3410–02–M

DEPARTMENT OF ENERGY

10 CFR Part 1013

Implementation of the Program Fraud Civil Remedies Act

AGENCY: Department of Energy.

ACTION: Proposed rule.

SUMMARY: The Department of Energy proposes to adopt procedural regulations implementing the Program Fraud Civil Remedies Act of 1986. These regulations would establish administrative procedures for imposing the statutorily authorized civil penalties and assessments against any person who makes, submits, or presents a false, fictitious, or fraudulent claim or written statement to the Department of Energy.

DATE: Comments must be received on or before July 31, 1987.

ADDRESS: Written comments should be mailed or delivered to the Deputy General Counsel for Legal Services, Room 6A–197, 1000 Independence Avenue, SW., Washington, DC 20585. Copies of all written comments will be available for inspection and photocopying between 9 a.m. and 5 p.m., Monday through Friday, in Room 1E–190, at the the above address.

FOR FURTHER INFORMATION CONTACT: D. Clifford Crook III, (202) 586–5246.

SUPPLEMENTARY INFORMATION: The Program Fraud Civil Remedies Act (the Act), Pub. L. 99–509, enacted on October 21, 1986, codified at 31 U.S.C. 3801 through 3812, generally provides that any person who knowingly submits a false claim or statement to the Federal Government in an amount less than $150,000 may be liable for an administrative civil penalty of not more than $5,000 for each false claim or statement, and, in certain cases, to an assessment equal to double the amount falsely claimed.

The Act establishes in all authorities an administrative remedy for fraudulent claims or statements made to such authorities. The Act defines "authority" to include the Departments of State, Treasury, Defense, Justice, Interior, Agriculture, Commerce, Labor, HUD, HHS, Energy, Education, Transportation, the Army, Navy, and Air Force, as well as AID, EPA, GSA, VA, NASA, SBA, the Untied States Postal Service and the Railroad Retirement Board.

The statute was based in large measure on the experiences of the Department of Health and Human Services (DHHS) with the Civil Monetary Penalties Law, 42 U.S.C. 1320a–1327a. Enacted in 1981, that statute granted to DHHS the authority to impose civil penalties and assessments on health care providers who file Medicare or Medicaid claims for services that they knew or had reason to know were not provided as claimed.

The Act mandates that each authority promulgate regulations, and the Report of the Senate Governmental Affairs Committee states that the Committee "expects that the regulations would be substantially uniform throughout government." (S. Rep. No. 99–213, 99th Cong., 1st Sess. 12 (1985)). In addition, the chairman of the President's Council on Integrity and Efficiency (PCIE) circulated a memorandum on December 23, 1986, which stated that, "Except in compelling circumstances necessitated by an agency's organizational or programmatic uniqueness, I strongly urge all PCIE members to adopt the final model regulations in their entirety."

Because of their experience in trying cases before administrative law judges under their Civil Monetary Penalties Law, the PCIE asked DHHS attorneys to head a task force to draft model regulations for use by all of the authorities.

DHHS was greatly assisted by a working group consisting of representatives from several different agencies. An initial draft of these model regulations was sent for comment to all members of the PCIE and the President's Council on Management Improvement, and a second draft was circulated to the working group shortly thereafter. All comments were considered, and many of the suggestions were incorporated. The following represents the Department of Energy's version of the proposed uniform regulations.

The Act vests authority to investigate allegations of liability under its provisions in an agency's Investigatory Official. Based upon the results of an investigation, the agency Reviewing Official determines, with the concurrence of the Attorney General, whether to refer the matter to a Presiding Officer for an administrative hearing. Any penalty or assessment imposed under the Act may be collected by the Attorney General, through the filing of a civil action, or by offsetting amounts, other than tax refunds, owed the particular party by the Federal Government.

The Act grants agency Investigatory Officials authority to require by subpoena the production of documentary evidence which is "not otherwise reasonably available." If the case proceeds to hearing, the Presiding Officer may require the attendance and testimony of witnesses, as well as the production of documentary evidence.

The Department of Energy is proposing to adopt implementing procedural regulations as new 10 CFR Part 1013, which would designate the Inspector General as the Department's Investigatory Official for purposes of the Program Fraud Civil Remedies Act, and would assign the role of Reviewing Official under the Act to the General Counsel. Any hearing under the Act would be presided over by an Administrative Law Judge. Administrative appeals of a Presiding Officer's decision would be determined by the Secretary, with judicial review in the appropriate U.S. District Court.

A. Executive Order 12291

The proposed rule was reviewed under Executive Order 12291, 46 FR 12193, dated February 27, 1981. The Department of Energy has concluded that the rule is not a "major rule" under the Executive Order, 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, State, Federal, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. Pursuant to section 3(c)(3) of Executive Order 12291, this rule was submitted to the Director of the Office of Management and Budget for review. The Director has concluded his review under that Executive Order.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601 through 612), requires Federal agencies to consider the impact of proposed regulations on small businesses, small governmental units, and other small entities; to consider the ability of small entities to comply with the proposed regulations; and to consider less stringent alternative compliance standards for small entities. An agency is required to prepare a regulatory flexibility analysis to document its consideration of these factors except in the situation where the agency determines that a regulation will not have a significant economic impact on a substantial number of small entities. These procedural regulations will not impose any additional burdens or impact on small entities. Therefore, DOE does not believe the obligations involved have a significant impact on small entities. Thus, a regulatory flexibility analysis will not be prepared.

C. Paperwork Reduction Act

Since there are no information gathering or reporting requirements in these statutorily mandated procedural regulations, no action is necessary under the Paperwork Reduction Act (Pub. L. 96–511, 44 U.S.C. 3501, *et seq.*).

The Department of Energy invites public comment on the following proposed addition to Chapter III of Title 10, Code of Federal Regulations.

List of Subjects in 10 CFR Part 1013

Administrative practice and procedure, Fraud, Penalties.

Issued in Washington, DC, this 26th day of May, 1987.

J. Michael Farrell,

General Counsel.

1. Part 1013 is added to Chapter III of Title 10 to read as follows:

PART 1013—PROGRAM FRAUD CIVIL REMEDIES AND PROCEDURES

Sec.

Authority: 31 U.S.C. 3801–3812.

§ 1013.1 Basis and purpose.

(a) *Basis.* This part implements the Program Fraud Civil Remedies Act of 1986, Pub. L. 99–509, sections 6101 through 6104, 100 Stat. 1874 (October 21, 1986), codified at 31 U.S.C. 3801 through 3812. 31 U.S.C. 3809 of the statute requires each authority head to promulgate regulations necessary to implement the provisions of the statute.

(b) *Purpose.* This part (1) establishes administrative procedures for imposing civil penalties and assessments against persons who make, submit, or present, or cause to be made, submitted, or presented, false, fictitious, or fraudulent claims or written statements to authorities or to their agents, and (2) specifies the hearing and appeal rights of persons subject to allegations of liability for such penalties and assessments.

§ 1013.2 Definitions.

ALJ means an Administrative Law Judge in the authority appointed pursuant to 5 U.S.C. 3105 or detailed to the authority pursuant to 5 U.S.C. 3344.

Authority means the Department of Energy.

Authority head means the Secretary or the Under Secretary of the Department of Energy.

Benefits means, except as the context otherwise requires, anything of value, including but not limited to any advantage, preference, privilege, license, permit, favorable decision, ruling, statuts, or loan guarantee.

Claim means any request, demand, or submission—

(a) Made to the authority for property, services, or money (including money representing grants, loans, insurance, or benefits);

(b) Made to a recipient of property, services, or money from the authority or to a party to a contract with the authority—

(1) For property or services if the United States—

(i) Provided such property or services;

(ii) Provided any portion of the funds for the purchase of such property or services; or

(iii) Will reimburse such recipient or party for the purchase of such property or services; or

(2) For the payment of money (including money representing grants, loans, insurance, or benefits) if the United States—

(i) Provided any portion of the money requested or demanded; or

(ii) Will reimburse such recipient or party for any portion of the money paid on such request or demand; or

(c) Made to the authority which has the effect of decreasing an obligation to pay or account for property, services, or money.

Complaint means the administrative complaint served by the reviewing official on the defendant under section 1013.7.

Defendant means any person alleged in a complaint under § 1013.7 to be liable for a civil penalty ro assessment under § 1013.3.

Department means the Department of Energy.

Government means the United States Government.

Individual means a natural person.

Initial decision means the written decision of the ALJ required by § 1013.10 or § 1013.37, and includes a revised initial decision issued following a remand or a motion for reconsideration.

Investigating official means the Inspector General of the Department of Energy or an officer or employee of the Inspector General designated by the Inspector General and serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS–16 under the General Schedule.

Knows or has reason to know, means that a person, with respect to a claim or statement—

(a) Has actual knowledge that the claim or statement is false, fictitious, or fraudulent;

(b) Acts in deliberate ignorance of the truth or falsity of the claim or statement; or

(c) Acts in reckless disregard for the truth or falsity of the claim or statement.

Makes, wherever it appears, shall include the terms presents, submits, and causes to be made, presented, or submitted. As the context requires, *making* or *made,* shall likewise include the correspnding forms of such terms.

Person means any individual, partnership, corporation, association, private organization, State, political subdivision of a State, municipality, county, district, and Indian tribe, and includes the plural of that term.

Representative means an attorney.

Reviewing official means the General Counsel of the Department or his designee who is—

(a) Not subject to supervision by, or required to report to, the investigating official;

(b) Not employed in the organizational unit of the authority in which the investigating official is employed; and

(c) Serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS–16 under the General Schedule.

Statement means any representation, certification, affirmation, document, record, or accounting or bookkeeping entry made—

(a) With respect to a claim or to obtain the approval or payment of a claim (including relating to eligibility to make a claim); or

(b) With respect to (including relating to eligibility for)—

(1) A contract with, or a bid or proposal for a contract with; or

(2) A grant, loan, or benefit from, the authority, or any State, political subdivision of a State, or other party, if the United States Government provides any portion of the money or property under such contract or for such grant, loan, or benefit, or if the Government will reimburse such State, political subdivision, or party for any portion of the money or property under such contract or for such grant, loan, or benefit.

§ 1013.3 Basis for civil penalties and assessments.

(a) *Claims.* (1) Except as provided in paragraph (c) of this section, any person who makes a claim that the person knows or has reason to know—

(i) Is false, fictitious, or fraudulent;

(ii) Includes or is supported by any written statement which asserts a material fact which is false, fictitious, or fraudulent;

(iii) Includes or is supported by any written statement that—

(A) Omits a material fact;

(B) Is false, fictitious, or fraudulent as a result of such omission; and

(C) Is a statement in which the person making such statement has a duty to include such material fact; or

(iv) Is for payment for the provision of property or services which the person has not provided as claimed, shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $5,000 for each such claim.

(2) Each voucher, invoice, claim form, or other individual request or demand for property, services, or money constitutes a separate claim.

(3) A claim shall be considered made to the authority, recipient, or party when such claim is actually made to an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of such authority, recipient, or party.

(4) Each claim for property, services, or money is subject to a civil penalty regardless of whether such property, services, or money is actually delivered or paid.

(5) If the Government has made any payment (including transferred property or provided services) on a claim, a person subject to a civil penalty under paragraph (a)(1) of this section shall also be subject to an assessment of not more than twice the amount of such claim or that portion thereof that is determined to be in violation of paragraph (a)(1) of this section. Such assessment shall be in lieu of damages sustained by the Government because of such claim.

(b) *Statements.* (1) Except as provided in paragraph (c) of this section, any person who makes a written statement that—

(i) The person knows or has reason to know—

(A) Asserts a material fact which is false, fictitious, or fraudulent; or

(B) Is false, fictitious, or fraudulent because it omits a material fact that the person making the statement has a duty to include in such statement, and

(ii) Contains or is accompanied by an express certification or affirmation of the truthfulness and accuracy of the contents of the statement.

shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $5,000 for each such statement.

(2) Each written representation, certification, or affirmation constitutes a separate statement.

(3) A statement shall be considered made to the authority when such statement is actually made to an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of such authority.

(c) *Application for certain benefits* (1) In the case of any claim or statement made by any individual relating to any of the benefits listed in paragraph (c)(2) of this section, received by such individual, such individual may be held liable for penalties and assessments under this section only if such claim or statement is made by such individual in making application for such benefits with respect to such individual's eligibility to receive such benefits.

(2) For purposes of this paragraph, the term "benefits" means benefits under part A of the Energy Conservation in Existing Buildings Act of 1976, which are intended for the personal use of the individual who receives the benefits or for a member of the individual's family.

(d) No proof of specific intent to defraud is required to establish liability under this section.

(e) In any case in which it is determined that more than one person is liable for making a claim or statement under this section, each such person may be held liable for a civil penalty under this section.

(f) In any case in which it is determined that more than one person is liable for making a claim under this section on which the Government has made payment (including transferred property or provided services), an assessment may be imposed against any such person or jointly and severally against any combination of such persons.

§ 1013.4 Investigation.

(a) If an investigating official concludes that a subpoena pursuant to the authority conferred by 31 U.S.C. 3804(a) is warranted—

(1) The subpoena so issued shall notify the person to whom it is addressed of the authority under which the subpoena is issued and shall identify the records or documents sought;

(2) He or she may designate a person to act on his or her behalf to receive the documents sought; and

(3) The person receiving such subpoena shall be required to tender to the investigating official or the person designated to receive the documents a certification that the documents sought have been produced, or that such

documents are not available and the reasons therefor, or that such documents, suitably identified, have been withheld based upon the assertion of an identified privilege.

(b) If the investigating official concludes that an action under the Program Fraud Civil Remedies Act may be warranted, the investigating official shall submit a report containing the findings and conclusions of such investigation to the reviewing official.

(c) Nothing in this section shall preclude or limit an investigating official's discretion to refer allegations directly to the Department of Justice for suit under the False Claims Act or other civil relief, or to preclude or limit such official's discretion to defer or postpone a report or referral to avoid interference with a criminal investigation or prosecution.

(d) Nothing in this section modifies any responsibility of an investigating official to report violations of criminal law to the Attorney General.

§ 1013.5 Review by the reviewing official.

(a) If, based on the report of the investigating official under § 1013.4(b), the reviewing official determines that there is adequate evidence to believe that a person is liable under § 1013.3 of this part, the reviewing official shall transmit to the Attorney General a written notice of the reviewing official's intention to issue a complaint under § 1013.7.

(b) Such notice shall include—

(1) A statement of the reviewing official's reasons for issuing a complaint;

(2) A statement specifying the evidence that supports the allegations of liability;

(3) A description of the claims or statements upon which the allegations of liability are based;

(4) An estimate of the amount of money or the value of property, services, or other benefits requested or demanded in violation of § 1013.3 of this part;

(5) A statement of any exculpatory or mitigating circumstances that may relate to the claims or statements known by the reviewing official or the investigating official; and

(6) A statement that there is a reasonable prospect of collecting an appropriate amount of penalties and assessments. Such a statement may be based upon information then known or an absence of information indicating that the person may be unable to pay such an amount.

§ 1013.6 Prerequisites for issuing a complaint.

(a) The reviewing official may issue a complaint under § 1013.7 only if—

(1) The Department of Justice approves the issuance of a complaint in a written statement described in 31 U.S.C. section 3803(b)(1), and

(2) In the case of allegations of liability under § 1013.3(a) with respect to a claim, the reviewing official determines that, with respect to such claim or a group of related claims submitted at the same time such claim is submitted (as defined in paragraph (b) of this section), the amount of money or the value of property or services demanded or requested in violation of § 1013.3(a) does not exceed $150,000.

(b) For the purposes of this section, a related group of claims submitted at the same time shall include only those claims arising from the same transaction (*e.g.*, grant, loan, application, or contract) that are submitted simultaneously as part of a single request, demand, or submission.

(c) Nothing in this section shall be construed to limit the reviewing official's authority to join in a single complaint against a person claims that are unrelated or were not submitted simultaneously, regardless of the amount of money or the value of property or services demanded or requested.

§ 1013.7 Complaint.

(a) On or after the date the Department of Justice approves the issuance of a complaint in accordance with 31 U.S.C. 3803(b)(1), the reviewing official may serve a complaint on the defendant, as provided in § 1013.8.

(b) The complaint shall state—

(1) The allegations of liability against the defendant, including the statutory basis for liability, an identification of the claims or statements that are the basis for the alleged liability, and the reasons why liability allegedly arises from such claims or statements;

(2) The maximum amount of penalties and assessments for which the defendant may be held liable;

(3) Instructions for filing an answer to request a hearing, including a specific statement of the defendant's right to request a hearing by filing an answer and to be represented by a representative; and

(4) That failure to file an answer within 30 days of service of the complaint will result in the imposition of the maximum amount of penalties and assessments without right to appeal.

(c) At the same time the reviewing official serves the complaint, he or she shall serve the defendant with a copy of these regulations.

§ 1013.8 Service of complaint.

(a) Service of a complaint must be made by certified or registered mail or by delivery in any manner authorized by Rule 4(d) of the Federal Rules of Civil Procedure.

(b) Proof of service, stating the name and address of the person on whom the complaint was served, and the manner and date of service, may be made by—

(1) Affidavit of the individual making service;

(2) An acknowledged United States Postal Service return receipt card; or

(3) Written acknowledgment of the defendant or his or her representative.

§ 1013.9 Answer.

(a) The defendant may request a hearing by filing an answer with the reviewing official within 30 days of service of the complaint. An answer shall be deemed to be a request for hearing.

(b) In the answer, the defendant—

(1) Shall admit or deny each of the allegations of liability made in the complaint;

(2) Shall state any defense on which the defendant intends to rely;

(3) May state any reasons why the defendant contends that the penalties and assessments should be less than the statutory maximum; and

(4) Shall state the name, address, and telephone number of the person authorized by the defendant to act as defendant's representative, if any.

§ 1013.10 Default upon failure to file an answer.

(a) If the defendant does not file an answer within the time prescribed in § 1013.9(a), the reviewing official may refer the complaint to the ALJ.

(b) Upon the referral of the complaint, the ALJ shall promptly serve on defendant in the manner prescribed in § 1013.8, a notice that an initial decision will be issued under this section.

(c) The ALJ shall assume the facts alleged in the complaint to be true and, if such facts establish liability under § 1013.3, the ALJ shall issue an initial decision imposing the maximum amount of penalties and assessments allowed under the statute.

(d) Except as otherwise provided in this section, by failing to file a timely answer, the defendant waives any right to further review of the penalties and assessments imposed under paragraph (c) of this section, and the initial decision shall become final and binding upon the parties 30 days after it is issued.

(e) If, before such an initial decision becomes final, the defendant files a

motion with the ALJ seeking to reopen on the grounds that extraodinary circumstances prevented the defendant from filing an answer, the initial decision shall be stayed pending the ALJ's decision on the motion.

(f) If, on such motion, the defendant can demonstrate extraordinary circumstances excusing the failure to file a timely answer, the ALJ shall withdraw the initial decision in paragraph (c) of this section, if such a decision has been issued, and shall grant the defendant an opportunity to answer the compliant.

(g) A decision of the ALJ denying a defendant's motion under paragraph (e) of this section is not subject to reconsideration under § 1013.38.

(h) The defendant may appeal to the authority head the decision denying a motion to reopen by filing a notice of appeal with the authority head within 15 days after the ALJ denies the motion. The timely filing of a notice of appeal shall stay the initial decision until the authority head decides the issue.

(i) If the defendant files a timely notice of appeal with the authority head, the ALJ shall forward the record of the proceeding to the authority head.

(j) The authority head shall decide expeditiously whether extraordinary circumstances excuse the defendant's failure to file a timely answer based solely on the record before the ALJ.

(k) If the authority head decides that extraordinary circumstances excused the defendant's failure to file a timely answer, the authority head shall remand the case to the ALJ with instructions to grant the defendant an opportunity to answer.

(l) If the authority head decides that the defendant's failure to file a timely answer is not excused, the authority head shall reinstate the initial decision of the ALJ, which shall become final and binding upon the parties 30 days after the authority head issues such decision.

§ 1013.11 Referral of complaint and answer to the ALJ.

Upon receipt of an answer, the reviewing official shall file the complaint and answer with the ALJ

§ 1013.12 Notice of hearing.

(a) When the ALJ receives the complaint and answer, the ALJ shall promptly serve a notice of hearing upon the defendant in the manner prescribed by § 1013.8. At the same time, the ALJ shall send a copy of such notice to the representative for the Government.

(b) Such notice shall include—

(1) The tentative time, date, and place, and the nature of the hearing;

(2) The legal authority and jurisdiction under which the hearing is to be held;

(3) The matters of fact and law to be asserted;

(4) A description of the procedures for the conduct of the hearing;

(5) The name, address, and telephone number of the representative of the Governnent and of the defendant, if any; and

(6) Such other matters as the ALJ deems appropriate.

§ 1013.13 Parties to the hearing.

(a) The parties to the hearing shall be the defendant and the authority.

(b) Pursuant to 31 U.S.C. 3730(c)(5), a private plaintiff under the False Claims Act may participate in these proceedings to the extent authorized by the provisions of that Act.

§ 1013.14 Separation of functions.

(a) The investigating official, the reviewing official, and any employee or agent of the authority who takes part in investigating, preparing, or presenting a particular case may not, in such case or a factually related case—

(1) Participate in the hearing as the ALJ;

(2) Participate or advise in the initial decision or the review of the initial decision by the authority head, except as a witness or a representative in public proceedings; or

(3) Make the collection of penalties and assessments under 31 U.S.C. 3806.

(b) The ALJ shall not be responsible to, or subject to the supervision or direction of, the investigating official or the reviewing official.

(c) Except as provided in paragraph (a) of this section, the representative for the Government may be employed anywhere in the authority, including in the offices of either the investigating official or the reviewing official.

§ 1013.15 Ex parte contacts.

No party or person (except employees of the ALJ's office) shall communicate in any way with the ALJ on any matter at issue in a case, unless on notice and opportunity for all parties to participate. This provision does not prohibit a person or party from inquiring about the status of a case or asking routine questions concerning administrative functions or procedures.

§ 1013.16 Disqualification of reviewing official or ALJ.

(a) A reviewing official or ALJ in a particular case may disqualify himself or herself at any time.

(b) A party may file with the ALJ a motion for disqualification of a reviewing official or an ALJ. Such motion shall be accompanied by an affidavit alleging personal bias or other reason for disqualification.

(c) Such motion and affidavit shall be filed promptly upon the party's discovery of reasons requiring disqualification, or such objections shall be deemed waived.

(d) Such affidavit shall state specific facts that support the party's belief that personal bias or other reason for disqualification exists and the time and circumstances of the party's discovery of such facts. It shall be accompanied by a certificate of the representative of record that it is made in good faith.

(e) Upon the filing of such a motion and affidavit, the ALJ shall proceed no further in the case until he or she resolves the matter of disqualification in accordance with paragraph (f) of this section.

(f) (1) If the ALJ determines that a reviewing official is disqualified, the ALJ shall dismiss the complaint without prejudice.

(2) If the ALJ disqualifies himself or herself, the case shall be reassigned promptly to another ALJ.

(3) If the ALJ denies a motion to disqualify, the authority head may determine the matter only as part of his or her review or the initial decision upon appeal, if any.

§ 1013.17 Rights of parties.

Except as otherwise limited by this part, all parties may—

(a) Be accompanied, represented, and advised by a representative;

(b) Participate in any conference held by the ALJ;

(c) Conduct discovery;

(d) Agree to stipulations of fact or law, which shall be made part of the record;

(e) Present evidence relevant to the issues at the hearing;

(f) Present and cross-examine witnesses;

(g) Present oral arguments at the hearing as permitted by the ALJ; and

(h) Submit written briefs and proposed findings of fact and conclusions of law.

§ 1013.18 Authority of the ALJ.

(a) The ALJ shall conduct a fair and impartial hearing, avoid delay, maintain order, and assure that a record of the proceeding is made.

(b) The ALJ has the authority to—

(1) Set and change the date, time, and place of the hearing upon reasonable notice to the parties;

(2) Continue or recess the hearing in whole or in part for a reasonable period of time;

(3) Hold conferences to identify or simplify the issues, or to consider other

matters that may aid in the expeditious disposition of the proceeding;

(4) Administer oaths and affirmations;

(5) Issue subpoenas requiring the attendance of witnesses and the production of documents at depositions or at hearings;

(6) Rule on motions and other procedural matters;

(7) Regulate the scope and timing of discovery;

(8) Regulate the course of the hearing and the conduct of representatives and parties;

(9) Examine witnesses;

(10) Receive, rule on, exclude, or limit evidence;

(11) Upon motion of a party, take official noticial notice of facts; decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact;

(12) Conduct any conference, argument, or hearing on motions in person or by telephone; and

(13) Exercise such other authority as is necessary to carry out the responsibilities of the ALJ under this part.

(c) The ALJ does not have the authority to decide upon the validity of Federal statutes or regulations.

§ 1013.19 Prehearing conferences.

(a) The ALJ may schedule prehearing conferences as appropriate.

(b) Upon the motion of any party, the ALJ shall schedule at least one prehearing conference at a reasonable time in advance of the hearing.

(c) The ALJ may use prehearing conferences to discuss the following:

(1) Simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings, including the need for a more definite statement;

(3) Stipulations and admissions of fact or as to the contents and authenticity of documents;

(4) Whether the parties can agree to submission of the case on a stipulated record;

(5) Whether a party chooses to waive appearance at an oral hearing and to submit only documentary evidence (subject to the objection of other parties) and written argument;

(6) Limitation of the number of witnesses;

(7) Scheduling dates for the exchange of witness lists and of proposed exhibits;

(8) Discovery;

(9) The time, date, and place for the hearing; and

(10) Such other matters as may tend to expedite the fair and just disposition of the proceedings.

(d) The ALJ may issue an order containing all matters agreed upon by the parties or ordered by the ALJ at a prehearing conference.

§ 1013.20 Disclosure of documents.

(a) Upon written request to the reviewing official, the defendant may review any relevant and material documents, transcripts, records, and other materials that relate to the allegations set out in the complaint and upon which the findings and conclusions of the investigating official under § 1013.4(b) are based, unless such documents are subject to a privilege under Federal law. Upon payment of fees for duplication, the defendant may obtain copies of such documents.

(b) Upon written request to the reviewing official, the defendant also may obtain a copy of all exculpatory information in the possession of the reviewing official or investigating official relating to the allegations in the complaint, even if it is contained in a document that would otherwise be privileged. If the document would otherwise be privileged, only that portion containing exculpatory information must be disclosed.

(c) The notice sent to the Attorney General from the reviewing official as described in § 1013.5 is not discoverable under any circumstances.

(d) The defendant may file a motion to compel disclosure of the documents subject to the provisions of this section. Such a motion may only be filed with the ALJ following the filing of an answer pursuant to § 1013.9.

§ 1013.21 Discovery.

(a) The following types of discovery are authorized:

(1) Requests for production of documents for inspection and copying;

(2) Requests for admissions of the authenticity of any relevant document or of the truth of any relevant fact;

(3) Written interrogatories; and

(4) Depositions.

(b) For the purpose of this section and § 1013.22 and § 1013.23, the term "documents" includes information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence. Nothing contained herein shall be interpreted to require the creation of a document.

(c) Unless mutually agreed to by the parties, discovery is available only as ordered by the ALJ. The ALJ shall regulate the timing of discovery.

(d) *Motions for discovery.* (1) A party seeking discovery may file a motion with the ALJ. Such a motion shall be accompanied by a copy of the requested discovery, or in the case of depositions, a summary of the scope of the proposed deposition.

(2) Within ten days of service, a party may file an opposition to the motion and/or a motion for protective order as provided in § 1013.24.

(3) The ALJ may grant a motion for discovery only if he or she finds that the discovery sought—

(i) Is necessary for the expeditious, fair, and reasonable consideration of the issues;

(ii) Is not unduly costly or burdensome;

(iii) Will not unduly delay the proceeding; and

(iv) Does not seek privileged information.

(4) The burden of showing that discovery should be allowed is on the party seeking discovery.

(5) The ALJ may grant discovery subject to a protective order under § 1013.24.

(e) *Depositions.* (1) If a motion for deposition is granted, the ALJ shall issue a subpoena for the deponent, which may require the deponent to produce documents. The subpoena shall specify the time, date, and place at which the deposition will be held.

(2) The party seeking to depose shall serve the subpoena in the manner prescribed in § 1013.8.

(3) The deponent may file with the ALJ a motion to quash the subpoena or a motion for a protective order within ten days of service.

(4) The party seeking to depose shall provide for the taking of a verbatim transcript of the deposition, which it shall make available to all other parties for inspection and copying.

(f) Each party shall bear its own costs of discovery.

§ 1013.22 Exchange of witness lists, statements and exhibits.

(a) At least 15 days before the hearing or at such other time as may be ordered by the ALJ, the parties shall exchange witness lists, copies of prior statements of proposed witnesses, and copies of proposed hearing exhibits, including copies of any written statements that the party intends to offer in lieu of live testimony in accordance with § 1013.33(b). At the time the above documents are exchanged, any party that intends to rely on the transcript of deposition testimony in lieu of live testimony at the hearing, if permitted by the ALJ, shall provide each party with a copy of the specific pages of the transcript it intends to introduce into evidence.

(b) If a party objects, the ALJ shall not admit into evidence the testimony of

any witness whose name does not appear on the witness list or any exhibit not provided to the opposing party as provided above unless the ALJ finds good cause for the failure or that there is no prejudice to the objecting party.

(c) Unless another party objects within the time set by the ALJ, documents exchanged in accordance with paragraph (a) of this section shall be deemed to be authentic for the purpose of admissibility at the hearing.

§ 1013.23 Subpoenas for attendance at hearing.

(a) A party wishing to procure the appearance and testimony of any individual at the hearing may request that the ALJ issue a subpoena.

(b) A subpoena requiring the attendance and testimony of an individual may also require the individual to produce documents at the hearing.

(c) A party seeking a subpoena shall file a written request therefore not less than 15 days before the date fixed for the hearing unless otherwise allowed by the ALJ for good cause shown. Such request shall specify any documents to be produced and shall designate the witnesses and describe the address and location thereof with sufficient particularity to permit such witnesses to be found.

(d) The subpoena shall specify the time, date, and place at which the witness is to appear and any documents the witness is to produce.

(e) The party seeking the subpoena shall serve it in the manner prescribed in § 1013.8. A subpoena on a party or upon an individual under the control of a party may be served by first class mail.

(f) A party or the individual to whom the subpoena is directed may file with the ALJ a motion to quash the subpoena within ten days after service or on or before the time specified in the subpoena for compliance if it is less than ten days after service.

§ 1013.24 Protective order.

(a) A party or a prospective witness or deponent may file a motion for a protective order with respect to discovery sought by an opposing party or with respect to the hearing, seeking to limit the availability or disclosure of evidence.

(b) In issuing a protective order, the ALJ may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) That the discovery not be had;

(2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) That the discovery may be had only through a method of discovery other than that requested;

(4) That certain matters not be inquired into, or that the scope of discovery be limited to certain matters;

(5) That discovery be conducted with no one present except persons designated by the ALJ;

(6) That the contents of discovery or evidence be sealed;

(7) That a deposition after being sealed be opened only by order of the ALJ;

(8) That a trade secret or other confidential research, development, commercial information, or facts pertaining to any criminal investigation, proceeding, or other administrative investigation not be disclosed or be disclosed only in a designated way; or

(9) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the ALJ.

§ 1013.25 Witness fees.

The party requesting a subpoena shall pay the cost of the fees and mileage of any witness subpoenaed in the amounts that would be payable to a witness in a proceeding in United States District Court. A check for witness fees and mileage shall accompany the subpoena when served, except that when a subpoena is issued on behalf of the authority, a check for witness fees and mileage need not accompany the subpoena.

§ 1013.26 Form, filing and service of papers.

(a) *Form.*

(1) Documents filed with the ALJ shall include an original and two copies.

(2) Every pleading and paper filed in the proceeding shall contain a caption setting forth the title of the action, the case number assigned by the ALJ, and a designation of the paper (*e.g.*, motion to quash subpoena).

(3) Every pleading and paper shall be signed by, and shall contain the address and telephone number of the party or the person on whose behalf the paper was filed, or his or her representative.

(4) Papers are considered filed when they are mailed. Date of mailing may be established by a certificate from the party or its representative or by proof that the document was sent by certified or registered mail.

(b) *Service.* A party filing a document with the ALJ shall, at the time of filing, serve a copy of such document on every other party. Service upon any party of any document other than the complaint or notice of hearing shall be made by delivering or mailing a copy to the party's last known address. When a party is represented by a representative, service shall be made upon such representative in lieu of the actual party.

(c) *Proof of service.* A certificate by the individual serving the document by personal delivery or by mail, setting forth the manner of service, shall be proof of service.

§ 1013.27 Computation of time.

(a) In computing any period of time under this part or in an order issued thereunder, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or legal holiday observed by the Federal government, in which event it includes the next business day.

(b) When the period of time allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays observed by the Federal government shall be excluded from the computation.

(c) Where a document has been served or issued by mail, an additional five days will be added to the time permitted for any response.

§ 1013.28 Motions.

(a) Any application to the ALJ for an order or ruling shall be by motion. Motions shall state the relief sought, the authority relied upon, and the facts alleged, and shall be filed with the ALJ and served on all other parties.

(b) Except for motions made during a prehearing conference or at the hearing, all motions shall be in writing. The ALJ may require that oral motions be reduced to writing.

(c) Within 15 days after a written motion is served, or such other time as may be fixed by the ALJ, any party may file a response to such motion.

(d) The ALJ may not grant a written motion before the time for filing responses thereto has expired, except upon consent of the parties or following a hearing on the motion, but may overrule or deny such motion without awaiting a response.

(e) The ALJ shall make a reasonable effort to dispose of all outstanding motions prior to the beginning of the hearing.

§ 1013.29 Sanctions.

(a) The ALJ may sanction a person, including any party or representative, for—

(1) Failing to comply with an order, rule, or procedure governing the proceeding;

(2) Failing to prosecute or defend an action; or

(3) Engaging in other misconduct that interferes with the speedy, orderly, or fair conduct of the hearing.

(b) Any such sanction, including but not limited to those listed in paragraphs (c), (d), and (e) of this section, shall reasonably relate to the severity and nature of the failure or misconduct.

(c) When a party fails to comply with an order, including an order for taking a deposition, the production of evidence within the party's control, or a request for admission, the ALJ may—

(1) Draw an inference in favor of the requesting party with regard to the information sought;

(2) In the case of requests for admission, deem each matter of which an admission is requested to be admitted;

(3) Prohibit the party failing to comply with such order from introducing evidence concerning, or otherwise relying upon, testimony relating to the information sought; and

(4) Strike any part of the pleadings or other submissions of the party failing to comply with such request.

(d) If a party fails to prosecute or defend an action under this part commenced by service of a notice of hearing, the ALJ may dismiss the action or may issue an initial decision imposing penalties and assessments.

(e) The ALJ may refuse to consider any motion, request, response, brief or other document which is not filed in a timely fashion.

§ 1013.30 The hearing and burden of proof.

(a) The ALJ shall conduct a hearing on the record in order to determine whether the defendant is liable for a civil penalty or assessment under § 1013.3 and, if so, the appropriate amount of any such civil penalty or assessment considering any aggravating or mitigating factors.

(b) The authority shall prove defendant's liability and any aggravating factors by a preponderance of the evidence.

(c) The defendant shall prove any affirmative defenses and any mitigating factors by a preponderance of the evidence.

(d) The hearing shall be open to the public unless otherwise ordered by the ALJ for good cause shown.

§ 1013.31 Determining the amount of penalties and assessments.

(a) In determining an appropriate amount of civil penalties and assessments, the ALJ and the authority head, upon appeal, should evaluate any circumstances that mitigate or aggravate the violation and should articulate in their opinions the reasons that support the penalties and assessments they impose. Because of the intangible costs of fraud, the expense of investigating such conduct, and the need to deter others who might be similarly tempted, ordinarily double damages and a significant civil penalty should be imposed.

(b) Although not exhaustive, the following factors are among those that may influence the ALJ and the authority head in determining the amount of penalties and assessments to impose with respect to the misconduct (*i.e.*, the false, fictitious, or fraudulent claims or statement) charged in the complaint:

(1) The number of false, fictitious, or fraudulent claims or statements;

(2) The time period over which such claims or statements were made;

(3) The degree of the defendant's culpability with respect to the misconduct;

(4) The amount of money or the value of the property, services, or benefit falsely claimed;

(5) The value of the Government's actual loss as a result of the misconduct, including foreseeable consequential damages and the costs of investigation;

(6) The relationship of the amount imposed as civil penalties to the amount of the Government's loss;

(7) The potential or actual impact of the misconduct upon national defense, public health or safety, or public confidence in the management of Government programs and operations, including particularly the impact on the intended beneficiaries of such programs;

(8) Whether the defendant has engaged in a pattern of the same or similar misconduct;

(9) Whether the defendant attempted to conceal the misconduct;

(10) The degree to which the defendant has involved others in the misconduct or in concealing it;

(11) Where the misconduct of employees or agents is imputed to the defendant, the extent to which the defendant's practices fostered or attempted to preclude such misconduct;

(12) Whether the defendant cooperated in or obstructed an investigation of the misconduct;

(13) Whether the defendant assisted in identifying and prosecuting other wrongdoers;

(14) The complexity of the program or transaction, and the degree of the defendant's sophistication with respect to it, including the extent of the defendant's prior participation in the program or in similar transactions;

(15) Whether the defendant has been found, in any criminal, civil, or administrative proceeding to have engaged in similar misconduct or to have dealt dishonestly with the Government of the United States or of a State, directly or indirectly; and

(16) The need to deter the defendant and others from engaging in the same or similar misconduct.

(c) Nothing in this section shall be construed to limit the ALJ or the authority head from considering any other factors that in any given case may mitigate or aggravate the offense for which penalties and assessments are imposed.

§ 1013.32 Location of hearing.

(a) The hearing may be held—

(1) In any judicial district of the United States in which the defendant resides or transacts business;

(2) In any judicial district of the United States in which the claim or statement in issue was made; or

(3) In such other place as may be agreed upon by the defendant and the ALJ.

(b) Each party shall have the opportunity to present argument with respect to the location of the hearing.

(c) The hearing shall be held at the place and at the time ordered by the ALJ.

§ 1013.33 Witnesses.

(a) Except as provided in paragraph (b) of this section, testimony at the hearing shall be given orally by witnesses under oath or affirmation.

(b) At the discretion of the ALJ, testimony may be admitted in the form of a written statement or deposition. Any such written statement must be provided to all other parties along with the last known address of such witness, in a manner which allows sufficient time for other parties to subpoena such witness for cross-examination at the hearing. Prior written statements of witnesses proposed to testify at the hearing and deposition transcripts shall be exchanged as provided in § 1013.22(a).

(c) The ALJ shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to,

(1) Make the interrogation and presentation effective for the ascertainment of the truth,

(2) Avoid needless consumption of time, and

(3) Protect witnesses from harassment or undue embarrassment.

(d) The ALJ shall permit the parties to conduct such cross-examination as may be required for a full and true disclosure of the facts.

(e) At the discretion of the ALJ, a witness may be cross-examined on matters relevant to the proceeding without regard to the scope of his or her direct examination. To the extent permitted by the ALJ, cross-examination on matters outside the scope of direct examination shall be conducted in the manner of direct examination and may proceed by leading questions only if the witness is a hostile witness, an adverse party, or a witness identified with an adverse party.

(f) Upon motion of any party, the ALJ shall order witnesses excluded so they cannot hear the testimony of other witnesses. This rule does not authorize exclusion of—

(1) A party who is a individual;

(2) In the case of a party that is not an individual, an officer or employee of the party designated by the party's representative; or

(3) An individual whose presence is shown by a party to be essential to the presentation of its case, including an individual employed by the Government engaged in assisting the representative for the Government.

§ 1013.34 Evidence.

(a) The ALJ shall determine the admissibility of evidence.

(b) Except as provided in this part, the ALJ shall not be bound by the Federal Rules of Evidence. However, the ALJ may apply the Federal Rules of Evidence where appropriate, *e.g.*, to exclude unreliable evidence.

(c) The ALJ shall exclude irrelevant and immaterial evidence.

(d) Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of cumultative evidence.

(e) Although relevant, evidence may be excluded if it is privileged under Federal law.

(f) Evidence concerning offers of compromise or settlement shall be inadmissable to the extent provided in Rule 408 of the Federal Rules of Evidence.

(g) The ALJ shall permit the parties to introduce rebuttal witnesses and evidence.

(h) All documents and other evidence offered or taken for the record shall be open to examination by all parties, unless otherwise ordered by the ALJ pursuant to § 1013.24.

§ 1013.35 The record.

(a) The hearing will be recorded and transcribed. Transcripts may be obtained following the hearing from the ALJ at a cost not to exceed the actual cost of duplication.

(b) The transcript of testimony, exhibits and other evidence admitted at the hearing, and all papers and requests filed in the proceeding constitute the record for the decision by the ALJ and the authority head.

(c) The record may be inspected and copies (upon payment of a reasonable fee) by anyone, unless otherwise ordered by the ALJ pursuant to § 1013.24.

§ 1013.36 Post-hearing briefs.

The ALJ may require the parties to file post-hearing briefs. In any event, any party may file a post-hearing brief. The ALJ shall fix the time for filing such briefs, not to exceed 60 days from the date the parties receive the transcript of the hearing or, if applicable, the stipulated record. Such briefs may be accompanied by proposed findings of fact and conclusions of law. The ALJ may permit the parties to file reply briefs.

§ 1013.37 Initial decision.

(a) The ALJ shall issue an initial decision based only on the record, which shall contain findings of fact, conclusions of law, and the amount of any penalties and assessments imposed.

(b) The findings of fact shall include a finding on each of the following issues:

(1) Whether the claims or statements identified in the complaint, or any portions thereof, violate § 1013.3;

(2) If the person is liable for penalties or assessments, the appropriate amount of any such penalties or assessments considering any mitigating or aggravating factors that he or she finds in the case, such as those described in § 1013.31.

(c) The ALJ shall promptly serve the initial decision on all parties within 90 days after the time for submission of post-hearing briefs and reply briefs (if permitted) has expired. The ALJ shall at the same time serve all defendants with a statement describing the right of any defendant determined to be liable for a civil penalty or assessment to file a motion for reconsideration with the ALJ or a notice of appeal with the authority head. If the ALJ fails to meet the deadline contained in this paragraph, he or she shall notify the parties of the reason for the delay and shall set a new deadline.

(d) Unless the initial decision of the ALJ is timely appealed to the authority head, or a motion for reconsideration of the initial decision is timely filed, the initial decision shall constitute the final decision of the authority head and shall be final and binding on the parties 30 days after it is issued by the ALJ.

§ 1013.38 Reconsideration of initial decision.

(a) Except as provided in paragraph (d) of this section, any party may file a motion for reconsideration of the initial decision within 20 days of receipt of the initial decision. If service was made by mail, receipt will be presumed to be five days from the date of mailing in the absence of contrary proof.

(b) Every much motion must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. Such motion shall be accompanied by a supporting brief.

(c) Responses to such motions shall be allowed only upon request of the ALJ.

(d) No party may file a motion for reconsideration of an initial decision that has been revised in response to a previous motion for reconsideration.

(e) The ALJ may dispose of a motion for reconsideration by denying it or by issuing a revised initial decision.

(f) If the ALJ denies a motion for reconsideration, the initial decision shall constitute the final decision of the authority head and shall be final and binding on the parties 30 days after the ALJ denies the motion, unless the initial decision is timely appealed to the authority head in accordance with § 1013.39.

(g) If the ALJ issues a revised initial decision, that decision shall constitute the final decision of the authority head and shall be final and binding on the parties 30 days after it is issued, unless it is timely appealed to the authority head in accordance with § 1013.39.

§ 1013.39 Appeal to authority head.

(a) Any defendant who has filed a timely answer and who is determined in an initial decision to be liable for a civil penalty or assessment may appeal such decision to the authority head by filing a notice of appeal with the authority head in accordance with this section.

(b)(1) No notice of appeal may be filed until the time period for filing a motion for reconsideration under § 1013.38 has expired.

(2) If a motion for reconsideration is timely filed, a notice of appeal must be filed under 30 days after the ALJ denies the motion or issues a revised initial decision, whichever applies.

(3) If no motion for reconsideration is timely filed, a notice of appeal must be filed within 30 days after the ALJ issues the initial decision.

(4) The authority head may extend the initial 30 day period for an additional 30 days if the defendant files with the authority head a request for an extension within the initial 30 day period and shows good cause.

(c) If the defendant files a timely notice of appeal with the authority head, the ALJ shall forward the record of the proceeding to the authority head.

(d) A notice of appeal shall be accompanied by a written brief specifying exceptions to the initial decision and reasons supporting the exceptions.

(e) The representatives for the Government may file a brief in opposition to exceptions within 30 days of receiving the notice of appeal and accompanying brief.

(f) There is no right to appear personally before the authority head.

(g) There is no right to appeal any interlocutory ruling by the ALJ.

(h) In reviewing the initial decision, the authority head shall not consider any objection that was not raised before the ALJ unless a demonstration is made of extraordinary circumstances causing the failure to raise the objection.

(i) If any party demonstrates to the satisfaction of the authority head that additional evidence not presented at such hearing is material and that there were reasonable grounds for the failure to present such evidence at such hearing, the authority head shall remand the matter to the ALJ for consideration of such additional evidence.

(j) The authority head may affirm, reduce, reverse, compromise, remand, or settle any penalty or assessment determined by the ALJ in any initial decision.

(k) The authority head shall promptly serve each party to the appeal with a copy of the decision of the authority head and a statement describing the right of any person determined to be liable for a penalty or an assessment to seek judicial review.

(l) Unless a petition for review is filed as provided in 31 U.S.C. 3805 after a defendant has exhausted all administrative remedies under this part and within 60 days after the date on which the authority head serves the defendant with a copy of the authority head's decision, a determination that a defendant is liable under § 1013.3 is final and is not subject to judicial review.

§ 1013.40 Stays ordered by the Department of Justice.

If at any time the Attorney General or an Assistant Attorney General designated by the Attorney General transmits to the authority head a written finding that continuation of the administrative process described in this part with respect to a claim or statement may adversely affect any pending or potential criminal or civil action related to such claim or statement, the authority head shall stay the process immediately. The authority head may order the process resumed only upon receipt of the written authorization of the Attorney General.

§ 1013.41 Stay pending appeal.

(a) An initial decision is stayed automatically pending disposition of a motion for reconsideration or of an appeal to the authority head.

(b) No administrative stay is available following a final decision of the authority head.

§ 1013.42 Judicial review.

Section 3805 of Title 31, United States Code, authorizes judicial review by an appropriate United States District Court of a final decision of the authority head imposing penalities or assessments under this part and specifies the procedures for such review.

§ 1013.43 Collection of civil penalties and assessments.

Sections 3806 and 3808(b) of Title 31, United States Code, authorize actions for collection of civil penalties and assessments imposed under this part and specify the procedures for such actions.

§ 1013.44 Right to administrative offset.

The amount of any penalty or assessment which has become final, or for which a judgment has been entered under § 1013.42 or § 1013.43, or any amount agreed upon in a compromise or settlement under § 1013.46, may be collected by administrative offset under 31 U.S.C. 3716, except that an administrative offset may not be made under this subsection against a refund of an overpayment of Federal taxes, then or later owing by the United States to the defendant.

§ 1013.45 Deposit in Treasury of United States.

All amounts collected pursuant to this part shall be deposited as miscellaneous receipts in the Treasury of the United States, except as provided in 31 U.S.C. 3806(g).

§ 1013.46 Compromise or settlement.

(a) Parties may make offers of compromise or settlement at any time.

(b) The reviewing official has the exclusive authority to compromise or settle a case under this part at any time after the date on which the reviewing official is permitted to issue a complaint and before the date on which the ALJ issues an initial decision.

(c) The authority head has exclusive authority to compromise or settle a case under this part at any time after the date on which the ALJ issues an initial decision, except during the pendency of any review under § 1013.42 or during the pendency of any action to collect penalties and assessments under § 1013.43.

(d) The Attorney General has exclusive authority to compromise or settle a case under this part during the pendency of any review under § 1013.42 or of any action to recover penalties and assessments under 31 U.S.C. 3806.

(e) The investigating official may recommend settlement terms to the reviewing official, the authority head, or the Attorney General, as appropriate. The reviewing official may recommend settlement terms to the authority head, or the Attorney General, as appropriate.

(f) Any compromise or settlement must be in writing.

§ 1013.47 Limitations.

(a) The notice of hearing with respect to a claim or statement must be served in the manner specified in § 1013.8 within six years after the date on which such claim or statement is made.

(b) If the defendant fails to file a timely answer, service of notice under § 1013.10(b) shall be deemed a notice of a hearing for purposes of this section.

(c) The statute of limitations may be extended by agreement of the parties.

[FR Doc. 87-12355 Filed 5-29-87; 8:45 am]
BILLING CODE 6450-01-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 87-ASW-20]

Proposed Removal of Transition Area; Danbury, TX

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice proposes to remove the transition area at Danbury, TX. The intended effect of the proposed action is to release controlled airspace no longer required for aircraft executing standard instrument approach procedures (SIAP's) to the Garrett Ranch Airport, Danbury, TX. This action is necessary since all existing SIAP's to the Garrett Ranch Airport have been canceled, thereby canceling the need for

a 700-foot transition area. This proposed action will change the airport status from instrument flight rules (IFR) to visual flight rules (VFR).

DATE: Comments must be received on or before July 16, 1987.

ADDRESSES: Send comments on the proposal in triplicate to: Department of Transportation, Federal Aviation Administration, Forth Worth, TX 76193–0530.

The official docket may be examined in the Office of the Regional Counsel, Southwest Region, Federal Aviation Administration, 4400 Blue Mound Road, Forth Worth, TX.

An informal docket may also be examined during normal business hours at the Airspace and Procedures Branch, Air Traffic Division, Southwest Region, Federal Aviation Administration, 4400 Blue Mound Road, Fort Worth, TX.

FOR FURTHER INFORMATION CONTACT: David J. Souder, Department of Transportation, Federal Aviation Administration, Fort Worth, TX 76193–0530; telephone: (817) 624–5535.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposal. Communications should identify the airspace docket and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Airspace Docket No. 87–ASW–20." The postcard will be date/time stamped and returned to the commenter. All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in the light of comments received. All comments submitted will be available for examination in the Office of the Regional Counsel, 4400 Blue Mound Road, Forth Worth TX, both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRM's

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the Department of Transportation, Federal Aviation Administration, Forth Worth, TX 76193–0530. Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for future NPRM's should also request a copy of Advisory Circular No. 11–2 which describes the application procedure.

The Proposal

The FAA is considering an amendment to § 71.181 of Part 71 of the Federal Aviation Regulations (14 CFR Part 71) to remove the transition area at Danbury, TX. This action is necessary since all SIAP's at the Garrett Ranch Airport, Danbury, TX, have been canceled, thereby canceling the need for a 700-foot transition area. This proposed action will change the airport status from IFR to VFR. Section 71.181 of Part 71 of the Federal Aviation Regulations was republished in Handbook 7400.6C dated January 2, 1987.

The FAA has determined that this proposed 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, when promulgated, 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, Transition areas.

The Proposed Amendment

PART 71—[AMENDED]

Accordingly, pursuant to the authority delegated to me, the FAA proposes to amend Part 71 of the Federal Aviation Regulations (14 CFR Part 71) 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.

§ 71.181 [Amended]

2. Section 71.181 is amended as follows:

Danbury, TX [Removed]

Issued in Forth Worth, TX, on May 15, 1987.

Larry L. Craig,

Assistant Manager, Air Traffic Division, Southwest Region.

[FR Doc. 87–12400 Filed 5–29–87; 8:45 am]

BILLING CODE 4910–13–M

INTERNATIONAL DEVELOPMENT COOPERATION AGENCY

Agency for International Development

22 CFR Part 224

Implementation of the Program Fraud Civil Remedies Act

AGENCY: Agency for International Development.

ACTION: Proposed rule.

SUMMARY: The Agency for International Development is issuing proposed regulations to implement the Program Fraud Civil Remedies Act of 1986. The regulations will establish administrative procedures for imposing the statutorily authorized civil penalties and assessments against any person who makes, submits, or presents or causes to be made, submitted or presented a false, fictitious, or fraudulent claim or written statement to the Agency for International Development.

DATE: Comments must be received on or before July 1, 1987.

ADDRESS: Written comments should be mailed to the Assistant General Counsel of Litigation and Enforcement, Agency for International Development, Department of State, Room 6947, Washington, DC 20523.

FOR FURTHER INFORMATION CONTACT: Gary Winter (202) 647–8874.

SUPPLEMENTARY INFORMATION: The Program Fraud Civil Remedies Act, Pub. L. 99–509, enacted on October 21, 1986, codified at 31 U.S.C. 3801 through 3812 generally provides that any person who knowingly submits or causes to be submitted a false claim or statement to the Federal Government in an amount less than $150,000 may be liable for an administrative civil penalty of not more than $5,000 for each false claim or statement and in certain cases, in which the Government has paid the false

claim, to an assessment equal to double the amount falsely claimed.

This action will not have a significant economic impact on a substantial number of small entities; does not constitute a "major rule" under Executive Order No. 12291; and is not a major Federal action significantly affecting the quality of the human environment.

Lists of Subjects in 22 CFR Part 224

Claims, Penalties.

For the reasons set forth in the preamble, it is proposed to amend Title 22, Chapter II, of the CFR to add a new Part 224 to read as follows:

PART 224—IMPLEMENTATION OF THE PROGRAM FRAUD CIVIL REMEDIES ACT

Sec.

Authority: 22 U.S.C. 2381; 31 U.S.C. 3801–3812.

§ 224.1 Basis and purpose.

(a) *Basis.* This part implements the Program Fraud Civil Remedies Act of 1986, Pub. L. No. 99–509, sections 6101–6104, 100 Stat. 1874 (October 21, 1986), to be codified at 31 U.S.C. 3801–3812. 31 U.S.C. 3809 of the Statute requires each authority head to promulgate regulations necessary to implement the provisions of the statute.

(b) *Purpose.* This part—

(1) Establishes administrative procedures for imposing civil penalties and assessments against persons who make, submit, or present, or cause to be made, submitted, or presented, false, fictitious, or fraudulent claims or written statements to the Agency for International Development or to its agents, and

(2) Specifies the hearing and appeal rights of persons subject to allegations of liability for such penalties and assessments.

§ 224.2 Definitions.

A.I.D. means the Agency for International Development.

ALJ means an Administrative Law Judge in the authority appointed pursuant to 5 U.S.C. 3105 or detailed to the authority pursuant to 5 U.S.C. 3344.

Benefits means, except as the context otherwise requires, anything of value, including but not limited to any advantage, preference, privilege, license, permit, favorable decision, ruling, status, or loan guarantee.

Claim means any request, demand, or submission—

(a) Made to A.I.D. for property, services, or money (including money representing grants, loans, insurance, or benefits);

(b) Made to a recipient of property, services, or money from A.I.D. or to a party to a contract with A.I.D.—

(1) For property or services if the United States—

(i) Provided such property or services;

(ii) Provided any portion of the funds for the purchase of such property or services; or

(iii) Will reimburse such recipient or party for the purchase of such property or services; or

(2) For the payment of money (including money representing grants, loans, insurance, or benefits) if the United States—

(i) Provided any portion of the money requested or demanded; or

(ii) Will reimburse such recipient or party for any portion of the money paid on such request or demand; or

(c) Made to A.I.D. which has the effect of decreasing an obligation to pay or account for property, services, or money.

Complaint means the administrative complaint served by the reviewing official on the defendant under § 224.7.

Defendant means any person alleged in a complaint under § 224.7 to be liable for a civil penalty or assessment under § 224.3.

Government means the United States Government.

Individual means a natural person.

Initial decision means the written decision of the ALJ required by § 224.10 or § 224.37, and includes a revised initial decision issued following a remand or a motion for reconsideration.

Investigating official means the Inspector General for A.I.D. or an officer or employee of the Office of Inspector General designated by the Inspector General and serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS–16 under the General Schedule.

Knows or has reason to know, means that a person, with respect to a claim or statement—

(a) Has actual knowledge that the claim or statement is false, fictitious, or fraudulent;

(b) Acts in deliberate ignorance of the truth or falsity of the claim or statement; or

(c) Acts in reckless disregard of the truth or falsity of the claim or statement.

Makes, wherever it appears, shall include the terms presents, submits, and causes to be made, presented, or submitted. As the context requires, *making* or *made,* shall likewise include the corresponding forms of such terms.

Person means any individual, partnership, corporation, association, private organization, State, political subdivision of a State, municipality, county, district, and Indian tribe, and includes the plural of that term.

Representative means an attorney.

Reviewing official means the General Counsel of A.I.D. or his designee who is:

(a) Not subject to supervision by, or required to report to, the investigating official;

(b) Not employed in the organizational unit of A.I.D. in which the investigating official is employed; and

(c) Is serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS–16 under the General Schedule.

Statement means any representation, certification, affirmation, document, record, or accounting or bookkeeping entry made—

(a) With respect to a claim or to obtain the approval or payment of a claim (including relating to eligibility to make a claim); or

(b) With respect to (including relating to eligibility for)—

(1) A contract with, or a bid or proposal for a contract with; or

(2) A grant, loan, or benefit from, A.I.D., or any State, political subdivision of a State, or other party, if the United States Government provides any portion of the money or property under such contract or for such grant, loan, or benefit, or if the Government will reimburse such State, political subdivision, or party for any portion of the money or property under such contract or for such grant, loan, or benefit.

§ 224.3 Basis for civil penalties and assessments.

(a) *Claims.* (1) Any person who makes a claim that the person knows or has reason to know—

(i) Is false, fictitious, or fraudulent;

(ii) Includes or is supported by any written statement which asserts a material fact which is false, fictitious, or fraudulent;

(iii) Includes or is supported by any written statement that—

(A) Omits a material fact;

(B) Is false, fictitious, or fraudulent as a result of such omission; and

(C) Is a statement in which the person making such statement has a duty to include such material fact; or

(iv) Is for payment for the provision of property or services which the person has not provided as claimed;

shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $5,000 for each such claim.

(2) Each voucher, invoice, claim form, or other individual request or demand for property, services, or money constitutes a separate claim.

(3) A claim shall be considered made to A.I.D., a recipient, or party when such claim is actually made to an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of A.I.D. or such recipient or party.

(4) Each claim for property, services, or money is subject to a civil penalty regardless of whether such property, services, or money is actually delivered or paid.

(5) If the Government has made any payment (including transferred property or provided services) on a claim, a person subject to a civil penalty under paragraph (a)(1) of this section shall also be subject to an assessment of not more than twice the amount of such claim or that portion thereof that is determined to be in violation of paragraph (a)(1) of this section. Such assessment shall be in lieu of damages sustained by the Government because of such claim.

(b) *Statements.* (1) Any person who makes a written statement that—

(i) The person knows or has reason to know—

(A) Asserts a material fact which is false, fictitious, or fraudulent; or

(B) Is false, fictitious, or fraudulent because it omits a material fact that the person making the statement had a duty to include in such statement; and

(ii) Contains or is accompanied by an express certification or affirmation of the truthfulness and accuracy of the contents of the statement,

shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $5,000 for each such statement.

(2) Each written representation, certification, or affirmation constitutes a separate statement.

(3) A statement shall be considered made to A.I.D. when such statement is actually made to an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of A.I.D.

(c) No proof of specific intent to defraud is required to establish liability under this section.

(d) In any case in which it is determined that more than one person is liable for making a claim or statement under this section, each such person may be held liable for a civil penalty under this section.

(e) In any case in which it is determined that more than one person is liable for making a claim under this section on which the Government has made payment (including transferred property or provided services), an assessment may be imposed against any such person or jointly and severally against any combination of such persons.

§ 224.4 Investigation.

(a) If an investigating official concludes that a subpoena pursuant to the authority conferred by 31 U.S.C. 3804(a) is warranted—

(1) The subpoena so issued shall notify the person to whom it is addressed of the authority under which the subpoena is issued, and shall identify the records or documents sought;

(2) He or she may designate a person to act on his behalf to receive the documents sought; and

(3) The person receiving such subpoena shall be required to tender to the investigating official or the person designated to receive the documents a certification that the documents sought have been produced, or that such documents are not available and the reasons therefore, or that such documents, suitably identified, have been withheld based upon the assertion of an identified privilege.

(b) If the investigating official concludes that an action under the Program Fraud Civil Remedies Act may be warranted, the investigating official shall submit a report containing the findings and conclusions of such investigation to the reviewing official.

(c) Nothing in this section shall preclude or limit an investigating official's discretion to refer allegations directly to the Department of Justice for suit under the False Claims Act or other civil relief, or to preclude or limit such official's discretion to defer or postpone a report or referral to avoid interference with a criminal investigation or prosecution.

(d) Nothing in this section modifies any responsibility of an investigating official to report violations of criminal law to the Attorney General.

§ 224.5 Review by the reviewing official.

(a) If, based on the report of the investigating official under § 224.4(b), the reviewing official determines that there is adequate evidence to believe that a person is liable under § 224.3 of this part, the reviewing official shall transmit to the Attorney General a written notice of the reviewing official's intention to issue a complaint under § 224.7.

(b) Such notice shall include—

(1) A statement of the reviewing official's reasons for issuing a complaint;

(2) A statement specifying the evidence that supports the allegations of liability;

(3) A description of the claims or statements upon which the allegations of liability are based;

(4) An estimate of the amount of money or the value of property, services, or other benefits requested or demanded in violation of § 224.3 of this part;

(5) A statement of any exculpatory or mitigating circumstances that may relate to the claims or statements known by the reviewing official or the investigating official; and

(6) A statement that there is a reasonable prospect of collecting an appropriate amount of penalties and

assessments. Such a statement may be based upon information then known or an absence of any information indicating that the person may be unable to pay such an amount.

§ 224.6 Prerequisites for issuing a complaint.

(a) The reviewing official may issue a complaint under § 224.7 only if:

(1) The Department of Justice approves the issuance of a complaint in a written statement described in 31 U.S.C. 3803(b)(1); and

(2) In the case of allegations of liability under § 224.3(a) with respect to a claim, the reviewing official determines that, with respect to such claim or a group of related claims submitted at the same time such claim is submitted (as defined in paragraph (b) of this section), the amount of money or the value of property or services demanded or requested in violation of § 224.3(a) does not exceed $150,000.

(b) For the purposes of this section, a related group of claims submitted at the same time shall include only those claims arising from the same transaction (*e.g.*, grant, loan, application, or contract) that are submitted simultaneously as part of a single request, demand, or submission.

(c) Nothing in this section shall be construed to limit the reviewing official's authority to join in a single complaint against a person claims that are unrelated or were not submitted simultaneously, regardless of the amount of money or the value of property or services demanded or requested.

§ 224.7 Complaint.

(a) On or after the date the Department of Justice approves the issuance of a complaint in accordance with 31 U.S.C. 3803(b)(1), the reviewing official may serve a complaint on the defendant, as provided in § 224.8.

(b) The complaint shall state:

(1) Allegations of liability against the defendant, including the statutory basis for liability, an identification of the claims or statements that are the basis for the alleged liability, and the reasons why liability allegedly arises from such claims or statements;

(2) The maximum amount of penalties and assessments for which the defendant may be held liable;

(3) Instructions for filing an answer to request a hearing, including a specific statement of the defendant's right to request a hearing by filing an answer and to be represented by a representative; and

(4) That failure to file an answer within 30 days of service of the complaint will result in the imposition of the maximum amount of penalties and assessments without right to appeal.

(c) At the same time the reviewing official serves the complaint, he or she shall serve the defendant with a copy of these regulations.

§ 224.8 Service of complaint.

(a) Service of a complaint must be made by certified or registered mail or by delivery in any manner authorized by Rule 4(d) of the Federal Rules of Civil Procedure.

(b) Proof of service, stating the name and address of the person on whom the complaint was served, and the manner and date of service, may be made by:

(1) Affidavit of the individual making service;

(2) An acknowledged United States Postal Service return receipt card; or

(3) Written acknowledgment of the defendant or his representative.

§ 224.9 Answer.

(a) The defendant may request a hearing by filing an answer with the reviewing official within 30 days of service of the complaint. An answer shall be deemed to be a request for hearing.

(b) In the answer, the defendant:

(1) Shall admit or deny each of the allegations of liability made in the complaint;

(2) Shall state any defense on which the defendant intends to rely;

(3) May state any reasons why the defendant contends that the penalties and assessments should be less than the statutory maximum; and

(4) Shall state the name, address, and telephone number of the person authorized by the defendant to act as defendant's representative, if any.

§ 224.10 Default upon failure to file an answer.

(a) If the defendant does not file an answer within the time prescribed in § 224.9(a), the reviewing official may refer the complaint to the ALJ.

(b) Upon the referral of the complaint, the ALJ shall promptly serve on defendant in the manner prescribed in § 224.8, a notice that an initial decision will be issued under this section.

(c) If the defendant fails to answer, the ALJ shall assume the facts alleged in the complaint to be true and, if such facts establish liability under § 224.3, the ALJ shall issue an initial decision imposing the maximum amount of penalties and assessments allowed under the statute.

(d) Except as otherwise provided in this section, by failing to file a timely answer, the defendant waives any right to further review of the penalties and assessments imposed under paragraph (c) of this section, and the initial decision shall become final and binding upon the parties 30 days after it is issued.

(e) If, before such an initial decision becomes final, the defendant files a motion with the ALJ seeking to reopen on the grounds that extraordinary circumstances prevented the defendant from filing an answer, the initial decision shall be stayed pending the ALJ's decision on the motion.

(f) If, on such motion, the defendant can demonstrate extraordinary circumstances excusing the failure to file a timely answer the ALJ shall withdraw the initial decision in paragraph (c) of this section, if such a decision has been issued, and shall grant the defendant an opportunity to answer the complaint.

(g) A decision of the ALJ denying defendant's motion under paragraph (e) of this section is not subject to reconsideration under § 224.38.

(h) The defendant may appeal to the A.I.D. Administrator the decision denying a motion to reopen by filing a notice of appeal with the A.I.D. Administrator within 15 days after the ALJ denies the motion. The timely filing of a notice of appeal shall stay the initial decision until the A.I.D. Administrator decides the issue.

(i) If the defendant files a timely notice of appeal with the A.I.D. Administrator, the ALJ shall forward the record of the proceeding to the A.I.D. Administrator.

(j) The A.I.D. Administrator shall decide expeditiously whether extraordinary circumstances excuse the defendant's failure to file a timely answer based solely on the record before the ALJ.

(k) If the A.I.D. Administrator decides that extraordinary circumstances excused the defendant's failure to file a timely answer, the A.I.D. Administrator shall remand the case to the ALJ with instructions to grant the defendant an opportunity to answer.

(l) If the A.I.D. Administrator decides that the defendant's failure to file a timely answer is not excused, the A.I.D. Administrator shall reinstate the initial decision of the ALJ, which shall become final and binding upon the parties 30 days after the A.I.D. Administrator issues such decision.

§ 224.11 Referral of complaint and answer to the ALJ.

Upon receipt of an answer, the reviewing official shall file the complaint and answer with the ALJ.

§ 224.12 Notice of hearing.

(a) When the ALJ receives the complaint and answer, the ALJ shall promptly serve a notice of hearing upon the defendant in the manner prescribed by § 224.8. At the same time, the ALJ shall send a copy of such notice to the representative for the Government.

(b) Such notice shall include:

(1) The tentative time and place, and the nature of the hearing;

(2) The legal authority and jurisdiction under which the hearing is to be held;

(3) The matters of fact and law to be asserted;

(4) A description of the procedures for the conduct of the hearing;

(5) The name, address, and telephone number of the representative of the Government and of the defendant, if any; and

(6) Such other matters as the ALJ deems appropriate.

§ 224.13 Parties to the hearing.

(a) The parties to the hearing shall be the defendant and A.I.D.

(b) Pursuant to 31 U.S.C. 3730(c)(5), a private plaintiff under the False Claims Act may participate in these proceedings to the extent authorized by the provisions of that Act.

§ 224.14 Separation of functions.

(a) The investigating official, the reviewing official, and any employee or agent of A.I.D. who takes part in investigating, preparing, or presenting a particular case may not, in such case or a factually related case:

(1) Participate in the hearing as the ALJ;

(2) Participate or advise in the initial decision or the review of the initial decision by the A.I.D. Administrator, except as a witness or representative in public proceedings; or

(3) Make the collection of penalties and assessments under 31 U.S.C. 3806.

(b) The ALJ shall not be responsible to, or subject to, the supervision or direction of the investigating official or the reviewing official.

(c) Except as provided in paragraph (a) of this section, the representative for the Government may be employed anywhere in A.I.D., including in the offices of either the investigating official or the reviewing official.

§ 224.15 Ex parte contracts.

No party or person (except employees of the ALJ's office) shall communicate in any way with the ALJ on any matter at issue in a case, unless on notice and opportunity for all parties to participate. This provision does not prohibit a person or party from inquiring about the status of a case or asking routine questions concerning administrative functions or procedures.

§ 224.16 Disqualification of reviewing official or ALJ.

(a) A reviewing official or ALJ in a particular case may disqualify himself or herself at any time.

(b) A party may file with the ALJ a motion for disqualification of a reviewing official or ALJ. Such motion shall be accompanied by an affidavit alleging personal bias or other reason for disqualification.

(c) Such motion and affidavit shall be filed promptly upon the party's discovery of reasons requiring disqualification, or such objections shall be deemed waived.

(d) Such affidavit shall state specific facts that support the party's belief that personal bias or other reason for disqualification exists and the time and circumstances of the party's discovery of such facts. It shall be accompanied by a certificate of the representative of record that it is made in good faith.

(e) Upon the filing of such a motion and affidavit, the ALJ shall proceed no further in the case until he or she resolves the matter of disqualification in accordance with paragraph (f) of this section.

(f) (1) If the ALJ determines that the reviewing official is disqualified, the ALJ shall dismiss the complaint without prejudice.

(2) If the ALJ disqualifies himself or herself, the case shall be reassigned promptly to another ALJ.

(3) If the ALJ denies a motion to disqualify, the A.I.D. Administrator may determine the matter only as part of his or her review of the initial decision upon appeal, if any.

§ 224.17 Rights of parties.

Except as otherwise limited by this part, all parties may:

(a) Be accompanied, represented, and advised by a representative;

(b) Participate in any conference held by the ALJ;

(c) Conduct discovery;

(d) Agree to stipulations of fact or law, which shall be made part of the record;

(e) Present evidence relevant to the issues at the hearing;

(f) Present and cross-examine witnesses;

(g) Present oral arguments at the hearing as permitted by the ALJ; and

(h) Submit written briefs and proposed findings of fact and conclusions of law after the hearing.

§ 224.18 Authority of the ALJ.

(a) The ALJ shall conduct a fair and impartial hearing, avoid delay, maintain order, and assure that a record of the proceeding is made.

(b) The ALJ may:

(1) Set and change the date, time, and place of the hearing upon reasonable notice to the parties;

(2) Continue or recess the hearing in whole or in part for a reasonable period of time;

(3) Hold conferences to identify or simplify the issues, or to consider other matters that may aid in the expeditious disposition of the proceeding;

(4) Administer oaths and affirmations;

(5) Issue subpoenas requiring the attendance of witnesses and the production of documents at depositions or at hearings;

(6) Rule on motions and other procedural matters;

(7) Regulate the scope and timing of discovery;

(8) Regulate the course of the hearing and the conduct of representatives and parties;

(9) Examine witnesses;

(10) Receive, rule on, exclude, or limit evidence;

(11) Upon motion of a party, take official notice of facts;

(12) Upon motion of a party, decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact;

(13) Conduct any conference, argument, or hearing on motions in person or by telephone; and

(14) Exercise such other authority as is necessary to carry out the responsibilities of the ALJ under this part.

(c) The ALJ does not have the authority to decide upon the validity of Federal statutes or regulations.

§ 224.19 Prehearing conferences.

(a) The ALJ may schedule prehearing conferences as appropriate.

(b) Upon the motion of any party, the ALJ shall schedule at least one prehearing conference at a reasonable time in advance of the hearing.

(c) The ALJ may use prehearing conferences to discuss the following:

(1) Simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings, including the need for a more definite statement;

(3) Stipulations, admissions of fact or as to the contents and authenticity of documents;

(4) Whether the parties can agree to submission of the case on a stipulated record;

(5) Whether a party chooses to waive appearance at an oral hearing and to submit only documentary evidence

(subject to the objection of other parties) and written argument;

(6) Limitation of the number of witnesses;

(7) Scheduling dates for the exchange of witness lists and of proposed exhibits;

(8) Discovery;

(9) The time and place for the hearing; and

(10) Such other matters as may tend to expedite the fair and just disposition of the proceedings.

(d) The ALJ shall issue an order containing all matters agreed upon by the parties or ordered by the ALJ at a prehearing conference.

§ 224.20 Disclosure of documents.

(a) Upon written request to the reviewing official, the defendant may review any relevant and material documents, transcripts, records, and other materials that relate to the allegations set out in the complaint and upon which the findings and conclusions of the investigating official under § 224.4(b) are based unless such documents are subject to a privilege under Federal law. Upon payment of fees for duplication, the defendant may obtain copies of such documents.

(b) Upon written request to the reviewing official, the defendant also may obtain a copy of all exculpatory information in the possession of the reviewing official or investigating official relating to the allegations in the complaint, even if it is contained in a document that would otherwise be privileged. If the document would otherwise be privileged, only that portion containing exculpatory information must be disclosed.

(c) The notice sent to the Attorney General from the reviewing official as described in § 224.5 is not discoverable under any circumstances.

(d) The defendant may file a motion to compel disclosure of the documents subject to the provisions of this section. Such a motion may only be filed with the ALJ following the filing of an answer pursuant to § 224.9.

§ 224.21 Discovery.

(a) The following types of discovery are authorized:

(1) Requests for production of documents for inspection and copying;

(2) Requests for admissions of the authenticity of any relevant document or the truth of any relevant fact;

(3) Written interrogatories; and

(4) Depositions.

(b) For the purpose of this section and §§ 224.22 and 224.23, the term "documents" includes information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence. Nothing contained herein shall be interpreted to require the creation of a document.

(c) Unless mutually agreed to by the parties, discovery is available only as ordered by the ALJ. The ALJ shall regulate the timing of discovery.

(d) *Motions for discovery.*

(1) A party seeking discovery may file a motion with the ALJ. Such a motion shall be accompanied by a copy of the requested discovery, or in the case of depositions, a summary of the scope of the proposed deposition.

(2) Within ten days of service a party may file an opposition to the motion and/or a motion for protective order as provided in § 224.24.

(3) The ALJ may grant a motion for discovery only if he finds that the discovery sought:

(i) Is necessary for the expeditious, fair, and reasonable consideration of the issues;

(ii) Is not unduly costly or burdensome;

(iii) Will not unduly delay the proceeding; and

(iv) Does not seek privileged information.

(4) The burden of showing that discovery should be allowed is on the party seeking discovery.

(5) The ALJ may grant discovery subject to a protective order under § 224.24.

(e) *Deposition.*

(1) If a motion for deposition is granted, the ALJ shall issue a subpoena for the deponent, which may require the deponent to produce documents. The subpoena shall specify the time and place at which the deposition will be held.

(2) The party seeking to depose shall serve the subpoena in the manner prescribed in § 224.8.

(3) The deponent may file with the ALJ a motion to quash the subpoena or a motion for a protective order within ten days of service.

(4) The party seeking to depose shall provide for the taking of a verbatim transcript of the deposition which it shall make available to all other parties for inspection and copying.

(f) Each party shall bear its own costs of discovery.

§ 224.22 Exchange of witness lists, statements and exhibits.

(a) At least 15 days before the hearing or at such other time as may be ordered by the ALJ, the parties shall exchange witness lists, copies of prior statements of proposed witnesses, copies of proposed hearing exhibits, including copies of any written statements that the party intends to offer in lieu of live testimony in accordance with § 224.33(b). At the time the above documents are exchanged, any party that intends to rely on the transcript of deposition testimony in lieu of live testimony at the hearing, if permitted by the ALJ, shall provide each party with a copy of the specific pages of the transcript it intends to introduce into evidence.

(b) If a party objects, the ALJ shall not admit into evidence the testimony of any witness whose name does not appear on the witness list or any exhibit not provided to the opposing party as provided above unless the ALJ finds good cause for the failure or that there is no prejudice to the objecting party.

(c) Unless another party objects within the time set by the ALJ, documents exchanged in accordance with paragraph (a) of this section shall be deemed to be authentic for the purpose of admissibility at the hearing.

§ 224.23 Subpoenas for attendance at hearing.

(a) A party wishing to procure the appearance and testimony of any individual at the hearing may request that the ALJ issue a subpoena.

(b) A subpoena requiring the attendance and testimony of an individual may also require the individual to produce documents at the hearing.

(c) A party seeking a subpoena shall file a written request therefore not less than 15 days before the date fixed for the hearing unless otherwise allowed by the ALJ for good cause shown. Such request shall specify any documents to be produced and shall designate the witnesses and describe the address and location thereof with sufficient particularity to permit such witnesses to be found.

(d) The subpoena shall specify the time and place at which the witness is to appear and any documents the witness is to produce.

(e) The party seeking the subpoena shall serve it in the manner prescribed in § 224.8. A subpoena on a party or upon an individual under the control of a party may be served by first class mail.

(f) A party or individual to whom the subpoena is directed may file with the ALJ a motion to quash the subpoena within ten days after service or on or before the time specified in the subpoena for compliance if it is less than ten days after service.

§ 224.24 Protective order.

(a) A party or a prospective witness or deponent may file a motion for a protective order with respect to discovery sought by an opposing party or, with respect to the hearing, seeking to limit the availability or disclosure of evidence.

(b) In issuing a protective order, the ALJ may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) That the discovery not be had;

(2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) That the discovery may be had only through a method of discovery other than that requested;

(4) That certain matters not inquired into, or that the scope of discovery be limited to certain matters;

(5) That discovery be conducted with no one present except persons designated by the ALJ;

(6) That the contents of discovery or evidence be sealed;

(7) That a deposition after being sealed be opened only by order of the ALJ;

(8) That a trade secret or other confidential research, development, commercial information, or facts pertaining to any criminal investigation, proceeding or other administrative investigation not be disclosed or be disclosed only in a designated way; or

(9) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the ALJ.

§ 224.25 Fees.

The party requesting a subpoena shall pay the cost of the fee and mileage of any witness subpoenaed in the amounts that would be payable to a witness in a proceeding in the United States District Court. A check for witness fees and mileage shall accompany the subpoena when served, except that when a subpoena is issued on behalf of A.I.D., a check for witness fees and mileage need not accompany the subpoena.

§ 224.26 Form, filing and service of papers.

(a) *Form.* (1) Documents filed with the ALJ shall include an original and two copies.

(2) Every pleading and paper filed in the proceeding shall contain a caption setting forth the title of the action, the case number assigned by the ALJ, and a designation of the paper (e.g., motion to quash subpoena).

(3) Every pleading and paper shall be signed by, and shall contain the address and telephone number of the party or the person on whose behalf the paper was filed, or his or her representative.

(4) Papers are considered filed when they are mailed. Date of mailing may be established by a certificate from the party or its representative or by proof that the document was sent by certified or registered mail.

(b) *Service.* A party filing a document with the ALJ shall, at the time of filing, serve a copy of such document on every other party. Service upon any party of any document other than the complaint or notice of hearing shall be made by delivering or mailing a copy to the party's last known address. When a party is represented by a representative, service shall be made upon such representative in lieu of the actual party.

(c) *Proof of service.* A certificate of the individual serving the document by personal delivery or by mail, setting forth the manner of service, shall be proof of service.

§ 224.27 Computation of time.

(a) In computing any period of time under this part or in an order issued thereunder, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or legal holiday observed by the Federal government, in which event it includes the next business day.

(b) When the period of time allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays observed by the Federal government shall be excluded from the computation.

(c) Where a document has been served or issued by mail, an additional five days will be added to the time permitted for any response.

§ 224.28 Motions.

(a) Any application to the ALJ for an order or ruling shall be by motion. Motions shall state the relief sought, the authority relied upon, and the facts alleged, and shall be filed with the ALJ and served on all other parties.

(b) Except for motions made during a prehearing conference or at the hearing, all motions shall be in writing. The ALJ may require that oral motions be reduced to writing.

(c) Within 15 days after a written motion is served, or such other time as may be fixed by the ALJ, any party may file a response to such motion.

(d) The ALJ may not grant a written motion before the time for filing responses thereto has expired, except upon consent of the parties or following a hearing on the motion, but may overrule or deny such motion without awaiting a response.

(e) The ALJ shall make a reasonable effort to dispose of all outstanding motions prior to the beginning of the hearing.

§ 224.29 Sanctions.

(a) The ALJ may sanction a person, including any party or representative for:

(1) Failing to comply with an order, rule, or procedure governing the proceeding;

(2) Failing to prosecute or defend an action; or

(3) Engaging in other misconduct that interferes with the speedy, orderly, or fair conduct of the hearing.

(b) Any such sanction, including but not limited to those listed in paragraphs (c), (d), and (e) of this section, shall reasonably relate to the severity and nature of the failure or misconduct.

(c) When a party fails to comply with an order, including an order for taking a deposition, or for the production of evidence within the party's control, or a request for admission, the ALJ may:

(1) Draw an inference in favor of the requesting party with regard to the information sought;

(2) In the case of requests for admission, deem each matter of which an admission is requested to be admitted;

(3) Prohibit the party failing to comply with such order from introducing evidence concerning, or otherwise relying upon, testimony relating to the information sought; and

(4) Strike any part of the pleadings or other submissions of the party failing to comply with such request.

(d) If a party fails to prosecute or defend an action under this part commenced by service of a notice of hearing, the ALJ may dismiss the action or may issue an initial decision imposing penalties and assessments.

(e) The ALJ may refuse to consider any motion, request, response, brief or other document which is not filed in a timely fashion.

§ 224.30 The hearing and burden of proof.

(a) The ALJ shall conduct a hearing on the record in order to determine whether the defendant is liable for a civil penalty or assessment under § 224.3, and if so, the appropriate amount of any such civil penalty or assessment considering any aggravating or mitigating factors.

(b) A.I.D. shall prove defendant's liability and any aggravating factors by a preponderance of the evidence.

(c) The defendant shall prove any affirmative defenses and any mitigating

factors by a preponderance of the evidence.

(d) The hearing shall be open to the public unless otherwise ordered by the ALJ for good cause shown

§ 224.31 Determining the amount of penalties and assessments.

(a) In determining an appropriate amount of civil penalties and assessments, the ALJ and the A.I.D. Administrator, upon appeal, should evaluate any circumstances that mitigate or aggravate the violation and should articulate in their opinions the reasons that support the penalties and assessments they impose. Because of the intangible costs of fraud, the expense of investigating such conduct, and the need to deter others who might be similarly tempted, ordinarily double damages and a significant civil penalty should be imposed.

(b) Although not exhaustive, the following factors are among those that may influence the ALJ and the A.I.D. Administrator in determining the amount of penalties and assessments to impose with respect to the misconduct (i.e., the false, fictitious, or fraudulent claims or statements) charged in the complaint:

(1) The number of false, fictitious, or fraudulent claims or statements;

(2) The time period over which such claims or statements were made;

(3) The degree of the defendant's culpability with respect to the misconduct;

(4) The amount of money or the value of the property, services, or benefit falsely claimed;

(5) The value of the Government's actual loss as a result of the misconduct, including foreseeable consequential damages and the costs of investigation;

(6) The relationship of the amount imposed as civil penalties to the amount of the Government's loss;

(7) The potential or actual impact of the misconduct upon national defense, public health or safety, or public confidence in the management of Government programs and operations, including particularly the impact on the intended beneficiaries of such programs;

(8) Whether the defendant has engaged in a pattern of the same or similar misconduct;

(9) Whether the defendant attempted to conceal the misconduct;

(10) The degree to which the defendant has involved others in the misconduct or in concealing it;

(11) Where the misconduct of employees or agents is imputed to the defendant, the extent to which the defendant's practices fostered or attempted to preclude such misconduct;

(12) Whether the defendant cooperated in or obstructed an investigation of the misconduct;

(13) Whether the defendant assisted in identifying and prosecuting other wrongdoers;

(14) The complexity of the program or transaction, and the degree of the defendant's sophistication with respect to it, including the extent of defendant's prior participation in the program or in similar transactions;

(15) Whether the defendant has been found, in any criminal, civil, or administrative proceeding, to have engaged in similar misconduct or to have dealt dishonestly with the Government of the United States or of a State, directly or indirectly; and

(16) The need to deter the defendant and others from engaging in the same or similar misconduct.

(c) Nothing in this section shall be construed to limit the ALJ or the A.I.D. Administrator from considering any other factors that in any given case may mitigate or aggravate the offense for which penalties and assessments are imposed.

§ 224.32 Location of hearing.

(a) The hearing may be held:

(1) In any judicial district of the United States in which the defendant resides or transacts business;

(2) In any judicial district of the United States in which the claim or statement in issue was made; or

(3) In such other place as may be agreed upon by the defendant and the ALJ.

(b) Each party shall have the opportunity to present argument with respect to the location of the hearing.

(c) The hearing shall be held at the place and at the time ordered by the ALJ.

§ 224.33 Witnesses.

(a) Except as provided in paragraph (b) of this section, testimony at the hearing shall be given orally by witnesses under oath or affirmation.

(b) At the discretion of the ALJ, testimony may be admitted in the form of a written statement or deposition. Any such written statement must be provided to all other parties along with the last known address of such witness, in a manner which allows sufficient time for other parties to subpoena such witness for cross-examination at the hearing. Prior written statements of witnesses proposed to testify at the hearing and deposition transcripts shall be exchanged as provided in § 224.22(a).

(c) The ALJ shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

(1) Make the interrogation and presentation effective for the ascertainment of the truth,

(2) Avoid needless consumption of time, and

(3) Protect witnesses from harassment or undue embarrassment.

(d) The ALJ shall permit the parties to conduct such cross-examination as may be required for a full and true disclosure of the facts.

(e) At the discretion of the ALJ, a witness may be cross-examined on matters relevant to the proceeding without regard to the scope of his or her direct examination. To the extent permitted by the ALJ cross-examination on matters outside the scope of direct examination shall be conducted in the manner of direct examination and may proceed by leading questions only if the witness is a hostile witness, an adverse party, or a witness identified with an adverse party.

(f) Upon motion of any party, the ALJ shall order witnesses excluded so that they cannot hear the testimony of other witnesses. This rule does not authorize exclusion of:

(1) A party who is an individual;

(2) In the case of a party that is not an individual, an officer or employee of the party designated by the party's representative; or

(3) An individual whose presence is shown by a party to be essential to the presentation of its case, including an individual employed by the Government engaged in assisting the representative for the Government.

§ 224.34 Evidence.

(a) The ALJ shall determine the admissibility of evidence.

(b) Except as provided herein, the ALJ shall not be bound by the Federal Rules of Evidence. However, the ALJ may apply the Federal Rules of Evidence, where appropriate, e.g., to exclude unreliable evidence.

(c) The ALJ shall exclude irrelevant and immaterial evidence.

(d) Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of cumulative evidence.

(e) Although relevant, evidence may be excluded if it is privileged under Federal law.

(f) Evidence concerning offers of compromise or settlement shall be inadmissible to the extent provided in

Rule 408 of the Federal Rules of Evidence.

(g) The ALJ shall permit the parties to introduce rebuttal witnesses and evidence.

(h) All documents and other evidence offered or taken for the record shall be open to examination by all parties, unless otherwise ordered by the ALJ pursuant to § 224.24.

§ 224.35 The record.

(a) The hearing will be recorded and transcribed. Transcripts may be obtained following the hearing from ALJ at a cost not to exceed the actual cost of duplication.

(b) The transcript of testimony, exhibits and other evidence admitted at the hearing, all papers and requests filed in the proceeding constitute the record for the decision by the ALJ and the A.I.D. Administrator.

(c) The record of the hearing may be inspected and copied (upon payment of a reasonable fee) by anyone, unless otherwise ordered by the ALJ pursuant to § 224.24.

§ 224.36 Post-hearing briefs.

The ALJ may require the parties to file post-hearing briefs. In any event, any party may file a post-hearing brief. The ALJ shall fix the time for filing briefs, at a time not exceeding 60 days from the date the parties receive the transcript of the hearing or, if applicable, the stipulated record. Such briefs may be accompanied by proposed findings of fact and conclusions of law. The ALJ may permit the parties to file reply briefs.

§ 224.37 Initial decision.

(a) The ALJ shall issue an initial decision based only on the record, which shall contain findings of fact, conclusions of law, and the amount of any penalties and assessments imposed.

(b) The findings of fact shall include a finding on each of the following issues:

(1) Whether the claims or statements identified in the complaint, or any portion thereof, violate § 224.3;

(2) If the person is liable for penalties or assessments, the appropriate amount of any such penalties or assessments, considering any mitigating or aggravating factors that he or she finds in the case, such as those described in § 224.31.

(c) The ALJ shall promptly serve the initial decision on all parties within 90 days after the time for submission of post-hearing briefs and reply briefs (if permitted) has expired. The ALJ shall at the same time serve all defendants with a statement describing the right of any defendant determined to be liable for a civil penalty or assessment to file a motion for reconsideration with the ALJ or a notice of appeal with the A.I.D. Administrator. If the ALJ fails to meet the deadline contained in this paragraph, he or she shall notify the parties of the reason for the delay and shall set a new deadline.

(d) Unless the initial decision of the ALJ is timely appealed to the A.I.D. Administrator, or a motion for reconsideration of the initial decision is timely filed, the initial decision shall constitute the final decision of the A.I.D. Administrator and shall be final and binding on the parties 30 days after it is issued by the ALJ.

§ 224.38 Reconsideration of initial decision.

(a) Except as provided in paragraph (d) of this section, any party may file a motion for reconsideration of the initial decision within 20 days of receipt of the initial decision. If service was made by mail, receipt will be presumed to be five days from the date of mailing in the absence of contrary proof.

(b) Every such motion must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. Such motion shall be accompanied by a supporting brief.

(c) Responses to such motions shall be allowed only upon request of the ALJ.

(d) No party may file a motion for reconsideration of an initial decision that has been revised in response to a previous motion for reconsideration.

(e) The ALJ may dispose of a motion for reconsideration by denying it or by issuing a revised initial decision.

(f) When a motion for reconsideration is made, the time periods for appeal to the A.I.D. Administrator contained in § 224.38, and for finality of the initial decision in § 224.36(d), shall begin on the date the ALJ issues the denial of the motion for reconsideration or a revised initial decision, as appropriate.

§ 224.39 Appeal to A.I.D. Administrator.

(a) Any defendant who has filed a timely answer and who is determined in an initial decision to be liable for a civil penalty or assessment may appeal such decision to the A.I.D. Administrator by filing a notice of appeal with the A.I.D. Administrator in accordance with this section.

(b) (1) No notice of appeal may be filed until the time period for filing a motion for reconsideration under § 224.38 has expired.

(2) If a motion for reconsideration is timely filed, a notice of appeal must be filed within 30 days after the ALJ denies the motion or issues a revised initial decision, whichever applies.

(3) If no motion for reconsideration is timely filed, a notice of appeal must be filed within 30 days after the ALJ issues the initial decision.

(4) The A.I.D. Administrator may extend the initial 30 day period for an additional 30 days if the defendant files with the A.I.D. Administrator a request for an extension within the initial 30 day period and shows good cause.

(c) If the defendant files a timely notice of appeal with the A.I.D. Administrator, the ALJ shall forward the record of the proceeding to the A.I.D. Administrator.

(d) A notice of appeal shall be accompanied by a written brief specifying exceptions to the initial decision and reasons supporting the exceptions.

(e) The representative for the Government may file a brief in opposition to exceptions within 30 days of receiving the notice of appeal and accompanying brief.

(f) There is no right to appear personally before the A.I.D. Administrator.

(g) There is no right to appeal any interlocutory ruling by the ALJ.

(h) In reviewing the initial decision, the A.I.D. Administrator shall not consider any objection that was not raised before the ALJ unless a demonstration is made of extraordinary circumstances causing the failure to raise the objection.

(i) If any party demonstrates to the satisfaction of the A.I.D. Administrator that additional evidence not presented at such hearing is material and that there were reasonable grounds for the failure to present such evidence at such hearing, the A.I.D. Administrator shall remand the matter to the ALJ for consideration of such additional evidence.

(j) The A.I.D. Administrator may affirm, reduce, reverse, compromise, remand, or settle any penalty or assessment determined by the ALJ in an initial decision.

(k) The A.I.D. Administrator shall promptly serve each party to the appeal with a copy of his/her decision. At the same time, the A.I.D. Administrator shall serve the defendant with a statement describing the defendant's right to seek judicial review.

(l) Unless a petition for review is filed as provided in 31 U.S.C. 3805 after a defendant has exhausted all administrative remedies under this part and within 60 days after the date on which the A.I.D. Administrator serves the defendant with a copy of his/her decision, a determination that a

defendant is liable under § 224.3 is final and is not subject to judicial review.

§ 224.40 Stays ordered by the Department of Justice.

If at any time the Attorney General or an Assistant Attorney General designated by the Attorney General transmits to the A.I.D. Administrator a written finding that continuation of the administrative process described in this part with respect to a claim or statement may adversely affect any pending or potential criminal or civil action related to such claim or statement, the A.I.D. Administrator shall stay the process immediately. The A.I.D. Administrator may order the process resumed only upon receipt of the written authorization of the Attorney General.

§ 224.41 Stay pending appeal.

(a) An initial decision is stayed automatically pending disposition of a motion for reconsideration or of an appeal to the A.I.D. Administrator.

(b) No administrative stay is available following a final decision of the A.I.D. Administrator.

§ 224.42 Judicial review.

Section 3805 of title 31, United States Code, authorizes judicial review by an appropriate United States District Court of a final decision of the A.I.D. Administrator imposing penalties or assessments under this part and specifies the procedures for such review.

§ 224.43 Collection of civil penalties and assessments.

Sections 3806 and 3808(b) of Title 31, United States Code, authorize actions for collection of civil penalties and assessments imposed under this part and specify the procedures for such actions.

§ 224.44 Right to administrative offset.

The amount of any penalty or assessment which has become final, or for which a judgment has been entered under § 224.42 or § 224.43, or any amount agreed upon in a compromise or settlement under § 224.46, may be collected by administrative offset under 31 U.S.C. 3716, except that an administrative offset may not be made under the subsection against a refund of an overpayment of Federal taxes, then or later owing by the United States to the defendant.

§ 224.45 Deposit in Treasury of United States.

All amounts collected pursuant to this part shall be deposited as miscellaneous receipts in the Treasury of the United States, except as provided in 31 U.S.C. 3806(g).

§ 224.46 Compromise or settlement.

(a) Parties may make offers of compromise or settlement at any time.

(b) The reviewing official has the exclusive authority to compromise or settle a case under this part at any time after the date on which the reviewing official is permitted to issue a complaint and before the date on which the ALJ issues an initial decision.

(c) The A.I.D. Administrator has exclusive authority to compromise or settle a case under this part at any time after the date on which the ALJ issues an initial decision, except during pendency of any review under § 224.42 or during the pendency of any action to collect penalties and assessments under § 224.43.

(d) The Attorney General has exclusive authority to compromise or settle a case under this part during the pendency of any review under § 224.42 or of any action to recover penalties and assessments under 31 U.S.C. 3806.

(e) The investigating official may recommend settlement terms 1 to the reviewing official, the A.I.D. Administrator, or the Attorney General, as appropriate. The reviewing official may recommend settlement terms to the A.I.D. Administrator, or the Attorney General, as appropriate.

(f) Any compromise or settlement must be in writing.

§ 224.47 Limitations.

(a) The notice of hearing with respect to a claim or statement must be served in the manner specified in § 224.8 within 6 years after the date on which such claim or statement is made.

(b) If the defendant fails to file a timely answer, service of a notice under § 224.10(b) shall be deemed notice of hearing for purposes of this section.

(c) The statute of limitations may be extended by agreement of the parties.

R.T. Rollis, Jr.,

Assistant to the Administrator for Management.

[FR Doc. 87-12205 Filed 5-29-87; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[FRL 3205-2]

Approval and Promulgation of Air Quality Implementation Plans, Massachusetts; VOC Bubble Regulations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing action on revisions submitted by the Commonwealth of Massachusetts to its plan for implementing the national ambient air quality standard ("NAAQS") for ozone. The revisions include the addition of Regulation 310 CMR 7.00: Appendix B to allow a source of volatile organic compounds (VOCs) to comply with an emission limitation on an average basis (24-hours or calendar-month), as opposed to a continuous basis. The revisions also include an amendment to existing SIP Regulation CMR 7.18(2)(b) that would make Appendix B applicable to it. The intended effect of this proposed approval is to approve fully those aspects of both revisions that allow and restrict the creation of VOC bubbles on the basis of 24-hour averaging. In contrast, the inteded effect of this action is to propose approval of those aspects of the revision that relate to calendar-month averaging only to the extent of rendering them federally enforceable. Thus, case-by-case EPA approval would be necessary before any VOC bubble using a calendar-month averaging time period could displace the existing VOC limitations for a facility in the SIP. This action is being taken in accordance with section 110 of the Clean Air Act.

DATES: Comments must be received on or before July 1, 1987.

ADDRESSES: Comments may be mailed to Louis F. Gitto, Director, Air Management Division, Room 2312, JFK Federal Building, Boston, Massachusetts 02203. Copies of the submittal and EPA's evaluation are available for public inspection during normal business hours at the Environmental Protection Agency, Room 2313, JFK Federal Building, Boston, Massachusetts 02203 and the Massachusetts Department of Environmental Quality Engineering, Division of Air Quality Control, Eighth Floor, One Winter Street, Boston, Massachusetts 02108.

FOR FURTHER INFORMATION CONTACT: Cynthia L. Greene at (617) 565-3244 or (FTS) 835-3244.

SUPPLEMENTARY INFORMATION:

A. Background

1. The Clean Air Act

The Clean Air Act requires States with areas that violate a NAAQS to have submitted revisions to their SIPs in 1979 which "provide for" attainment of the NAAQS by no later than December 31, 1982. For States unable to demonstrate attainment of the ozone or carbon monoxide standard by 1982, the

Act allows an extension until the end of 1987 as long as the State, as part of its attainment plan, requires "reasonable further progress" ("RFP") in the interim, including the adoption by sources of reasonably available control technology ("RACT"). Clean Air Act 172(a), 172(b)(3). See generally 44 FR 20372 (April 4, 1979); 46 FR 7182 (January 22, 1981).

The NAAQS for ozone is 0.12 parts per million (ppm). 40 CFR 50.9 (1986). An exceedence of this standard over the course of one or more hours during any given day results in a daily exceedence; more than three daily exceedences during any three-year period results in nonattainment during that period. 40 CFR 50, Appendix H (1979). To reduce ozone concentrations, emissions of VOCs and oxides of nitrogen are controlled.

2. The Massachusetts SIP

Massachusetts is divided into three analysis areas: the Boston, Worcester, and Springfield urban areas. EPA approved the Massachusetts SIP, which covered each area, by notice dated November 9, 1983 (48 FR 51480). As part of its SIP submissions, Massachusetts included an attainment demonstration for each area. The attainment demonstration included an emissions inventory of all point sources, as well as area and mobile sources. The attainment demonstration shows that along with area and mobile source controls, if the point sources identified in the inventory (i) maintain production at what the State determined to be the average daily level, and (ii) limit their VOC emission rates to the rates resulting from the application of RACT, then attainment of the ozone standard would result as expeditiously as practicable, but no later than December 31, 1987, and RFP would occur in the interim.

The Massachusetts SIP itself consists of EPA-approved State regulations that, in general, require point sources to limit their VOC emission rates, on a continuous basis, to the RACT rates. The SIP imposes no direct constraints on the sources' level of production, either by limiting hours of operation or rate of production.

3. Need for Bubble Regulations

The SIP requirements are difficult to meet by the many facilities in the State that use batch rather than continuous operations and that are speciality job shops. With batch or specialty job operations, coatings with differing solvent contents can be changed on process lines frequently (e.g., many times a day, week, or month), making it technically difficult to control certain coatings to RACT limits on a continuous, or even daily basis.

Accordingly, Massachusetts developed bubble regulations to allow each facility to average its emissions over either one day or one calendar-month. The purpose of these regulations is to enable the facilities to design cost-effective control strategies, i.e., to control some lines to below the SIP approved emission limits with add-on controls and/or reformulation, while continuing to use some noncomplying coatings.

4. EPA BUBBLE Policy and Averaging Policy

EPA has promulgated general guidelines for approving bubbles as SIP revisions. These guidelines are found in the Interim Emissions Trading Policy Statement, 47 FR 15076 (April 7, 1982), as revised by the Final Emissions Trading Policy Statement, 51 FR 43814 (December 4, 1986).[1] The guidelines contain numerous requirements, as discussed in the technical Support Document accompanying this Notice of Proposed Rulemaking, which is available at the locations listed under **ADDRESSES** above. The most important requirement for present purposes is that, in areas such as Massachusetts that are nonattainment but have an approved attainment demonstration, the baseline must be consistent with the assumptions used to develop the area's attainment demonstration. the baseline is the level of required emissions, taking into account production level and emission rate, beyond which reductions must occur for a source to receive credit. See 47 FR 15077, 15080; 51 FR 43815, 43818.

EPA has also developed a policy on the use of long-term (more than 24-hour) averaging of VOC emissions for purposes of compliance with RACT requirements. This policy is contained in a memorandum from John O'Connor, then Acting Director of the Office of Air Quality Planning and Standards (O'Connor Memorandum). (This memorandum is available from the EPA Regional Office listed in the **ADDRESSES** section of this notice.) The memorandum allows averaging over a period of time up to 30 days, but only upon a showing that the application of RACT on a daily basis is not economically or technically feasible. The memorandum further provides that if emission limits per unit of time are provided, the limits should reflect typical, rather than potential or allowable, production rate and operating hours. These and other requirements of this memorandum are discussed more fully below.

B. The Massachusetts Bubble Regulations

The Massachusetts VOC bubble regulation, 310 CMR 7.00: Appendix B, extends the use of bubbles to all existing VOC facilities which meet the criteria described below. Appendix B's requirements also apply to the Massachusetts SIP's approved generic VOC bubble regulation for surface coating sources, Regulation 310 CMR 7.18(2)(b). Only facilities that were part of the 1982 SIP point source emissions inventory are eligible to use Appendix B. The seven sections of Appendix B which serve as the criteria that each source must meet are explained below.[2]

1. Alternative Emission Limitations

Each alternative emissions limit assigned by the Massachusetts Department of Environmental Quality Engineering ("DEQE") will be incorporated into a plan approval for each facility and therefore will be enforceable by the State. (Masasachusetts calls its permits plan approvals.) Appendix B stipulates that the assigned alternative emission limits may not result in violations of any NAAQS; interfere with RFP; trade toxic, hazardous, or photochemically reactive chemicals for nontoxic, nonhazardous, or nonphotochemically reactive chemicals respectively; nor result in a violation of the emission limits imposed under the New Source Performance Standards (NSPS), National Emission Standards for Hazardous Air Pollutants (NESHAPs), Lowest Achievable Emission Reductions (LAER), or Best Available Control Technology (BACT), where applicable. Appendix B also stipulates that only quantifiable emissions reductions may be used in a bubble, and if a more restrictive emissions limit becomes applicable, reductions must be achieved by the bubbling source to meet it.

[1] Bubbles, or emissions trades, allow existing facilities to achieve little or no reductions in emissions where control costs are high in exchange for compensating reductions beyond regulatory requirements from processes where control costs are less expensive, resulting in an alternative, but equivalent compliance strategy. The alternative emission limits specified in a bubble for VOC facilities, averaged over an approved time period, are mathematically equivalent to the summation of applicable RACT limits in the existing SIP for the source categories involved. See 47 FR 15076.

[2] The history of the bubble regulations is lengthy, and may be found in the Massachusetts SIP submittals dated May 21, 1982, September 9, 1982, July 27, 1984, March 6, 1985, and April 12, 1985, as well as EPA's Notice of Proposed Rulemaking, 48 FR 5044 (Feb. 3, 1983). The Notice of Proposed Rulemaking published today provides the public with its first opportunity to comment on the use of a calendar-month averaging period as part of the Massachusetts ozone SIP.

2. Determination of Emission Limitations

a. Applicable Emission Limits

The emissions limits specified in a bubble plan approval must be mathematically equivalent, when calculated on a solids-applied basis, minus water, to existing VOC emission limits prescribed in the federally approved SIP. Therefore, a non-Control Technique Guideline (non-CTG) VOC facility or line must have a State-determined and EPA-approved RACT emission limit incorporated into the SIP before that facility or line may apply for a bubble.

b. Averaging Time

Each bubble approval will have emission limits which must be complied with over a 24-hour or calendar-month averaging time period. Any plan approved with a calendar-month averaging time period will also specify the maximum quantity of emissions (in pounds of VOC per day), in other words, a "daily cap" on the source's total emissions. The daily cap will be based on the amount of coatings (in gallons of solids-applied) historically used at the facility. The historical average per day will be determined from the highest two consecutive years of usage since 1979. The daily average (expressed in gallons of solids applied) will then be multiplied by (i) a multiplication factor, and (ii) the SIP assigned RACT limit (expressed in pounds of VOC per gallon of solids applied); the resulting pounds of VOC per day will be the daily cap that may not be exceeded.

As most recently proposed by the State, the multiplication factor is a number, greater than 1, that represents the differential between the average daily production level and approximately 95 percent of the maximum daily production level actually achieved during the two-year period. Thus, the factor has the effect of setting the daily cap at slightly below the maximum historical level of emissions, assuming the application of RACT.

Appendix B identifies the multiplication factor as 1.9. The DEQE derived the 1.9 factor from production and emissions data of one Massachusetts source. Since this factor was calculated, it has been determined that reductions which occurred before 1979 (the design year of the attainment demonstration) were used as emission reduction credits (ERCs) at the source. Therefore, EPA has asked the State to recalculate the multiplication factor without the pre-1979 reductions and with more than one source's data. The method for determining the multiplication factor and the resulting multiplication factor itself must be submitted before EPA will publish a final rulemaking notice on today's proposed action. The resulting multiplication factor shall in no case be greater than 1.9.

Opportunity for public comment on the revised factor and the revised method for determining the factor, will be available when EPA promulgates direct final rulemaking on each individual calendar-month bubble approved and submitted by Massachusetts. Additionally, in order to confirm a source specific multiplication factor, the multiplication factor will be reviewed after each source approved to bubble has operated continuously under its plan approval for one year. The calculation method that must be submitted before EPA takes final action on this proposed action will be used to review each source's data. To assure that this review can be conducted, EPA has asked the State to submit, prior to final action on this rulemaking, a revision to Appendix B that would add one more reporting requirement—gallons of solids used per day—to be reported by the relevant facility monthly.

If the multiplication factor changes, the daily cap will change, but in no case will the factor be allowed to be greater than 1.9. The new multiplication factor will be multiplied by the historical average gallons of solids per day (already calculated) and the SIP emission limitation in pounds of VOC per gallon of solids to determine the new daily cap. Therefore the daily cap will be conditionally approved in the Federal Register final rulemaking notice on the individual source's plan approval. Within ninety days of the one year anniversary of each source's plan approval, the DEQE will submit to EPA a new daily cap for each source or a confirmation that the original conditionally approved cap was appropriate. The new or confirmed conditional daily cap will then be published in the **Federal Register** in a notice of final rulemaking and incorporated into the SIP. Failure of the DEQE to make this submission by the agreed time will result in revocation of the bubble approval of EPA.

An example of the daily cap calculation is contained in the Technical Support Document.

The State will gant bubble plan approvals incorporating emission limitations with calendar-month averaging time periods only if a facility can demonstrate that its SIP assigned RACT limit is not achievable on a daily basis. Each single-source SIP revision submitted by the State will contain this demonstration of need, and EPA will review it to ensure that there is indeed a technological need for a longer averaging time period.

c. Reasonable Further Progress

The ability of the SIP to achieve reasonable further progress (RFP) towards the attainment of the NAAQS for ozone by no later than December 31, 1987 in the Boston, Worcester, and Springfield Air Quality Control Regions (AQCRs) must not be compromised by VOC bubbles under Appendix B.

The calendar-month bubble provisions include safeguards, including the daily cap, designed to ensure RFP. For each source approved to bubble, the DEQE has committed itself to examine such source's annual emissions and to certify that these emissions do not interfere with RFP. In addition, in each subsequent RFP report following approval of a bubble, and in any future attainment demonstrations, the DEQE will use the daily cap, expressed in pounds of VOC per day, as the average daily emissions (i.e., the typical summer weekday emissions) for each source using a calendar-month bubble. This procedure means that the RFP report will show a higher amount of VOC emissions from each source approved to bubble than was assumed in the attainment demonstration. The DEQE has committed to evaluate each RFP report, and if the RFP report indicates that total VOC emissions from all sources exceed the total amounts assumed in the attainment demonstration, Massachusetts will promulgate additional control measures, and will submit them to EPA as SIP revisions. These additional measures may include revisions to the bubbles. (The State has submitted letters committing to these actions, but the State must submit these commitments as part of a SIP revision before EPA can take final action on this proposal.)

d. Emissions Reductions

In order to be included in a bubble as an ERC, the reduction must be real and permanent decrease below the applicable baseline after 1979. The base year emissions data used in the 1982 Ozone and Carbon Monoxide SIP was 1980 data derived from 1979 data using growth factors; so 1979 is used as the cutoff year.) The facility may be required to perform compliance testing in order to confirm the reductions used in the bubble.

3. Multi-Facility Bubbles

Facilities located at different sites, but under the same corporation ownership and in the same ozone demonstration area, are allowed to bubble between the different sites. Appendix B requires that for each ten straight miles of distance between the applicable facilities, an additional five percent reduction in total VOC emissions produced by all facilities covered by the bubble will be required. The five percent reduction will be calculated on the RACT limit. For example, if two paper coating sources with a SIP-assigned emission limit of 2.9 lobs VOC/gallon of coating (on a solids-applied basis, minus water) are eleven miles apart and are using the bubble, they will have to achieve (2.9) (1−0.05)=2.8 lbs VOC/gal of coating (on a solids-applied basis, minus water) averaged over 24-hours or a calendar-month. The Department will not allow a multi-facility bubble if it will interfere with maintenance of RFP towards or attainment of the ozone NAAQS.

Also multi-facility bubbles must be within the same demonstration area as explained in the State's March 6, 1985 commitment letter. Any multi-facility bubble with a 24-hour and/or calendar-month averaging time period between different demonstration areas must be submitted as single-source SIP revisions and will go through the full federal proposed and final rulemaking process.

4. Compliance Status of Facilities

No bubble will be established for a facility which is subject to or has been subject to an EPA enforcement action unless EPA approves the bubble and the schedule to comply with it through both a proposed and a final rulemaking notice published in the **Federal Register**. Furthermore, EPA is not approving the allowance of compliance date extensions for the 24-hour generic bubbles.

5. Public Notice and Participation

The DEQE will notify the public of bubble application and proposed plan approval, and give thirty days for comment and the opportunity to request a public hearing. If anyone requests a public hearing, DEQE will conduct that public hearing.

Public comments submitted to the DEQE during the State public comment period conducted for each bubble plan may also be submitted to EPA by the commenters to the **ADDRESSEES** stated in this **Federal Register**. EPA's direct final rulemaking package will summarize and address all the public comments received by EPA. If the bubble plan approval issued by the DEQE after the State's public hearing is significantly different from the plan proposed at the State's public hearing, EPA, in the notice of direct final rulemaking, would identify the revisions.

6. Monitoring and Reporting Requirements

Any facility that receives approval for a bubble plan from DEQE and EPA must submit calendar-month summary reports to the DEQE of daily records to demonstrate that all of the bubble requirements are being met. DEQE regulations and commitments require that only EPA-approved testing methods will be used to determine compliance with the SIP-assigned limitations. In addition, DEQE requires each source to keep comprehensive daily records of the quantity of coatings used and the solvent and solids content of these coatings, and to calculate the daily allowable and actual emissions on forms supplied by the State. The source must retain these records and must use them to calculate its calendar-month average in pounds of VOC per gallon of solids. Monthly summaries of this data must be submitted to the DEQE so that the DEQE can determine that the daily cap and calendar-month average have not been exceeded.

7. Revocation

Finally, the Department has the authority to revoke any bubble plan approval for not adhering to the requirements of the six sections outlined above.

8. Additional Safeguards

The March 6, 1985 and April 12, 1985 letters from DEQE to EPA transmitted the following clarifications and commitments for the regulations, in addition to the commitments summarized above:

1. Bubbles will not be allowed with reductions generated by shifting demand sources (e.g., drycleaners, gas stations, paint shops).

2. All sources will be required to be in compliance no later than the attainment date specified in the SIP (no later than December 31, 1987).

3. Before a bubble can be implemented for a non-CTG, 100 ton per year source, the DEQE must have identified and received EPA approval of RACT for that source.

4. Plan approval letters for calendar-month bubbles will be submitted to EPA as single source SIP revisions. These plan approvals and accompanying documentation will be used to evaluate adherence to all the generic criteria outlined in this **Federal Register** notice and for EPA approval or disapproval. Plan approvals for 24-hour bubbles under 7.18(2)(b) will be submitted to EPA, but are not subject to federal rulemaking as individual SIP revisions.

5. The emission limits incorporated in a bubble will be federally enforceable.

6. The Department's Regional Air Quality Section Chief has the authority to issue a conditional plan approval for a bubble.

7. The Department requires EPA-approved test methods when it requires testing for determining compliance.

8. The bubble is available to VOC sources with production lines or processes which were in operation by (and not after) February 1979. Processes or production lines which commenced operation after February 1979 as well as those subject to NSPS, BACT, and LAER are not eligible for bubbles in Massachusetts.

9. Bubbles will not allow one hazardous pollutant to be bubbled with another hazardous pollutant.

10. The State will implement additional controls if the calendar-month bubble regulation prevents reasonable further progress toward attainment of the ozone standard.

11. The State will require sources to submit monthly summaries so that DEQE can determine that the daily emissions cap limitations and the monthly averaged emission rate have not been exceeded.

Massachusetts must promulgate revisions to Appendix B incorporating the commitments described herein. EPA will not publish final rulemaking on this proposed action until Massachusetts submits these revisions.

As an additional safeguard, EPA's proposed action, with respect to the calendar-month bubble, is on trial basis for one year. One year after this proposed action is finalized, or after 10 to 15 bubbles have been approved by DEQE, EPA will do an extensive audit of those sources that received plan approvals for bubbles and check their daily and calendar-month records to determine if RFP is being maintained in each of the three demonstration areas of Massachusetts as defined in the 1982 SIP. If, after the one-year audit, EPA finds that all of the bubble approvals were issued according to the generic criteria and that RFP is maintained in each demonstration area, EPA will publish a notice in the **Federal Register** extending approval of the regulation unconditionally. If EPA finds that RFP has not been maintained, EPA will publish a notice in the **Federal Register** prospectively removing EPA's approval of the calendar-month averaging bubble regulation. (This prospective action

would not affect already approved, source-specific bubbles.)

Massachusetts anticipates that up to thirty point sources will request calendar-month bubbles.

C. Discussion

1. *Consistency with Emissions Trading Policy.* For present purposes, the principal requirement of the Interim and Final Emissions Trading Policy Statements is that the baselines used for the bubbles be consistent with the assumptions contained in the attainment demonstration. This requirement is discussed below. The other requirements of the Emissions Trading Policy Statements are discussed in the Technical Support Document.

The principal issue is whether amending the SIP to allow a calendar-month bubble for an individual source would interfere with attainment or with RFP. This issue may be analyzed by comparing (i) the total volume of VOC emissions that the approved attainment demonstration assumed would be coming from point sources subject to RACT requirements on a continuous basis with (ii) the total volume of VOC emissions from point sources when some would no longer be subject to RACT requirements on a continuous basis and instead would be subject to the calendar-month averaging requirements.

The attainment demonstration assumes that on any given day, each point source's VOC emissions will be the amount resulting from production at the source's average daily level, and a RACT emission rate. The SIP, however, merely requires attainment of the RACT emission rate on a continuous basis, placing no limits on production levels. Hence, it is highly likely that on any given day, some sources' production levels may exceed their average daily level. However, it is also likely that on that same day, other sources' production levels will be below their average daily level. On balance, there is a sufficient probability that, on any given day, the overall daily emissions from all the point sources will in fact approximate the overall daily emissions assumed in the attainment demonstration so as to support the determination that the SIP provides for attainment and requires RFP. In effect, because the attainment demonstration uses figures that it expressly recognized as averages, it must have contemplated deviations from those averages in an actual performance.

The calendar-month bubble provisions, however, allow a point source's emission rates, on any given day and from moment-to-moment, to exceed RACT rates. As a result, concern arises that on that day, total actual emissions from the point source may exceed the amount that would result under the SIP constraints without the bubble, and thus may exceed the amounts assumed in the attainment demonstration (even granted the variations in production levels). Such an increase in emissions, in turn, could jeopardize attainment and RFP.

This concern is answered by several other requirements of the bubble provisions. First, because sources granted a bubble are required to limit their average daily emission rates over the course of a month to the RACT rates, a source that exceeds its RACT emission rate on one day must reduce its emission rate to below RACT levels on another day that month. Accordingly, on any given day, one bubble source's higher-than-RACT level emissions rate may be offset by another bubble source's lower-than-RACT level rate. Second, the daily cap imposes a limit on maximum daily emissions from a particular source that, as now calculated by the State, is 95% of the maximum upward swing of daily emissions that was implicitly contemplted for that source by the average daily production level in the attainment demonstration.

For these reasons, EPA has concluded that the probabilities that actual emissions under the SIP as revised by the bubble will result in attainment and RFP are probably comparable to the probabilities under the present SIP and attainment demonstration.

Further support that the bubble will not jeopardize attainment or RFP is found in Massachusetts' commitment to review each source's actual emissions after one year, and to (i) certify that the source's emissions do not interfere with attainment and RFP, and (ii) develop additional control measures if VOC emissions from all sources exceed the total amount assumed in the attainment demonstration.

Finally, the number and contribution of the facilities that could come under calendar-month bubbles is a small fraction, seven percent, of the total VOC emissions inventory.

2. Consistency With EPA Policy on Compliance Averaging

The O'Connor Memorandum contains numerous additional requirements for calendar-month averaging proposals. These requirements, and the extent to which the Massachusetts proposal complies with them, are as follows:

Requirement

a. Sources requesting a longer than 24-hour averaging time period must demonstrate a need for longer than a 24-hour averaging time period.

EPA Response

The DEQE requires that the source must submit a satisfactory demonstration of need for a longer averaging time period. Each single-source SIP revision submitted by the State will contain this demonstration of need, and EPA will review it to ensure that there is a technological need for a longer averaging time period.

Requirement

b. Real emission reductions must be achieved that are consistent with the applicable RACT emission limits in the SIP. Where the emission limits cannot be expressed in pounds of VOC per unit of production, an emissions limit in pounds of VOC per unit time can be accepted as long as the limit reflects typical production rate and operating hours. Additionally, nonproduction or equipment downtime cannot be allowed in the emission limit calculation.

EPA Response

This requirement has been discussed above. It should be reiterated that the Massachussetts' regulations require that the total of the emission limits in the bubble cannot exceed the mathematical equivalent of the total of the existing VOC emission limits in the SIP. Calculation of these emission limits must also be done on a solids-applied basis. For the calendar-month averaging time bubbles, an additional daily emission limit, the daily cap, must be met.

Requirement

c. Averaging periods are to be as short as practicable and no longer than 30 days.

EPA Response

Only a 24-hour or calendar-month averaging time period is allowed.

Requirement

d. A demonstration must be made that the use of a longer than 24-hour averaging time period will not jeopardize either the NAAQS for ozone or RFP towards the attainment of the ozone standard. Meaningful short term emission caps are desirable to ensure the attainment of the ozone standard.

EPA Response

This requirement has been discussed above.

Requirement

e. The O'Connor Memorandum requires that the information listed

below be included in each longer than 24-hour averaging time bubble.

(1) The VOC emission limits must be in an enforceable form with appropriate compliance dates.

The VOC limits specified in each plan approval will be calculated to be equivalent to those already approved in the SIP with compliance dates no later than December 31, 1986, the approved final compliance date in the SIP, except where extended to December 31, 1987 (the ozone attainment date) through a State issued consent order. The consent order will not have effect for federal purposes unless consistent with EPA enforcement related policies. At the time that EPA reviews each individual bubble submission to complete the final rulemaking, EPA will verify that the conditions of the bubble meet all applicable EPA enforcement related policies. The plan approvals will specify both RACT emission limitations to be met over a calendar-month and the total of VOC emissions allowed per day, the daily cap.

(2) A description of the affected process and associated historical production and operating rates must be included.

The bubble applications and plan approval letters will describe the source's processes and the historical production and operating rates used to calculate the daily cap calculation.

(3) A description of the control strategies must be included.

The application and plan approval letters will specify which processes are being controlled and how reductions are achieved. Those documents will also specify which processes will be left uncontrolled.

(4) The nature of the emission control program must be described.

The emission control program will be a bubble and will be described as stated above.

(5) The method of recordkeeping and reporting to be employed must be described.

The March 6, 1985 submittal from the State included a compliance comparison sheet which will be used by the source to keep daily records to ensure that the daily cap is not exceeded. Additionally, the State requires that each source must make calendar-month summary submittals to verify the calendar-month average.

f. The Regulations are consistent with the O'Connor policy in all areas except two, as follows: (i) The SIP submittal does not provide sufficient documentation to demonstrate that RFP will be maintained in the case of calendar-month averaging; and (ii) the current version of the regulation does not prohibit the use of pre-1979 reductions as emission reduction credits in bubble applications. Both of these issues are discussed in detail below.

(1) *RFP Documentation*—(a) *Calendar-month Bubbles.* Appendix B contains a daily emissions cap which limits emissions on every single day to no greater than 1.9 times the average daily emissions that would occur at RACT. The question which must be answered is: Does the cap, computed in this manner, allow the SIP requirements (as revised by the bubble) to provide for attainment and RFP with the same probability as the SIP in its present form?

One source submitted data and that data indicates that a cap set at 1.9 times RACT may be appropriate for that source. Since the 1.9 multiplication factor was calculated, however, it has been determined that the one source's data contained pre-1979 emission reduction credits ("ERCs"). In addition, there are approximately thirty Massachusetts sources that will use the calendar-month bubble. EPA is not confident that data from one source is statistically sufficient to conclude that a cap set at a multiplication factor of 1.9 times RACT times the historical average daily emissions will ensure that, on any given day, the maximum emissions from a source under the bubble will be 95% of the maximum amount for the source implicitly assumed in the attainment demonstration.

Therefore, EPA has asked the State to recalculate the multiplication factor without the pre-1979 reductions and with more than one source's data. EPA will defer final action on this proposal until the DEQE submits to EPA the revised calculation method or confirmation of the 1.9 multiplication factors calculation method.

In addition, the DEQE has committed to review each bubble under the revised calculation method after one year of continuous operation, using source-specific data, and the DEQE must commit to use that calculation method in any future reviews of the bubble. If the review calculation indicates that the multiplication factor should be less than the revised factor, the daily cap will be reduced accordingly, and the State will submit a revised plan approval to EPA for incorporation into the SIP. (This revised plan approval will be handled by EPA under the direct to final procedure because the revised method of determining the daily cap would previously have been subject to public comment.) The State must take this action within ninety days of the one year anniversary date of the plan approval.

The new daily cap must be submitted within ninety days of the one year anniversary date of the plan approval or the SIP emission limits will be enforced on a line-by-line basis. That adjusted daily cap must then be incorporated into a revised plan approval and submitted to EPA for incorporation into the SIP. The DEQE will notify the source of the above requirements through conditions set out in the source's Plan Approval. EPA will effectuate all of the above requirements through conditions in rulemakings on the DEQE's original Plan Approvals.

Accordingly, prior to final rulemaking to approve these regulations, DEQE is to submit revisions to Appendix B which do the following:

(i) Add a requirement for calendar-month reporting and recordkeeping of gallons of solids used per day;

(ii) Establish the calculation method for the multiplication factor that will be used to review each source's data after one year of continuous operation, and a commitment to use that calculation method in any future reviews of the bubble,

(iii) Commit to adjust the multiplication factor and the daily cap, if necessary after reviewing data from one year of continuous operation, to ensure that the cap limits the emissions to no more than 95% of what would be emitted at the maximum production level contemplated by the attainment demonstration, and submit the new daily cap to EPA within ninety days of the one year anniversary date of the plan approval,

(iv) Commit to submit the adjusted multiplication factor and daily cap for each individual bubble to EPA as SIP revisions,

(v) Submit an interpretation that generally, only the same hazardous air pollutants listed under section 112 of the Act may be traded, and only within a single plant or contiguous plants, and

(vi) Commit that emissions cannot increase for pollutants that EPA has proposed to regulate under section 112 of the Act; listed; published a notice of intent to list; listed, but not regulated due to limited national exposure; and included on a formal Notice-of-Intent-Not-to-List because of limited national exposure but for which risk is sufficiently high to support State regulations (e.g., acrylonitrile). This commitment is needed to prevent an increase in emissions of any of these pollutants.

Additionally, EPA is proposing to approve the criteria set forth in this regulation for calendar-month bubbles on a trial basis for one year. At the end

of the first year or after 10–15 calendar-month bubbles have been approved by DEQE, EPA will do an extensive audit of those sources that received Plan Approvals for calendar-month bubbles and check their daily and calendar-month records to determine if RFP is being maintained in each of the three demonstration areas of Massachusetts as defined in the 1982 SIP. If after the one year audit, EPA finds that all of the bubble approvals were issued according to the Appendix B criteria and that RFP is being maintained in each demonstration area, EPA will publish a notice in the **Federal Register** extending approval of the regulation unconditionally. If EPA finds that RFP has not been maintained, EPA will publish a notice in the **Federal Register** removing our approval of the calendar-month averaging bubble regulation.

(b) 24-hour Bubbles. Bubbles using the 24-hour averaging time period protect RFP by requiring the facility to achieve real and permanent reductions equivalent to RACT. The 24-hour averaging time period is consistent with EPA's interpretation of RACT as stated in the December 8, 1980 **Federal Register** notice for can coating operations. 45 FR 80825.

(2) *Pre-1979 Reductions Used as ERCs.* EPA policy on this issue is very clear. "Only reductions not assumed in the area's demonstration of reasonable further progress and attainment can be considered surplus." 47 FR 15077. Any coating that was reformulated to a water-based or low-solvent coating before 1979 and/or controlled by an add-on control device before 1979 would have been assumed reductions for Massachusetts' attainment demonstration. Therefore, EPA is proposing to approve these Regulations only if the DEQE commits to excluding the use of the pre-1979 water-based or low-solvent coatings and add-on control reductions in all bubbles.

To prepare for this commitment, the DEQE and the Associated Industries of Massachusetts have informed the thirteen sources identified by EPA as using pre-1979 reductions as ERCs that the use of pre-1979 reductions as ERCs is not allowed.

D. Proposed Action

For the reasons described here and in the Technical Support Document, EPA proposes to fully approve Appendix B and the amendment to Regulation 310 CMR 7.18(2)(b) to the extent that they allow and restrict the issuance of bubbles on the basis of 24-hour averaging, except with respect to cross demonstration area multifacility bubbles and except with respect to the allowance of compliance date extensions. Under such an approval, individual 24-hour bubbles would not require case-by-case EPA approval in order to become part of the SIP and displace the relevant pre-existing emission limitations.

EPA also proposes to approve Appendix B and the amendment to § 7.18(2)(b) insofar as they govern the issuance of calendar-month bubbles, but only for the purpose of rendering those revisions federally enforceable. EPA proposes not to approve any calendar-month bubble in advance, on the grounds that the criteria in Appendix B are not sufficiently mechanical (i.e., replicable) in their operation. Thus, each such bubble would have to be approved on a case-by-case basis upon a showing by the State that it is equivalent to the pre-existing control requirements from the standpoint of applying RACT to the source and assuring timely attainment and maintenance of RFP. EPA, however, views the showings of equivalence that the State has already made to be substantially adequate, when coupled with the additional safeguards it has offered, the comparatively small number of sources involved, and the additional showings the State will have made by the time EPA takes final action on this proposal. EPA, therefore, will process individual calendar-month bubbles under a specialized rulemaking procedure reserved for noncontroversial SIP revisions which it refers to as the direct to final approach.[3]

However, EPA will process cross demonstration area multi-facility bubbles (both 24-hour and calendar-month) as single-source SIP revisions under proposed and final rulemaking.

EPA will defer final action on this proposal until such time as the Senate satisfies EPA's requests and its own commitments as described below:

1. Each calendar-month bubble Plan Approval letter must be submitted to EPA for the direct to final approval procedure and incorporation into the SIP.

2. Each 24-hour bubble plan approval letter based under Massachusetts approved generic bubble regulations 310 CMP 7.18(2)(b) or Appendix B must be submitted to EPA. However, federal rulemaking will not be conducted for these generic approvals.

3. The DEQE submits a reporting and recordkeeping requirement for the gallons of solids used per day by each source. This information must be reported monthly by the source.

4. Before EPA takes final action, the DEQE establishes a calculation method for the multiplication factor that will be used to review each source's data after one year of continuous operation. Additionally, the DEQE must commit to use that calculation method for any future reviews of the bubble.

5. The DEQE must review each source's data after one year of continuous operation to determine if the 1.9 multiplication factor used to determine the daily cap is appropriate or if it should be lowered to ensure that the maximum daily VOC emissions under the bubble are no more than 95% of the amount of VOCs that would be emitted if the source were operating at historical maximum production levels, with RACT emission rates. If a lower daily cap is required, a revised plan approval must be submitted to EPA for incorporation into the SIP. The new daily cap must be submitted to EPA within 90 days of the one year anniversary date of the Plan Approval, or the bubble will automatically terminate.

6. The DEQE must commit that emissions can not increase for pollutants that EPA has proposed to regulate under section 112 of the CAA; listed published a notice of intent to list; listed but not regulated due to limited national exposure; and included on a formal Notice-of-Intent-Not-to-List became of limited national exposure *but* for which risk is sufficiently high to support State regulations (i.e., acrylonitrile).

7. The DEQE must commit to prohibit the use of pre-1979 reductions as emission reduction credits in any bubble.

8. Bubbles will not be allowed with reductions generated by shifting demand sources (*e.g.*, dry cleaners, gas stations, paint shops).

9. All sources will be required to be in compliance no later than the attainment date specified in the SIP (no later than December 31, 1987).

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[3] At the time that EPA reviews each bubble submission, EPA will verify that the conditions of the bubble meet all applicable EPA enforcement related policies. Public comments submitted to the DEQE during the State public comment period conducted for each bubble plan may also be submitted to EPA to the ADDRESSES stated in this **Federal Register**. If the bubble plan approval issued by the DEQE after the State's public hearing is significantly different from the plan proposed at the State's public hearing, EPA may initiate a new public comment period. EPA's direct final rulemaking package will summarize and address all the public comments received by EPA. The action will be effective sixty days from the date of the **Federal Register** notice unless, within thirty days of such date, notice is received that adverse or critical comments will be submitted. If such notice is received, EPA will withdraw the action before its 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. These plan approvals will be fully enforceable by both the State and EPA.

10. Before a bubble can be implemented for a non-CTG, 100 ton per year source, the DEQE must have identified and received EPA approval of RACT for that source.

11. The emissions limit incorporated in a bubble will be federally enforceable.

12. The DEQE's Regional Air Quality Section Chief has the authority to issue a conditional Plan Approval for a bubble.

13. The DEQE requires EPA approved test methods when it requires testing for determining compliance.

14. The bubble is available to VOC sources with production lines or processes which were in operation by (and not after) February 1979. Processes or production lines which commenced operation after February 1979 as well as subject to NSPS, BACT, or LAER are not eligible for bubbles in Massachusetts.

15. For each source approved to use a calendar-month bubble, the DEQE will include in each RFP report after such approval (and each subsequent attainment demonstration) the amount of emissions at the level of the daily cap as the average daily (typical summer weekday) emissions. In addition, the DEQE will examine each such source's annual emissions and certify that such emissions do not interfere with RFP. Furthermore, if the RFP report indicates that the total VOC emissions from all sources exceed the total amounts assumed in the attainment demonstration, Massachusetts will promulgate additional control measures, and will submit them to EPA as SIP revisions. These measures may include revisions to the bubbles.

In order to give EPA time to evaluate whether RFP will be maintained, EPA is proposing to approve the criteria set forth in this regulation on a trial basis for one year. At the end of that one year, or after 10–15 calendar-month bubbles have been approved by DEQE, EPA will do an extensive audit of those sources that received Plan Approvals for calendar-month bubbles and check their daily and calendar-month records to determine if RFP is being maintained in each of the three demonstration areas as defined in the 1982 SIP. If, after one year, EPA finds that all of the bubble approvals were issued according to the criteria outlined in this NPR and that RFP is being maintained in each demonstration areas, EPA will publish a notice in the **Federal Register** extending approval of the regulation unconditionally. If EPA finds that RFP has not been maintained, EPA will publish a notice in the **Federal Register** removing our approval of the calendar-month averaging bubble regulation.

Under 5 U.S.C. section 605(b), I certify that this SIP revisions will 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.

The Administrator's decision to approve of disapprove the plan revisions will be based on whether they meet the requirements of sections 110(a)(2)(A)–(K) and 110(a)(3) of the Clean Air Act, as amended, and EPA regulations in 40 CFR Part 51.

List of Subjects in 40 CFR Part 52

Air Pollution control, Ozone, Sulfur oxides, Nitrogen dioxide, Lead, Particulate matter, Carbon monoxide, Hydrocarbons, Intergovernmental relations, and Incorporation by Reference.

Authority: 42 U.S.C. 7401–7642.

Dated: September 8, 1986.

Merill S. Hohman,

Acting Regional Administrator, Region I.

[FR Doc. 87–11642 Filed 5–29–87; 8:45 am]

BILLING CODE 6560–50–M

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40 CFR Part 228

[OW–4–FRL–3210–9]

Ocean Dumping; Proposed Cancellation of Site Designations; Ponce de Leon Inlet, FL et al.

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA today proposes to cancel the designation of two ocean dumping sites which are currently designated on an interim basis. This action is being taken because there is no projected future need for these sites. These sites will be removed from the list of "Approved Interim and Final Ocean Dumping Sites."

DATE: Comments must be received on or before July 1, 1987.

ADDRESS: Send comments to: Ms. Sally Turner, Environmental Protection Agency, Water Management Division, Marine and Estuarine Branch, Marine Protection Section, Region IV, 345 Courtland Street, Atlanta, Georgia 30365.

FOR FURTHER INFORMATION CONTACT: Ms. Sally Turner, 404/347–2126.

SUPPLEMENTARY INFORMATION: EPA published revised Ocean Dumping Regulations and Criteria in the **Federal Register** on January 11, 1977 (42 FR 2462 et seq.). Section 228.12 contains a list of "Approved Interim and Final Ocean Dumping Sites."

This list was amended on December 9, 1980, (45 FR 81042 et seq.) to extend the interim designation of some ocean dumping sites and cancel the designation of six industrial sites and one dredged material site. At that time EPA stated its intention to identify additional ocean dumping sites for which there is no projected future need.

Two such sites have now been identified, and EPA proposes to cancel the interim designation of these sites based upon recommendations from the Corps of Engineers.

The purpose of this notice is to provide the public an opportunity to comment on the proposed cancellation of two interim designated ocean dumping sites for the disposal of dredged material. These sites with their identifying coordinates are listed below:

1. Ponce de Leon Inlet, FL:
   29°06'05"N., 80°55'50"W.
   29°06'10"N., 80°55'40"W.
   29°05'34"N., 80°55'10"W.
   29°05'28"N., 80°55'20"W.
2. St. Augustine Harbor, FL:
   29°51'33"N., 81°15'24"W.
   29°51'33"N., 81°15'00"W.
   29°50'33"N., 81°15'00"W.
   29°50'33"N., 81°15'24"W.

The cancellation of these two sites as EPA Interim Approved Ocean Dumping Sites is being published as a proposed rulemaking. Interested persons may participate in this proposed rulemaking by submitting written comments within 30 days of the date of this publication to the address given above.

Under the Regulatory Flexibility Act, EPA is required to perform a Regulatory Flexibility Analysis for all rules which may have a significant impact on a substantial number of small entities. Under Executive Order 12291, EPA must judge whether a regulation is "major" and therefore subject to the requirement of a Regulatory Impact Analysis.

EPA has determined that this proposal will not have a significant impact on small entities. No small entities are using or, as far as EPA is aware, are planning to use these sites in the near future. Furthermore, the cancellation of these site designations will have no effect on the economy or cause any of the other effects which would result in its being classified as a "major" action. Consequently, this proposal does not necessitate the preparation of a Regulatory Flexibility Analysis or Regulatory Impact Analysis.

This proposed rule does not contain any information collection requirements subject to Office of Management and

Budget review under the Paperwork Reduction Act of 1980, 44 U.S.C. et seq.

Dated: May 14, 1987.

Jack E. Ravan,

Regional Administrator.

PART 228—[AMENDED]

In consideration of the foregoing, Part 228 of Title 40 is proposed to be amended as set forth below.

1. The authority citation for Part 228 continues to read as follows:

§ 228.12 [Amended]

2. It is proposed to amend § 228.12(a)(3) by removing from the list of dredged material sites the following two ocean dumping sites:

Ponce de Leon Inlet, FL:
29°06'05"N., 80°55'50"W.
29°06'10"N., 80°55'40"W.
29°05'34"N., 80°55'10"W.
29°05'28"N., 80°55'20"W.

St. Augustine Harbor, FL:
29°51'33"N., 81°15'24"W.
29°51'33"N., 81°15'00"W.
29°50'33"N., 81°15'00"W.
29°50'33"N., 81°15'24"W.

[FR Doc. 87-12370 Filed 5-29-87; 8:45 am]

BILLING CODE 6560-50-M

FEDERAL MARITIME COMMISSION

46 CFR Parts 558, 559, 560, 561, 562, 564, 566, 569

[Docket No. 87-9]

Filing of Agreements by Common Carriers and Other Persons Subject to the Shipping Act, 1916

AGENCY: Federal Maritime Commission.

ACTION: Availability of finding of no significant impact.

SUMMARY: The Commission has completed an environmental assessment of a proposed rule in Docket No. 87-9 (May 4, 1987, 52 FR 16282) and found that its resolution of this proceeding will not have a significant impact on the quality of the human environment.

DATE: Petitions for review are due June 11, 1987.

ADDRESS: Petitions for review (Original and 15 copies) to: Joseph C. Polking, Secretary, Federal Maritime Commission, 1100 L Street NW., Washington, DC 20573.

FOR FURTHER INFORMATION CONTACT: Edward R. Meyer, Office of Special Studies, 1100 L Street NW., Washington, DC 20573, (202) 523-5835.

SUPPLEMENTARY INFORMATION: Upon completion of an environmental assessment, the Federal Maritime Commission's Office of Special Studies has determined that the Commission's proposed rule in Docket No. 87-9 will not constitute a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969, 42 U.S.C. 4321 et seq., and that preparation of an environmental impact statement is not required.

In Docket 87-9 the Commission proposes to amend its rules governing the filing of agreements by common carriers and other persons subject to the Shipping Act, 1916. The purpose of the rules changes is to amend 46 CFR Part 560 to incorporate all other Parts pertaining to the filing of agreements in the domestic offshore trades.

This Finding of No Significant Impact (FONSI) will become final within 10 days of publication of this notice in the **Federal Register** unless a petition for review is filed pursuant to 46 CFR 504.6 (b).

The FONSI and related environmental assessment are available for inspection on request from the Office of the Secretary, Room 11101, Federal Maritime Commission, Washington, DC 20573, telephone (202) 523-5725.

By the Commission.

Joseph C. Polking,

Secretary.

[FR Doc. 87-12398 Filed 5-29-87; 8:45 am]

BILLING CODE 6730-01-M

46 CFR Part 586

[Docket No. 87-6]

Actions To Adjust or Meet Conditions Unfavorable to Shipping in the United States/Peru Trade

AGENCY: Federal Maritime Commission.

ACTION: Availability of finding of no significant impact.

SUMMARY: The Commission has completed an environmental assessment of a proposed rule in Docket No. 87-6 and found that its resolution of this proceeding will not have a significant impact on the quality of the human environment.

DATE: Petitions for review are due June 11, 1987.

ADDRESS: Petitions for review (Original and 15 copies) to: Joseph C. Polking, Secretary, Federal Maritime Commission, 1100 L Street, NW., Washington, DC 20573.

FOR FURTHER INFORMATION CONTACT: Edward R. Meyer, Office of Special Studies, 1100 L Street, NW., Washington, DC 20573.

SUPPLEMENTARY INFORMATION: Upon completion of an environmental assessment, the Federal Maritime Commission's Office of Special Studies has determined that the Commisison's proposed rule in Docket No. 87-6 will not constitute a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969, 42 U.S.C. 4321 et seq., and that preparation of an environmental impact statement is not required.

In Docket No. 87-6 the Commission, in response to apparent unfavorable conditions in the foreign oceanborne trade between the United States and Peru, proposes rules suspending the tariffs of Peruvian-flag carriers in that trade unless certification is received ensuring that these conditions no longer exist. The effect of the rule, if published as final, would be to adjust or meet unfavorable conditions by imposing burdens on Peruvian-flag carriers which approximate those imposed on non-Peruvian-flag carriers by Peruvian laws and regulations.

This Finding of No Significant Impact (FONSI) will become final within 10 days of publication of this notice in the **Federal Register** unless a petition for review is filed pursuant to 46 CFR 504.6(b).

The FONSI and related environmental assessment are available for inspection on request from the Office of the Secretary, Room 11101, Federal Maritime Commisison, Washington, DC 20573, telephone (202) 523-5725. By the Commission.

Joseph C. Polking,

Secretary.

[FR Doc. 87-12397 Filed 5-29-87; 8:45 am]

BILLING CODE 6730-01-M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 87-121 FCC-152]

Broadcast Services; Short-Spaced FM Station Assignments by Use of Directional Antennas

AGENCY: Federal Communications Commission.

ACTION: Notice of Inquiry.

SUMMARY: This action initiates an investigation into the possibility of authorizing short-spaced FM station assignments by using directional antennas. FM directional antennas have been successfully used for some years, and their use in short-spaced situations

may offer to some licensees the opportunity to expand or enhance their coverage. The action is needed to resolve some issues before such authorizations can be proposed.

DATES: Comments are due on or before July 17, 1987, and reply comments on or before August 3, 1987.

ADDRESS: Federal Communications Commission, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Bernard Gorden, Mass Media Bureau, (202) 632–9660.

SUPPLEMENTARY INFORMATION: This is a summary of Commission's Notice of Inquiry adopted April 27, 1987, released May 26, 1987. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street NW., Washington, DC. The complete text of this decision may also be purchased from the Commisson's copy contractors, International Transcription Services, (202) 857–3800, 2100 M Street, NW., Suite 140, Washington, DC 20037.

Summary of Notice of Inquiry

1. This action initiates an inquiry into the use of directional antenna systems for the express purposes of permitting short-spaced transmitter sites of commercial FM broadcast station assignments.

2. Interference among commercial FM stations on channels 221 to 300 is currently controlled by requiring that adjacent and co-channel stations be geographically separated by certain minimum distances. Two conditions are assumed in determining these distances: (1) That all stations are operating at the maximum power and antenna height permitted for their class; and (2) that transmitting antennas are omni-directional (i.e., they radiate equally well in all horizontal directions).

3. For the most part, the Commission does not account for directional antenna characteristics in spacing FM allotments or assignments. However, directional antenna use may be benefical in some instances and so is authorized on ocassion.

4. Nevertheless, there are some issues which must be discussed before the use of directional antenna characteristics is routinely considered in permitting short-spaced facilities. For example, precisely how should the Commission account for antenna characteristics? There are also issues related to antenna design, antenna height, and protection of existing stations which must be resolved. Finally, the Commission is concerned about the administrative effects of such rule changes on the processing procedures. The debate initiated by this should establish a basis for resolving these matters.

Comment Information

Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, 47 CFR 1.415 and 1.419, interested parties may file comments on or before July 17, 1987, and reply comments on or before August 3, 1987. All relevant and timely comment will be considered by the Commission before final action is taken in this proceeding.

Authority

Authority for issuance of this *Notice* is contained in sections 4 and 303 of the Communications Act of 1934, as amended.

Supplementary Information:

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

William J. Tricarico,

Secretary.

[FR Doc. 87–12378 Filed 5–29–87; 8:45 am]

BILLING CODE 6712-01-M

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47 CFR Part 73

[MM Docket No. 87–131; FCC 87–155]

Radio Broadcasting Services; Unlimited-Time Operation by Existing AM Daytime-Only Radio Broadcast Stations; Discontinuance of Authorization of Additional Daytime-Only Stations; and Minimum Power of Class III Stations

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: On its own motion the FCC has initiated this action inviting comments on a proposal to amend the Commission's Rules (1) to permit unlimited-time operations for existing daytime-only AM radio broadcast stations on the U.S. domestic clear and regional channels; (2) to discontinue the authorization of new daytime-only stations; and (3) to reduce the minimum power of Class III AM radio broadcast stations.

DATES: Comments must be filed on or before July 17, 1987, and reply comments on or before August 3, 1987.

ADDRESS: Federal Communications Commission, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Louis C. Stephens, Policy and Rules Division, Mass Media Bureau, (202) 254–3394.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Notice of Proposed Rule Making* in MM Docket No. 87–131, adopted April 29, 1987, and released May 26, 1987.

The full text of this Commission action is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street NW., Washington, DC. The complete next of this *Notice of Proposed Rule Making* may also be purchased from the Commission's copy contractor, International Transcription Services, (202) 857–3800, 2100 M St., NW., Suite 140, Washington, DC 20037.

Summary of Notice of Proposed Rule Making

1. Having previously opened the way for unlimited-time operation for most daytime-only AM radio broadcast stations operating on the 14 foreign clear channels, the FCC proposes to take similar action for those assigned to the U.S. clear and regional AM channels. Accordingly, the Commission proposes rule amendments under which it would calculate and inform the pertinent daytime-only stations of the powers, within a range of .001 kW (1 watt) to 0.5 kW, that they may use for broadcasting during nighttime hours with the antenna systems they are licensed to start using at sunrise. The authorized power would be reduced as necessary in order to provide full interference protection to foreign and domestic stations. All but about 200 to 300 daytime-only stations on the U.S. clear and regional channels are expected to be able to meet the interference protection requirement.

2. Daytime-only stations authorized to operate during nighttime hours with power sufficient to enable them to provide a field strength of at least 141 mV/m at 1 kilometer from their transmitters would be reclassified as Class II–B and Class II–C on clear channels, and as unlimited-time Class III stations on regional channels. The others would be classified as Class II–S or Class III–S.

3. None of the stations permitted to operate during nighttime hours would be required to provide interference protection to each other. They would, however, be required to protect: (1) Foreign stations, (2) existing unlimited-time stations, and (3) new and changed unlimited-time stations for which construction permits had been issued or applications tendered no later than the day the proposed rule changes enter into effect. The reclassified stations could apply, under regular procedures, for nighttime power increases, up to the maximum generally permitted for the

class of channel occupied, consistent with requisite protection against interference to other stations.

4. Stations reclassified as Class II–S or III–S would not be required to provide the generally required minimum signal to their principal cities nighttime, nor would they be required to meet the requirement generally applicable to stations that regularly operate during nighttime hours, that they broadcast at least 4 hours between 6 p.m. and midnight. Stations reclassified as Class II–B, 11–C or III would be required to meet the latter requirement, but, so long as their nighttime powers were limited to those initially authorized by the Commission, they would be exempted from the minimum city signal requirement.

5. It is proposed, also, to reduce the minimum power of stations on regional channels from 0.5 kW to 0.25 kW. The few Class IV stations assigned to regional channels that already, exceptionally operate at 0.25 kW without interference protection, will then be reclassified as Class III stations, thereafter entitled to protection.

6. Finally, it is proposed to discontinue the assignment of additional daytime-only AM stations.

Comments

7. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, 47 CFR 1.415 and 1.419, interested parties may file comments on or before July 17, 1987, and reply comments on or before August 3, 1987. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding.

Nonrestricted Rule Making

8. This is a non-restricted notice and comment rule making proceeding. *See* § 1.1231 of the Commission's Rules, 47 CFR 1.1231, for rule governing permissible *ex parte* contacts.

Initial Regulatory Flexibility Analysis

9. With reference to the Regulatory Flexibility Act of 1980, 5 U.S.C. 603, the proposed rule will, if promulgated, have a beneficial impact on small daytime-only AM stations that will be enabled, through more extended hours of operation, to provide enhanced services to the public, and thereby compete more effectively with existing unlimited-time AM and FM stations. Public comment is requested on the initial regulatory flexibility analysis set out in full in the Commission's complete Notice of Proposed Rule Making.

10. The Secretary of the Commission is directed to send a copy of the Notice of Proposed Rule Making in this proceeding to the Chief Counsel for Advocacy of the Small Business Administration in accordance with section 603(a) of the Regulatory Flexibility Act, Pub. L. 96–354, 94 Stat. 1164, U.S.C. 601 *et seq. (1980).*

Paperwork Reduction Act Statement

11. The proposed rule changes have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information, collection and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden hours imposed on the public.

12. Authority for the rule changes on which comments are invited is contained in sections 4(i), 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303, and 307.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

William J. Tricarico,

Secretary.

[FR Doc. 87–12377 Filed 5–29–87; 8:45 am]

BILLING CODE 6712–01–M

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47 CFR Part 73

[MM Docket No. 87–68; FCC 87–104]

Television, AM Radio, FM Radio; Policies Regarding Detrimental Effects of Proposed New Broadcasting Stations on Existing Stations

AGENCY: Federal Communications Commission.

ACTION: Notice of inquiry.

SUMMARY: This Notice of Inquiry is looking towards the abolishment of two policies that address the issue of economic injury to existing broadcast stations. These policies are known as the Carroll doctrine and the UHF impact policy. Our experience in administering these policies and the growth and development of the electronic media over the past three decades call into question whether these policies continue to promote the public interest.

DATES: Comments due July 17, 1987; replies due August 3, 1987.

ADDRESS: Federal Communications Commission, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Judith Herman, Mass Media Bureau, (202) 632–6302.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Inquiry in MM Docket No. 87–68, adopted March 26, 1987, and released May 26, 1987. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, Northwest, Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, (202) 857–3800, 2100 M Street, Northwest, Suite 140, Washington, DC 20037.

Summary of the Notice of Inquiry

1. In the Notice of Inquiry, the Commission proposes to abolish two policies that address the issue of economic injury to existing broadcast stations. These policies are known as the Carroll doctrine and the UHF impact policy. The Carroll doctrine was established by judicial decision in 1958. The doctrine requires that when an existing licensee offers proof of detrimental economic effect from a proposed new broadcasting station that is likely to result in net loss of service to the public, the Commission must consider such proof and, if it is substantial, conduct a hearing and make findings on the issue. To date, the Commission has never denied an application for a new broadcast license based on the Carroll doctrine.

2. Under the UHF impact policy, applications to initiate or improve VHF service may be considered contrary to the public interest if the proposals threaten adverse economic impact on UHF stations. The Commission established the UHF impact policy in 1960 to afford UHF stations an opportunity to develop in the marketplace at a time when the development of the UHF service was in its infancy. In light of the advances made in the UHF service in the ensuing years, the Commission modified the policy to allow greater flexibility to improve VHF service.

3. The Commission has examined claims of economic injury to existing broadcast stations detrimental to the public interest under the Carroll doctrine and the UHF impact policy for almost thirty years. Our experience in administering these policies and the growth and development of the electronic media over the past three decades call into question whether these policies continue to promote the public interest.

4. This is a non-restricted notice and comment rule making proceeding. *See* § 1.1231 of the Commission's Rules, 47 CFR 1.1231, for rules governing permissible *ex parte* contacts.

5. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. 603, this proceeding proposes to abolish the Carroll doctrine and the UHF impact policy. The time and costs involved in authorizing new or improved radio and television service will be reduced. Public comment is requested on the initial regulatory flexibility analysis set out in full in the Commission's complete decision.

6. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose no information collection requirement on the public.

7. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415 and 1.419, interested parties may file comments on or before July 17, 1987, and reply comments on or before August 3, 1987. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding.

List of Subjects in 47 CFR Part 73

Television, AM Radio, FM Radio.

Federal Communications Commission.

William J. Tricarico,

Secretary.

[FR Doc. 87-12376 Filed 5-29-87; 8:45 am]

BILLING CODE 6712-01-M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 23

Foreign Proposals To Amend Appendices to the Convention on International Trade in Endangered Species of Wild Fauna and Flora; Correction

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of correction of proposed amendments to appendices.

SUMMARY: The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) regulates international trade in certain animals and plants. This notice corrects the **Federal Register** notice of May 22, 1987 (52 FR 19455) for two species: a bird and a snail. The French proposal on the Scarlet ibis (*Eudocimus ruber*) is to add this species to Appendix I, while only the Suriname proposal is to add it to Appendix II (p. 19457). One of the Cuatro Cienegas snails is *Coahuilix hubbsi*, not *C.* "milleri" (p. 19459). These corrections do not change the tentative negotiating positions presented for these species in the original notice.

Dated: May 28, 1987.

Sam Marler,

Acting Deputy Director, U.S. Fish and Wildlife Service.

[FR Doc. 87-12511 Filed 5-29-87; 8:45 am]

BILLING CODE 4310-55-M

Notices

Federal Register
Vol. 52, No. 104
Monday, June 1, 1987

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

Renewal; Citizens' Advisory Committee on Equal Opportunity; Office of Advocacy and Enterprise

Notice is hereby given that the Secretary of Agriculture has renewed the Citizens' Advisory Committee on Equal Opportunity.

The purpose of the Committee is to strengthen the Department's efforts in the area of Civil Rights. The Committee will advise the Secretary and other Officials of the Department on all aspects of the Department's policies, practices, and procedures which promote equal opportunity.

The renewal of this Committee is in the public interest in connection with the performance of duties and responsibilities of the Department.

May 26, 1987.

Charles L. Grizzle,
Deputy Assitant Secretary for Administration.

[FR Doc. 87-12418 Filed 5-29-87; 8:45 am]
BILLING CODE 3410-94-M

Federal Grain Inspection Service

Designation Applicants in the Geographic Area Currently Assigned to the State of Oregon and Southern Illinois Agency (IL); Request for Comments

AGENCY: Federal Grain Inspection Service (Service), USDA.

ACTION: Notice.

SUMMARY: This notice requests comments from interested parties on the applicants for official agency designation in the geographic area currently assigned to Oregon Department of Agriculture (Oregon) and Southern Illinois Grain Inspection Service, Inc. (Southern Illinois).

DATE: Comments to be postmarked on or before July 16, 1987.

ADDRESS: Comments must be submitted in writing to Lewis Lebakken, Jr., Information Resources Staff, FGIS, USDA, Room 1661 South Building, 1400 Independence Avenue SW., Washington, DC 20250.

Telemail users may respond to [IRSTAFF/FGIS/USDA] telemail.

Telex users may respond as follows:

TO: Lewis Lebakken
TLX: 7607351, ANS: FGIS UC.

All comments received will be made available for public inspection at the above address during regular business hours (7 CFR 1.27(b)).

FOR FURTHER INFORMATION CONTACT: Lewis Lebakken, Jr., telephone (202) 382-1738.

SUPPLEMENTARY INFORMATION: This action has been reviewed and determined not to be a rule or regulation as defined in Executive Order 12291 and Departmental Regulation 1512-1; therefore, the Executive Order and Departmental Regulation do not apply to this action.

The Service requested applications for official agency designation to provide official services within specified geographic areas in the April 1, 1987, **Federal Register** (52 FR 10391). Applications were to be postmarked by May 1, 1987. Oregon was the only applicant for designation in its geographic area and applied for designation renewal in the area currently assigned to that agency. There were two applicants for designation in the Southern Illinois geographic area. Southern Illinois applied for designation renewal in the area currently assigned to that agency. A new corporation, Mid-American Grain Inspection Service, Inc., to be located in Granite City, Illinois, has been established by Scott D. Deatherage, Villa Ridge, Missouri, and Donald B. Reynolds, Rock Port, Missouri, and also has applied for designation in the area currently assigned to Southern Illinois.

This notice provides interested persons the opportunity to present their comments concerning the designation of the applicants. All comments must be submitted to the Information Resources Staff, Resources Management Division, at the above address.

Comments and other available information will be considered in making a final decision. Notice of the final decision will be published in the **Federal Register**, and the applicants will be informed of the decision in writing.

Pub. L. 94-582, 90 Stat. 2867, as amended. (7 U.S.C. 71 *et seq.*)

Dated: May 15, 1987.

J.T. Abshier,
Director, Compliance Division.

[FR Doc. 87-12314 Filed 5-29-87; 8:45 am]
BILLING CODE 3410-EN-M

Request for Designation Applicants to Provide Official Services in the Geographic Area Currently Assigned to the Aberdeen Agency (SD), McGregor Agency (IA), and State of Missouri

AGENCY: Federal Grain Inspection Service (Service), USDA.

ACTION: Notice.

SUMMARY: Pursuant to the provisions of the U.S. Grain Standards Act, as Amended (Act), official agency designations shall terminate not later than triennially and may be renewed according to the criteria and procedures prescribed in the Act. This notice announces that the designation of three agencies will terminate, in accordance with the Act, and requests applications from parties, including the agencies currently designated, interested in being designated as the official agency to provide official services in the geographic area currently assigned to the specified agencies. The official agencies are Aberdeen Grain Inspection, Inc., McGregor Grain Inspection and Weighing Corporation, Inc., and Missouri Department of Agriculture.

DATE: Applications to be postmarked on or before July 1, 1987.

ADDRESS: Applications must be submitted to James R. Conrad, Chief, Review Branch, Compliance Division, FGIS, USDA, 1400 Independence Avenue, SW., Room 1647 South Building, Washington, DC 20250. All applications received will be made available for public inspection at this address during regular business hours.

FOR FURTHER INFORMATION CONTACT: James R. Conrad, telephone (202) 447-8525.

SUPPLEMENTARY INFORMATION: This action has been reviewed and determined not to be a rule or regulation as defined in Executive Order 12291 and Departmental Regulation 1512-1; therefore, the Executive Order and Departmental Regulation do not apply to this action.

Section 7(f)(1) of the Act specifies that the Administrator of the Service is authorized, upon application by any qualified agency or person, to designate such agency or person to provide official services after a determination is made that the applicant is better able than any other applicant to provide official services in an assigned geographic area.

Aberdeen Grain Inspection, Inc. (Aberdeen), 15 S. Dakota Street, P.O. Box 842, Aberdeen, SD 57401; McGregor Grain Inspection and Weighing Corporation, Inc. (McGregor), 125 B Street, P.O. Box 201, McGregor, IA 52157; and Missouri Department of Agriculture (Missouri), 1616 Missouri Boulevard, P.O. Box 630, Jefferson City, MO 65102, were each designated under the Act as an official agency to provide inspection functions on December 1, 1984.

Each official agency's designation terminates on November 30, 1987. Section 7(g)(1) of the Act states that official agencies' designations shall terminate not later than triennially and may be renewed according to the criteria and procedures prescribed in the Act.

The geographic area presently assigned to Aberdeen, in the States of North and South Dakota, pursuant to section 7(f)(2) of the Act, which may be assigned to the applicant selected for designation, is as follows:

Bounded on the North by U.S. Route 12 east to State Route 22; State Route 22 north to the Burlington-Northern (BN) line; the Burlington-Northern (BN) line east to State Route 21; State Route 21 east to State Route 49; State Route 49 south to the North Dakota-South Dakota State line; the North Dakota-South Dakota State line east to U.S. Route 83; U.S. Route 83 north to State Route 13; State Route 13 east and north to McIntosh County; the northern McIntosh County line east to Dickey County; the northern Dickey County line east to U.S. Route 281; U.S. Route 281 south to the North Dakota-South Dakota State line; the North Dakota-South Dakota State line east;

Bounded on the East by the eastern South Dakota State line (the Big Sioux River) to A54B;

Bounded on the South by A54B west to State Route 11; State Route 11 north to State Route 44 (U.S. 18); State Route 44 west to the Missouri River; the Missouri River south-southeast to the South Dakota State line; the southern South Dakota State line west; and

Bounded on the West by the western South Dakota State line north; the western North Dakota State line north to U.S. Route 12.

The following locations, all in North Dakota, outside of the foregoing contiguous geographic area are presently assigned to Aberdeen and are part of this geographic area assignment: Farmers Elevator, Guelph, Dickey County; Farmers Equity Exchange and Sun Grain, both in New England, Hettinger County; and Regent Grain Company and Regent Equity, both in Regent, Hettinger County.

Exceptions to the described geographic area are the following locations situated inside Aberdeen's area which have been and will continue to be serviced by Sioux City Inspection & Weighing Agency, Inc.: Farmers Elevator Company and Feeders Mill & Elevator, Inc., both in Platte, Charles County, South Dakota.

The geographic area presently assigned to McGregor, in the State of Iowa, pursuant to section 7(f)(2) of the Act, which may be assiged to the applicant selected for designation, is as follows:

Bounded on the North by the Iowa-Minnesota State line from the western Howard County line east to the Mississippi River;

Bounded on the East by the Mississippi River south-southeast to the southern Clayton County line;

Bounded on the South by the southern Clayton, Fayette, and Bremer County lines; and

Bounded on the West by the Western Bremer County line north to State Route 3; State Route 3 east to U.S. Route 218; U.S. Route 218 north to Chickasaw County; the western Chickasaw County line north to Howard County; the western Howard County line north to the Iowa-Minnesota State line.

Exceptions to the described geographic area are the following locations situated inside McGregor's area which have been and will continue to be serviced by Central Iowa Grain Inspection Service, Inc.: Nashua Equity Co-op, Nashua, Chickasaw County; and Plainfield Co-op, Plainfield, Bremer County.

The geographic area presently assigned to Missouri, pursuant to section 7(f)(2) of the Act, which may be assigned to the applicant selected for designation, is as follows: the entire State of Missouri.

Interested parties, including Aberdeen, McGregor, and Missouri, are hereby given opportunity to apply for official agency designation to provide the official services in each geographic area, as specified above, under the provisions of section 7(f) of the Act and § 800.196(d) of the regulations issued thereunder. Designation in each specified geographic area is for the period beginning December 1, 1987, and ending November 30, 1990. Parties wishing to apply for designation should contact the Review Branch, Compliance Division, at the address listed above, for forms and information.

Applications and other available information will be considered in determining which applicant will be designated to provide official services in a geographic area.

Pub. L. 94–582, 90 Stat. 2867, as amended. (7 U.S.C. 71 *et seq.*)

Dated: May 15, 1987.

J.T. Abshier,

Director, Compliance Division.

[FR Doc. 87–2315 Filed 5–29–87; 8:45 am]

BILLING CODE 3410–EN–M

Designation Applicant in the Cedar Rapids, Iowa, Geographic Area; Request for Comments

AGENCY: Federal Grain Inspection Service (Service), USDA.

ACTION: Notice.

SUMMARY: This notice requests comments from interested parties on the applicants for official agency designation in the Cedar Rapids, Iowa, geographic area.

DATE: Comments to be postmarked on or before July 16, 1987.

ADDRESS: Comments must be submitted in writing to Lewis Lebakken, Jr., Information Resources Staff, FGIS, USDA, Room 1661 South Building, 1400 Independence Avenue, SW., Washington, DC 20250.

Telemail users may respond to [IRSTAFF/FGIS/USDA] telemail.

Telex users may respond as follows.

To: Lewis Lebakken
TLX: 760351, ANS:FGIS UC.

All comments received will be made available for public inspection at the above address during regular business hours (7 CFR 1.27(b)).

FOR FURTHER INFORMATION CONTACT: Lewis Lebakken, Jr., telephone (202) 382–1738.

SUPPLEMENTARY INFORMATION: This action has been reviewed and determined not to be a rule or regulation as defined in Executive Order 12291 and Departmental Regulation 1512–1; therefore, the Executive Order and Departmental Regulation do not apply to this section.

FGIS announced the cancellation of designation of Cedar Rapids Grain Service, Inc., effective September 30, 1987, and requested applications for official agency designation to provide

official services within a specified geographic area in the April 1, 1987, Federal Register (52 FR 10392). Applications were to be postmarked by May 1, 1987. Florian E. Polaski and Jeffrey Polaski, Cedar Rapids, Iowa, propose to establish Mid-Iowa Grain Inspection, Inc., and have applied for designation in the entire area available for assignment.

This notice provides interested persons the opportunity to present their comments concerning the designation of the applicant. All comments must be submitted to the Information Resources Staff, Resources Management Division, at the above address.

Comments and other available information will be considered in making a final decision. Notice of the final decision will be published in the Federal Register, and the applicant will be informed of the decision in writing.

(Pub. L. 94-582, 90 Stat. 2867, as amended) (7 U.S.C. 71 *et seq*)

Dated: May 15, 1987.

J.T. Abshier,

Director, Compliance Division.

[FR Doc. 87-12316 Filed 5-29-87; 8:45 am]

BILLING CODE 3410-EN-M

DEPARTMENT OF COMMERCE

Office of the Secretary

[Docket No. 70482-7082]

Productivity Improvement Program Review List

AGENCY: Office of the Secretary, Commerce.

ACTION: Notice.

SUMMARY: Pursuant to Office of Management and Budget (OMB) Circular No. A-76 and Department of Commerce Administrative Order 201-41, the Department of Commerce has compiled an inventory of activities it operates which provide a product or service which could be obtained from a commercial source. The Department is reviewing or plans to initiate reviews for these activities to determine which, if any, should be performed by commercial sources under government contract instead of being performed "in-house" by government personnel using government facilities. Reviews are scheduled as indicated.

FOR FURTHER INFORMATION CONTACT: John O'Brien, Office of Finance and Federal Assistance, U.S. Department of Commerce, 14th & Constitution Avenue, NW., Rm. H6823, Washington, DC 20230, (202) 377-0641.

SUPPLEMENTARY INFORMATION: This notice is issued under the authority of the Budget and Accounting Act of 1921 (31 U.S.C. 501); the Office of Federal Procurement Policy Act Amendments of 1979 (41 U.S.C. 401 et seq.); Office of Management and Budget (OMB) Circular No. A-76, Performance of Commercial Activities; and Department Administrative Order (DAO) No. 201-41, "Performance of Commercial Activities." Commercial activities are those which are operated by the agency and which provide a product or service which could be obtained from a commercial source.

Sonya G. Stewart,

Director, Office of Finance and Federal Assistance.

U.S. Department of Commerce, A-76 Productivity Improvement Review List, Fiscal Year 1987, Federal Register and Commerce Business Daily

Identifier:

BEA—Bureau of Economic Analysis
CEN—Bureau of the Census
EDA—Economic Development Administration
ITA—International Trade Administration
NBS—National Bureau of Standards
NOAA—National Oceanic & Atmospheric Administration
NTIA—National Telecommunications and Information Administration
NTIS—National Technical Information Service
O/S—Office of the Secretary
Type of Review:
F—Full cost comparison
Functional Categories:
1. Automated Data Processing
2. Data Transcription and Keypunch
3. Training
4. Audiovisual
5. Food Service
6. Facilities/Grounds Maintenance
7. Mail and File
8. Architecture and Civil Engineering
9. Library
10. Laundry and Dry Cleaning
11. Warehouse/Stockhandling
12. Motor Pool/Vehicle Maintenance
13. Account Management
14. Loan Processing
"U" Unclassified

U.S. DEPARTMENT OF COMMERCE A-76 PRODUCTIVITY IMPROVEMENT REVIEW LIST FISCAL YEAR 1987 FEDERAL REGISTER AND COMMERCE BUSINESS DAILY

Identifier	Name of activity	Location of activity	Description of activity	Approx. number of FTES	Review start date	Review end date	Type of review	Functional categories (1-14)
BEA-W001-C.	Data Conversion	Washington, DC	Key-to-disk operation converting surveys, coding forms, etc. to machine readable form	13.0	09/01/86	01/15/88	F	"2"
CEN-8515-C	Library	Suitland, MD	Planning, directing and coordinating library services	20.0	05/01/85	09/30/87	F	"9"
EDA-ISS4-C	Loan Application Review and Processing	Washington, DC/Field	Loan application, review and processing. EDA is head of this joint review along with ITA (OMS4-C) and NOAA (F007-C)	59.0	07/01/86	10/15/87	F	"14"
ITA-OMS4-C	Loan Application Review and Processing	Washington, DC	Loan application review and processing. EDA (ISS4-C) is head of this joint review along with NOAA (F007-C)	5.0	07/01/86	10/15/87	F	"14"
NBS-14-C	Instrument Shops	Gaithersburg, MD	Provide instrument design, fabrication, modification, and repair for research and development programs	31.0	01/15/85	09/30/87	F	"U"

U.S. DEPARTMENT OF COMMERCE A-76 PRODUCTIVITY IMPROVEMENT REVIEW LIST FISCAL YEAR 1987 FEDERAL REGISTER AND COMMERCE BUSINESS DAILY—Continued

Identifier	Name of activity	Location of activity	Description of activity	Approx. number of FTES	Review start date	Review end date	Type of review	Functional categories (1-14)
NBS-21-C	Instrument Shops	Boulder, CO	Provide instrument design, fabrication, modification, and repair for research and development programs	16.0	03/31/86	12/31/87	F	*U*
NBS-33-C	Visual Arts	Gaithersburg, MD.	Produces scientific and technical illustrations, technical drafting, record photography film processing, and production of material for presentation	14.3	06/30/86	09/30/87	F	*4*
NBS-36-C	Technical Support for Scientific Computer.	Gaithersburg, MD.	Provides the human link between the user community and the hardware, software, and procedures which comprise the computing facility	16.0	09/30/86	09/30/87	F	*1*
NBS-45-C	Plant Operations	Boulder, CO	Grounds maintenance, central steam, electric shop, pipe shop, construction shop, paint shop, a/c and refrigeration	35.0	07/09/85	11/01/87	F	*6*
NBS-46-C	Plant Operations	Gaithersburg, MD.	Grounds maintenance, central steam, electric shop, pipe shop, construction shop, paint shop, metal shop, a/c and refrigeration	125.0	10/31/85	07/15/88	F	*6*
NBS-47-C	Consolidated Administrative Services.	Gaithersburg, MD	Janitorial service, mail service, supply operations, shuttle service, and auto repair	52.4	09/30/86	12/31/87	F	*11*12*
NOA-E006B-C.	Office of Satellite Data.	Suitland, MD	Satellite data collection, processing, and distribution	40.0	12/16/86	03/14/88	F	*1*2*U*
NOA-E008-C.	Satellite Command and Data Acquisition.	Wallops Island, VA.	Environmental satellite operations station	100.0	07/30/85	07/20/87	F	*8*
NOA-E009-C.	National Climatic Data Center.	Asheville, NC	Climate records processing, systems programming, climate library, and satellite data operations	64.0	08/01/87	12/30/88	F	*1*
NOA-F001-C.	NMFS Computer Operations.	Washington, DC/Field.	Provide computer operations and systems analysis support for NMFS	15.0	09/01/85	10/30/87	F	*1*
NOA-F007-C.	NMFS Financial Service.	Washington, DC/Field.	Loan application, processing, and portfolio maintenance. EDA (ISS4-C) is head of this joint review along with ITA (OMS4-C)	34.0	07/01/86	10/15/87	F	*14*
NOA-NOO7-C.	Marine Chart Branch.	Rockville, MD	Constructs and maintenance nautical charts, Coast Pilots, and other related marine publications	36.0	01/26/87	05/20/88	F	*8*
NOA-NOO8B-C.	Geodetic Resources Management.	Rockville, MD	Provides technical and logistical support to geodetic field units and compiles, publishes, and maintains information for the geodetic user community	154.0	08/01/86	03/31/88	F	*8*
NOA-NO22-C.	Office of Aircraft Operations.	Miami, FL	Aircraft operations	22.0	03/06/87	09/09/88	F	*0*
NOA-NO23-C.	Chart Reproduction.	Rockville, MD	Chart reproduction	68.0	08/01/86	06/14/88	F	*8*
NOA-NO24-C.	Hydrographic Field Parties.	Washington, DC/Field.	Planning activities for hydrographic surveys.	27.0	08/01/86	06/24/88	F	*8*
NOA-ROO1-C.	GFDL Computer Operations.	Princeton, NJ	Provides ADP support for the research activities conducted at GFDL	16.0	05/01/83	10/31/87	F	*1*
NOA-WOO1A-C.	NWS Engineering Activities.	Washington, DC/Field.	Provides maintenance, reconditioning, and quality control in support of the NMS technical equipment program	54.0	12/01/86	8/29/88	F	*8*

U.S. DEPARTMENT OF COMMERCE A-76 PRODUCTIVITY IMPROVEMENT REVIEW LIST FISCAL YEAR 1987 FEDERAL REGISTER AND COMMERCE BUSINESS DAILY—Continued

Identifier	Name of activity	Location of activity	Description of activity	Approx. number of FTES	Review start date	Review end date	Type of review	Functional categories (1-14)
NOA-WO11-C.	NWS Alaska Regional Activities.	Achorage, AK	Provides engineering, facilities, and instrumentation support to field installations	35.0	03/1/84	09/30/87	F	*8*
NOA-WO13-C.	NWS Hawaii Regional Activities.	Honolulu, HI	Provides electronic maintenance for NWS instrumentation and weather observations and support in Honolulu	16.0	11/01/83	09/30/87	F	*8*
NOA-WO15A-C.	NWS Kennedy Airport Observations.	New York, NY	Provides aviation weather observations	5.0	04/01/84	10/12/87	F	*U*
NOA-WO15B-C.	LaGuardia Airport Observations.	Newark, NJ	Provides aviation weather observations	6.0	04/01/84	10/08/87	F	*U*
NOA-WO117B-C.	LA Airport Observations—Long Beach.	Long Beach, LA	Provides aviation weather observations	5.0	04/01/84	09/01/87	F	*U*
NOA-WO18-C.	NWS Dulles Airport Observations.	Chantilly, VA	Provides aviation weather observations	9.0	05/01/83	07/29/87	F	*U*
NOA-WO19-C.	NMC Computer Operations.	Suitland, MD	Provides comprehensive computer services to the National Meoterological Center	50.0	03/02/87	08/02/88	F	*1*
NOA-WO20-C.	O'Hare Airport Observations.	Chicago, IL	Provides aviation weather observations	6.0	06/01/87	11/08/88	F	*U*
NOA-WO21-C.	NWS Overseas Operations.	Washington, DC/Field.	Support of overseas weather observations	31.0	12/01/85	12/29/87	F	*U*
NOA-WO22-C.	NWS Integrated Systems Laboratory.	Silver Spring, MD.	Systems development engineering	37.0	07/01/87	12/21/88	F	*8*
NOA-WO24-C.	NWS Training Center.	Kansas City, MO.	Electronics and meteorological training	42.0	07/03/86	12/14/87	F	*U*
OS-ORP1-C	Operations and Maintenance.	Washington, DC	Provides craftsmen to operate and maintain mechanical systems in HCHB	20.0	04/01/87	11/15/88	F	*6*

[FR Doc. 87-12324 Filed 5-29-87; 8:45 am]
BILLING CODE 3510-FA-M

International Trade Administration

[A-428-061]

Precipitated Barium Carbonate From the Federal Republic of Germany; Final Results of Antidumping Duty Administrative Review

AGENCY: International Trade Administration, Import Administration, Commerce.

ACTION: Notice of final results of antidumping duty administrative review.

SUMMARY: On April 3, 1987, the Department of Commerce published the preliminary results of its administrative review of the antidumping duty order and tentative determination to revoke in part on precipitated barium carbonate from the Federal Republic of Germany. The review covers one manufacturer/exporter of this merchandise and the period July 1, 1983 through June 30, 1985.

We gave interested parties an opportunity to comment on the preliminary results and tentative determination to revoke in part. We received no comments. The final results are unchanged from those presented in the preliminary results of review.

EFFECTIVE DATE: June 1, 1987.

FOR FURTHER INFORMATION CONTACT: Richard P. Bruno or Robert J. Marenick, Office of Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 377-5255.

SUPPLEMENTARY INFORMATION:

Background

On April 3, 1987, the Department of Commerce ("the Department") published in the **Federal Register** (52 FR 10787) the preliminary results of its administrative review and tentative determination to revoke in part the antidumping duty order on precipitated barium carbonate from the Federal Republic of Germany (46 FR 32884, June 25, 1981). The Department has now completed that administrative review in accordance with section 751 of the Tariff Act of 1930 ("the Tariff Act").

Scope of the Review

Imports covered by the review are shipments of precipitated barium carbonate, a chemical compound $Ba(CO_3)$, currently classifiable under item 472.0600 of the Tariff Schedules of the United States Annotated.

The review covers one manufacturer/exporter of West German precipitated barium carbonate, to the United States, Kali-Chemie AG; and the period July 1, 1983 through June 30, 1985.

Final Results of the Review

We gave interested parties an opportunity to comment on the preliminary results. We received no comments. The final results of our review are the same as those presented in the preliminary results, and we determine that no margins exist for Kali-Chemie AG, for the period July 1, 1983 through June 30, 1985.

The Department will instruct the Customs Service not to assess

antidumping duties on all appropriate entries. The Department will issue appraisement instruction directly to the Customs Service.

Further, as provided by section 751(a)(1) of the Tariff Act, since there was no margin the Department shall not require a cash deposit of estimated antidumping duties for Kali-Chemie AG. For any shipments from the one remaining known manufacturer/exporter not covered by this review, the cash deposit will continue to be the rate published in the final results of the last administrative review for that firm (50 FR 16330, April 25, 1985). For any entries of this merchandise from a new exporter not covered in this or prior administrative reviews, whose first shipment occurred after June 30, 1985 and who is unrelated to the reviewed firm, no cash deposit shall be required. These deposit requirements are effective for all shipments of precipitated barium carbonate entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice and shall remain in effect until publication of the final results of the next administrative review.

This administrative review and notice are in accordance with section 751(a)(1) of the Tariff Act (19 U.S.C. 1675(a)(1)) and § 353.53a of the Commerce Regulations (19 CFR 353.53a).

Dated: May 26, 1987.

Joseph A. Spetrini,

Acting Deputy Assistant Secretary for Import Administration.

[FR Doc. 87-12409 Filed 5-29-87; 8:45 am]

BILLING CODE 3510-DS-M

[A-588-053]

Birch 3-Ply Doorskins From Japan; Final Results of Antidumping Duty Administrative Review

AGENCY: International Trade Administration, Import Administration, Commerce.

ACTION: Notice of final results of antidumping duty administrative review.

On April 2, 1987, the Department of Commerce published the preliminary results of its administrative review of the antidumping finding on birch 3-ply doorskins from Japan. The review covers one manufacturer and one exporter of this merchandise and the period February 1, 1982 through January 31, 1986.

We gave interested parties an opportunity to comment on the preliminary results. We received no comments. The final results are unchanged from those presented in the preliminary results of review.

EFFECTIVE DATE: June 1, 1987.

FOR FURTHER INFORMATION CONTACT: Dennis U. Askey or John R. Kugelman, Office of Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone (202) 377-2923/3601.

SUPPLEMENTARY INFORMATION:

Background

On April 2, 1987, the Department of Commerce ("the Department") published in the **Federal Register** (52 FR 10599) the preliminary results of its administrative review of the antidumping finding on birch 3-ply doorskins from Japan (41 FR 7389, February 18, 1976). We have now completed the administrative review in accordance with section 751 of the Tariff Act of 1930 ("the Tariff Act").

Scope of the Review

Imports covered by the review are shipments of birch 3-ply doorskins, manufactured in a variety of glue types, sizes, and colors. birch 3-ply doorskins are currently classficable under items 240.1420, 240.1440, and 240.1460 of the Tariff Schedules of the United States Annotated.

The review covers one manufacturer and one exporter of Japanese birch 3-ply doorskins to the United States and the period February 1, 1982 through January 31, 1986.

Final Results of the Review

We invited interested parties to comment on the preliminary results. We received no comments. Based on our analysis, the final results of review are the same as those presented in the preliminary results of review, and we determine that no margine exist for Sanmoku/C.Itoh for the period February 1, 1982 through January 31, 1986.

The Department shall instruct the Customs Service not to assess antidumping duties on all appropriate entries.

Further, as provided for by section 751(a)(1) of the Tariff Act, a cash deposit of estimated antidumping duties shall not be required for these firms. For any shipments from the remaining known manufacturers and/or exporters not covered by this review, the cash deposit will continue to be at the rate published in the final results of the last administrative review for each of these firms (48 FR 33026, July 20, 1983). For any future entries of this merchandise from a new exporter, not covered in this or prior administrative reviews, whose first shipments occurred after Jnauary 31, 1986 and who is unrelated to any reviewed firm or any previously reviewed firm, no cash deposit shall be required.

These cash deposit requirements are effective for all shipments of Japanese birch 3-ply doorskins entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice and shall remain in effect until publication of the final results of the next administrative review.

This administrative review and notice are in accordance with section 751(a)(1) of the Tariff Act (19 U.S.C. 1675 (a)(1)) and § 353.53a of the Commerce Regulations (19 CFR 353.53a).

Dated: May 26, 1987.

Joseph A. Spetrini,

Acting Deputy Assistant Secretary Import Administration.

[FR Doc. 87-12405 Filed 5-29-87; 8:45 am]

BILLING CODE 3510-DS-M

[A-401-004]

Carton-Closing Staples and Staple Machines From Sweden; Final Results of Antidumping Duty Administrative Review

AGENCY: International Trade Administration, Import Administration, Commerce.

ACTION: Notice of final results of antidumping duty administrative review.

SUMMARY: On April 9, 1987, the Department of Commerce published the preliminary results of its administrative review of the antidumping duty order on carton-closing staples and staple machines from Sweden. The review covers two manufacturer/exporters of this merchandise, Josef Kihlberg AB and Grytgols Bruks AB, and the periods December 1, 1983 through November 30, 1984 and December 1, 1983 through January 25, 1985, respectively.

We gave interested parties an opportunity to comment on the preliminary results. We received no comments. Based on our analysis, the final results of review are unchanged from those presented in the preliminary results.

EFFECTIVE DATE: June 1, 1987.

FOR FURTHER INFORMATION CONTACT: Katherine Glover or David P. Mueller, Office of Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 377-1130/2923.

SUPPLEMENTARY INFORMATION:

Background

On April 9, 1987 the Department of Commerce ("the Department") published in the **Federal Register** (52 FR 11523) the preliminary results of its administrative review of the antidumping duty order on carton-closing staples and staple machines from Sweden. The Department has now completed its review.

Scope of the Review

Imports covered by the review are shipments of certain carton-closing staples in strip form and certain non-automatic carton-closing staple machines. Carton-closing staples are u-shaped wide crown fastening devices used to secure and close the flaps of corrugated paperboard cartons. They generally have crown widths of 1¼ inch or more, and cross-sectional dimensions vary from .037–.040 inches by .074–.092 inch. The staples are made of steel, most often copper-coated or galvanized.

Non-automatic wide crown carton-closing staple machines use the wide crown staples described above and can be divided into two categories, hand-held top closing staple machines and free-standing bottom closing machines.

Such staples and staple machines are currently classifiable under items 646.2000 and 662.2065, respectively, of the Tariff Schedules of the United States Annotated.

The review covers two manufacturer/exporters, Josef Kihlberg AB and Grytgols Bruks AB, of carton-closing staples and staple machines from Sweden and the periods December 1, 1983 through November 30, 1984 and December 1, 1983 through January 25, 1985, respectively.

Final Results of the Review

We invited interested parties to comment on the preliminary results. We received no comments or requests for a hearing. Based on our analysis, the final results of our review are unchanged from those we presented in the preliminary results, and we determine that the following margins exist:

Manufacturer/exporter	Time period	Margin (percent)
Josef Kihlberg AB:		
Staples	12/82–11/84	.6
Staples Machines	xd	6.0
Grytgols Bruks AB Staples.	12/83–1/25/85	0

The Department will instruct the Customs Service to assess antidumping duties on all appropriate entries. Individual differences between United States price and foreign market value may vary from the percentages stated above. The Department will issue appraisement instructions directly to the Customs Service.

Further, as provided for in section 751(a)(1) of the Tariff Act and based on the above margins, no cash deposit of estimated antidumping duties shall be required for shipments by Grytgols Bruks AB. Because we have already published the final results of a review for a later period for Josef Kihlberg, the rate of .7 percent of staple machines established in the final results of that review (52 FR 9321) shall be required for shipments by Josef Kihlberg AB. Since the rate on staples was *de minimis* for cash deposit purposes in that review, no cash deposit of estimated antidumping duties shall be required for shipments of staples by Josef Kihlberg AB.

For any future entries of this merchandise from a new exporter not covered in this or a prior administrative review, whose first shipments occurred after November 30, 1985 and who is unrelated to either a reviewed firm or any other previously reviewed firm, a cash deposit of .7 percent on staple machines established in the final results of the earlier review shall be required. No cash deposit of antidumping duties shall be required for shipments of carton-closing staples.

These deposit requirements are effective for all shipments of Swedish carton-closing staples and staple machines entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review.

This admninistrative review and notice are in accordance with section 751(a)(1) of the Tariff Act (19 U.S.C. 1675(a)(1) and § 353.53a of the Commerce Regulations (19 CFR 353.53a).

Dated: May 26, 1987.

Joseph A. Spetrini,

Acting Deputy Assistant Secretary, Import Administration.

[FR Doc. 87–12406 Filed 5–29–87; 8:45 am]

BILLING CODE 3510-DS-M

[A-583-606]

Certain Light-Walled Rectangular Welded Carbon Steel Pipes and Tubes From Taiwan; Final Determination of Sales at Less Than Fair Value

AGENCY: International Trade Administration, Import Administration, Commerce.

ACTION: Notice.

SUMMARY: We have determined that certain light-walled rectangular welded carbon steel pipes and tubes (light-walled rectangular pipes and tubes) from Taiwan are being, or are likely to be, sold in the United States at less than fair value. We have notified the U.S. International Trade Commission (ITC) of our determination and have directed the U.S. Customs Service to continue to suspend the liquidation of all entries of light-walled rectangular pipes and tubes from Taiwan that are entered, or withdrawn from warehouse, for consumption, on or after March 17, 1987 and to require a cash deposit or bond for each entry in an amount equal to the estimated dumping margin as described in the "Suspension of Liquidation" section of this notice.

EFFECTIVE DATE: June 1, 1987.

FOR FURTHER INFORMATION CONTACT: Paul Tambakis or Charles Wilson, Office of Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 377–4136 or 377–5288.

SUPPLEMENTARY INFORMATION:

Final Determination

We have determined that light-walled rectangular pipes and tubes from Taiwan are being, or are likely to be, sold in the United States at less than fair value, as provided in section 735(a) of the Tariff Act of 1930, as amended (the Act) (19 U.S.C. 1673d(a)). We made fair value comparisons on 100 percent of the sales of the class or kind of merchandise to the United States by the sole respondent during the period of investigation, May 1 through October 31, 1986. The weighted-average margin is shown in the "Suspension of Liquidation" section of this notice.

Case History

On March 11, 1987, we made an affirmative preliminary determination (51 FR 8331, March 17, 1987). Since then, as required by the Act, we afforded interested parties an opportunity to submit oral and written comments addressing the issues arising in this investigation. On April 13, 1987, we held a public hearing to allow parties to address the issues.

Scope of Investigation

The products covered by this investigation are certain light-walled welded carbon steel pipes and tubes, of rectangular (including square) cross-section, having a wall thickness of less than 0.156 inch, as provided for in item 610.4928 of the *Tariff Schedules of the United States Annotated (TSUSA).*

Fair Value Comparisons

We investigated sales of light-walled rectangular pipes and tubes to the United States during the period May 1 through October 31, 1986. Because Yieh Hsing accounted for all sales of this merchandise from Taiwan, we limited our investigation to this company.

To determine whether sales of the subject merchandise in the United States were made at less than fair value, we compared the United States price with the foreign market value for the company under investigation. We used data provided in the response, as explained in the "Foreign Market Value" section of this notice, except where otherwise noted.

United States Price

As provided in section 772(b) of the Act, we used the purchase price of the subject merchandise to represent United States price since the merchandise was purchased by unrelated U.S. customers directly from the foreign manufacturer prior to importation. We calculated purchase price based on the packed, c. & f., c.i.f. or f.o.b. prices to unrelated purchasers in the United States. We made deductions, where appropriate, for foreign inland freight, brokerage and handling charges, bank charges, ocean freight and marine insurance. We made additions to purchase price for duty drawback (i.e., import duties which were rebated, or not collected, by reason of the exportation of the merchandise to the United States) pursuant to section 772(d)(1)(B) of the Act.

Foreign Market Value

In accordance with section 773(e) of the Act, we calculated foreign market value based on constructed value. Since Yieh Hsing had no viable home market, in accordance with section 773(a)(1)(B) of the Act and § 353.5 of our regulations, respondent reported sales to Saudi Arabia, its largest third country market, as the basis for foreign market value. The petitioners alleged that these third country sales were at prices below the cost of producing the merchandise. We examined production costs which included all appropriate costs for materials, fabrication and general expenses. We found insufficient sales to Saudi Arabia above the cost of production to allow us to use third country prices for foreign market value in accordance with section 773(b) of the Act.

Cost of Production

In determining the cost of production for Yieh Hsing, the Department relied on "best information available" because during verification, major factors (e.g. materials) used in the calculation of the cost of production could not be verified.

Additionally, in its response the company did not present the actual quantities of materials and other components which it used in the manufacturing of the products, but developed a cost for these components based on formulas. Analysis of these formulas revealed major conceptual inaccuracies. Therefore, even if the data used in the formula were verified, the submission could not have been used.

For the cost of production, the Department used certain company data which was verified and adjusted this cost, when necessary, to quantify more appropriately the per unit costs. For information which was not verified, the respondent's cost information was supplemented with information submitted by petitioners. The Department relied upon the petitioners' material usage information and the prices for the materials paid by the respondent. For labor and factory overhead, the respondent's costs were used, but reallocated to restate the per unit costs more appropriately. General expenses were also reallocated, as a percentage of cost of goods, since the theoretical basis for developing the per unit expense used by the respondent was not acceptable.

Constructed Value

Since we found there were insufficient sales above the cost of production, as defined in section 773(b) of the Act, we used constructed value as the basis for calculating foreign market value.

In accordance with section 773(e) of the Act, the constructed value included the material and fabrication expenses incurred to produce the product sold in the U.S. market. Since general expenses were greater than 10 percent, we used actual general expenses of the company. Actual profit could not be determined because the actual costs could not be verified. Therefore, the statutory minimum profit of eight percent was added. We also added the cost of U.S. packing. We made an adjustment to constructed value for differences between unrelated commissions paid in the two markets in accordance with § 353.15(b) of our regulations.

Currency Conversion

We made currency conversions from new Taiwan dollars to U.S. dollars in accordance with § 353.56(a) of our regulations, using the certified daily exchange rates furnished by the Federal Reserve Bank of New York.

Verification

We verified the information used in making our final determination in accordance with section 776(a) of the Act. We used standard verification procedures, including examination of relevant sales and financial records of the company under investigation. However, there was a lack of sufficient supporting documentation for certain portions of the respondent's cost of production. Therefore, we determined that portions of the cost of production data submitted by the respondent could not be verified.

Petitioners' Comments

Petitioners' comment 1: The petitioners argue that neither the response nor the verification accurately reflects rerolling costs. Petitioners assert that thinner gauge pipe would require more extensive rerolling processing. The petitioners also suggest that since the rerolling processing would not be less expensive than cold-rerolling costs, the amount of the average price difference between hot-rolled steel and cold-rolled steel should be used for rerolling costs.

DOC position: Since the exact coil used to produce each size pipe could not be identified and the gauge of the coil and pipe varied within approximately the same range, the Department did not assume that thinner pipe would require more rerolling. The rerolling expenses were averaged over all pipe produced.

Petitioners' comment 2: The petitioners argue that the respondent's method to derive the input of coil using theoretical weight, subtracting an amount representing a saving because of the lower tolerance level for the wall thickness of the pipe and adding scrap which was sold, will not appropriately state material usage. They contend that a weight saving cannot be assumed to be a consistent amount and that scrap sold should not be compared to pipe produced.

DOC position: The Department did not consider the amount of the input of coil to be appropriately calculated or verified and used "best information available." See the "Foreign Market Value" section of this notice.

Petitioners' comment 3: The petitioners contend that since the verification report indicates that the company maintained adequate records to allocate conversion costs on machine time, the theoretical methodology should not be accepted.

DOC position: The Department does not have specific verified machine times. Therefore, we used "best information" for the allocation of conversion costs for

all processes. We did use the verified "through-put" rate in the forming stage to develop labor costs for this process since this data was available. See the "Foreign Market Value" section of this notice.

Petitioners' comment 4: The petitioners argue that the respondent's methodology for allocating interest expenses based on assets used by the various operations of the company is not appropriate since interest expense is general and cannot be specifically tied to an operation.

DOC position: The Department agrees. Funds used to finance the company's operations are fungible and, therefore, the interest expense was allocated to all products based on the costs incurred for the goods sold.

Petitioners' comment 5: Petitioners urge the Department to add the total duty paid on imported raw materials to U.S. price and foreign market value, rather than adding the amount of duty drawback since petitioners contend that drawback amounts were excessive when compared to duties paid.

DOC position: We disagree. As required by the Act, we have added the total verified amount of duty drawback for each sale, instead of adding duties paid on raw materials. The verification showed that the actual amount of duty drawback granted was slightly less than duties which would have been paid, and not more, as indicated by petitioners. This nominal difference between duty paid on imported coil and duty rebated on exported pipes and tubes is collected by the Ministry of Finance as a handling charge for maintaining drawback accounts.

Respondent's Comments

Respondent's comment 1: The respondent argues that although the verification report does not directly disparage Yieh Hsing's actions or methods, certain statements have negative implications—specifically, that the 1986 trial balance of the company was not presented until the second to the last day of the verification. Respondent contends that the company did not have audited 1986 financial statements or audited quarterly statements and that these statements had not been requested by the Department's verification workplan presented to the respondent two days before verification.

DOC position: The 1986 financial statements were requested by the Department in its questionnaire. Since such statements were not available, only then did the Department resort to the possible use of the trial balance as a means to reconcile the data provided by the respondent. Although the trial balance was not specified by the Department's verification workplan, this workplan is provided by the Department only as an aid to the respondent. The workplan, as stated in its first paragraph, does not limit the Department's ability to verify only those areas and to obtain only those documents specifically requested. The Department has the right to request any documents and verify any areas which may be needed for a satisfactory completion of the verification.

A trial balance is a primary financial document maintained in the ordinary course of business by a company, and therefore, should have been readily available. Since the trial balance is used as a means to reconcile all the various cost components, in the absence of an audited financial statement it must be an integral part of the total verification.

Respondent's comment 2: The respondent contends that the amount of scrap sold by the company is an adequate reflection of the amount of scrap produced, and therefore the actual output weight can be divided by the yield to derive the actual input weight.

DOC position: The Department disagrees. All scrap generated by the process may not be retrieved and, if retrieved, may not be sold. Therefore, the input would be understated if only the amount sold was added to the output.

Respondent's comment 3: Respondent contends that the methods used to allocate materials, labor, and overhead—namely, the theoretical weights obtained from the sales records, were the most appropriate bases of allocation; and that theoretical weights were verified by the Department during the sales verification.

DOC position: Production costs for a period of time should not be allocated based on the weight of the products sold during that time. Production during the period of investigation would not be equal to the sales since certain pipe sold had been produced prior to such time and other pipe produced was inventoried during that period.

Additionally, the weights of the various sizes of pipe, individually and in total, used by the respondent for the allocation of production costs, did not reconcile to the total weights or the various individual weights verified for sales.

Respondent's comment 4: The respondent contends that duties should be included in material costs only to the extent duties are paid. Since such duties are rebated if such materials are used in export, these amounts are contingent liabilities and material costs should not include the rebated duties.

DOC position: The Act requires that duties paid and rebated upon exportation be added to the U.S. sales prices. Section 772(d)(1)(B). To reflect a commensurate amount of actual duties in the "foreign market," the duties rebated on materials were included as material costs.

Respondent's comment 5: The respondent argues that long-term interest expense should be allocated to product groups based on the value of the fixed assets used for that group and then allocated to the sales units based on production.

DOC position: The Department believes that expressing interest expenses as a percentage of the cost of goods is an appropriate method for the allocation of such expenses. See *Mirrors in Stock Sheet and Lehr End Sizes from Belgium* (52 FR 3156). The interest expense in incurred during a period of time; if allocated based on quantities produced and not on the goods sold, total interest expense for this period would not be captured since part of the interest expense would be attributed to those products which may have been inventoried.

Respondent's comment 6: Respondent contends that in the previous pipe and tube investigation in 1985, the Department accepted the methodology used by the respondent in computing the cost of production.

DOC position: The Department did not accept the respondent's methodology of computing the cost of production in the 1985 pipe and tube investigation for the final determination. In fact, in its final determination in the 1985 investigation, the Department used the best information available (which included certain information contained in the petition) and the respondent's methodology was rejected.

Respondent's comment 7: Respondent claims that the Department erred in its preliminary determination by using an incorrect conversion rate which had the effect of overstating adjustments relating to the sales prices and understated the constructed value calculations.

DOC position: We agree and have used the correct conversion factor for our final calculations.

Respondent's comment 8: The respondent states that the Department erred in the computation of the cost of production for the preliminary determination by using the average duty drawback added to the raw material costs rather than a weighted average duty drawback.

DOC position: For the final determination, the Department used the percentage of duties on purchases of raw materials. The average duty drawback was used in the preliminary determination because of the lack of specific data.

Respondent's comment 9: Respondent claims that the Department double-counted the packing expenses in computing the constructed value in the preliminary determination, since the cost of packing was included in the cost of production.

DOC position: We agree that we double-counted packing labor. This has been corrected. We note, however, that the Department had no basis to know that the cost of packing materials was included in the cost of production, since this fact was not disclosed in the submission.

Respondent's comment 10: The respondent declares that it included the costs of ocean freight, insurance, brokerage, and banking charges in selling, general and administrative expenses in the submission, and that these should be taken out, since the Department compares ex-factory prices to cost of production.

DOC position: Selling, general and administrative expenses have been adjusted in the final determination to exclude ex-factory costs. Again, it was not disclosed to DOC until verification that these expenses were included.

Respondent's comment 11: Respondent argues that Yieh Hsing's claim for duty drawback should be accepted on those sales for which drawback was applied but not yet received based on a presumption of regularity. Respondent refers to the verification where it was demonstrated that in other instances drawback was routinely granted once an application was filed. Respondent also claims that Yeih Hsing's drawback claim should be accepted on those contracts where applications were not filed at the time of the verification, but, have since been submitted to the Ministry of Finance for payment.

DOC Position: Regarding the first point raised by respondent, we agree and have allowed the drawback claim because the verification did not show any instances where drawback applications had been denied. We disagree, however, with respondent's contention that drawback should be granted on sales where applications were not filed until after verification. We disallowed Yieh Hsing's drawback claim on sales where drawback amounts could not be verified through the existence of a drawback application and other relevant documents.

Suspension of liquidation: In accordance with section 733(d) of the Act, we are directing the U.S. Customs Service to continue to suspend liquidation of all entries of light-walled rectangular pipes and tubes from Taiwan that are entered, or withdrawn from warehouse, for consumption, on or after March 17, 1987, the date of publication of our notice of preliminary determination in the **Federal Register**. The U.S. Customs Service shall continue to require a cash deposit or the posting of a bond equal to the estimated weighted-average amounts by which the foreign market value of the merchandise subject to this investigation exceeds the United States price as shown in the table below. The cash deposit or bonding rate established in the preliminary determination shall remain in effect with respect to entries or withdrawal from warehouse made prior to the date of publication of this notice in the **Federal Register**. The suspension of Liquidation will remain in effect until further notice.

Manufacturer/producer/exporter	Margin percentage
Yieh Hsing Enterprise Co., Ltd.	17.29
All others	17.29

ITC Notification

In accordance with section 735(d) of the Act, we have notified the ITC of our determination. In addition, we are making available to the ITC all nonprivileged and nonproprietary information relating to this investigation. We will allow the ITC access to all privileged and business proprietary information in our files, provided the ITC confirms that it will not disclose such information either publicly or under administrative protective order without the written consent of the Deputy Assistant Secretary for Import Administration. The ITC will determine whether these imports materially injure, or threaten material injury to, a United States industry within 45 days of the publication of this notice.

This determination is published pursuant to section 735(d) of the Act (19 U.S.C. 1673d(d)).

Dated: May 26, 1987.

Paul Freedenberg,

Assistant Secretary for Trade Administration.

[FR Doc. 87-12407 Filed 5-29-87; 8:45 am]

BILLING CODE 3510-DS-M

[A-247-003]

Portland Cement, Other Than White, Nonstaining Portland Cement, From the Dominican Republic; Final Results of Antidumping Duty Administrative Review

AGENCY: International Trade Administration, Import Administration, Commerce.

ACTION: Notice of final results of antidumping administrative review.

SUMMARY: On April 3, 1987, the Department of Commerce published the preliminary results of its administrative review of the antidumping finding on Portland cement, other than white, nonstaining Portland cement, from the Dominican Republic. The review covers three manufacturers and/or exporters of this merchandise to the United States and the period June 1, 1983 through April 30, 1985.

We gave interested parties an opportunity to comment on the preliminary results. We received no comments. Based on our analysis, the final results of review are unchanged from those presented in the preliminary results.

EFFECTIVE DATE: June 1, 1987.

FOR FURTHER INFORMATION CONTACT: Knobae C.H. Brooks or Robert J. Marenick, Office of Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 377-5255.

SUPPLEMENTARY INFORMATION:

Background

On April 3, 1987, the Department of Commerce ("the Department") published in the **Federal Register** (52 FR 10786) the preliminary results of its administrative review of the antidumping finding on Portland cement, other than white, nonstaining Portland cement, from the Dominican Republic (28 FR 4507, May 4, 1963).

The Department has not completed that administrative review in accordance with section 751 of the Tariff Act of 1930 ("the Tariff Act").

Scope of the Review

Imports covered by the review are shipments of Portland cement, other than white, nonstaining Portland cement, currently classifiable under items 511.1420 and 511.1440 of the Tariff Schedule of the United States Annotated.

The review covers three manufacturers and/or exporters of Dominican Republic Portland cement, other than white, nonstaining Portland

cement, to the United States and the period June 1, 1983 through April 30, 1985

Final Results of Review

We gave interested parties an opportunity to comment on the preliminary results. We received no comments. Based on our analysis, the final results of review are the same as those presented in the preliminary results of review, and we determine that for the period June 1, 1983 through April 30, 1985 a margin of 10.33 percent exists for the three manufacturers and/or exporters, Cementos Nacionales, S.A.; Comercializadora del Caribe, S.A.; and Fabrica Dominicana de Cemento, C. por A.

The Department will instruct the Customs Service to assess antidumping duties on all appropriate entries. The Department will issue appraisement instructions directly to the Customs Service.

Further, as provided for by section 751(a)(1) of the Tariff Act a cash deposit of estimated antidumping duties based upon the above margin shall be required for these firms. For any shipments from a new exporter not covered by this or prior administrative reviews whose first shipments occurred after April 30, 1985 and who is unrelated to any reviewed firm, a cash deposit of 10.33 percent shall be required. These deposit requirements are effective for all shipments of Dominican Republic Portland cement, othe than white, nonstaining Portland cement, entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice and shall remain in effect until publication of the final results of the next administrative review.

This administrative review and notice are in accordance with section 751(a)(1) of the Tariff Act (19 U.S.C. 1675(a)(1)) and § 353.53a of the Commerce Regulations (19 CFR 353.53a).

Dated: May 26, 1987.

Joseph A. Spetrini,

Acting Deputy Assistant Secretary for Import Administration.

[FR Doc. 87-12408 Filed 5-29-87; 8:45 am]

BILLING CODE 3510-DS-M

[A-427-001]

Sorbitol From France; Final Results of Antidumping Duty Administrative Review

AGENCY: International Trade Administration, Import Administration, Commerce.

ACTION: Notice of final results of antidumping duty Administrative Review.

SUMMARY: On April 2, 1987, the Department of Commerce published the preliminary results of its administrative review of the antidumping duty order on Sorbitol from France. The review covers one manufacturer of this merchandise and the period April 1, 1985 through March 31, 1986.

We gave interested parties an opportunity to comment on the preliminary results. We received no comments and the final results remain unchanged from those presented in our preliminary results of review.

EFFECTIVE DATE: June 1, 1970.

FOR FURTHER INFORMATION CONTACT: Maureen Rosch or David Mueller, Office of Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 377-2923.

SUPPLEMENTARY INFORMATION:

Background

On April 2, 1987, the Department of Commerce ("the Department") published in the **Federal Register** (52 FR 10600) the preliminary results of its administrative review of the antidumping duty order on sorbitol from France (52 FR 15391, April 9, 1982). We have now completed the administrative review in accordance with section 751 of the Tariff Act of 1930 ("the Tariff Act").

Scope of the Review

Imports covered by the review are shipments of crystalline sorbitol. Crystalline sorbitol is a polyol produced by the catalytic hydrogenation of sugar (glucose). It is used in the production of sugarless gum, candy, groceries, and pharmaceuticals. Crystalline sorbitol is currently classifiable under item 493.6820 of the Tariff Schedules of the United States Annotated.

The review covers one French manufacturer of crystalline sorbitol exported to the United States, Roquette Freres, and the period April 1, 1985 through March 31, 1986.

Final Results of the Review

We invited interested parties to comment on the preliminary results. We received no comments or requests for a hearing. Based on our analysis, the final results of our review are unchanged from those we presented in the preliminary results, and we determine that a margin of 12.07 percent exists for the period April 1, 1985 through March 31, 1986.

The Department will instruct the Customs Service to assess antidumping duties on all appropriate entries. The Department will issue appraisement instructions directly to the Customs Service. Individual differences between United States price and foreign market value may vary from the percentage stated above.

Further, as provided for by section 751(a) of the Tariff Act, a cash deposit of estimated antidumping duties of 12.07 percent shall be required.

For any future entries of this merchandise from a new exporter, not covered in this or prior administrative reviews, whose first shipments occurred after March 31, 1986 and who is unrelated to the reviewed firm or any previously reviewed firm, a cash deposit of 12.07 percent shall be required. This deposit requirement is effective for all shipments of French sorbitol entered or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review.

This administrative review and notice are in accordance with section 751(a)(1) of the Tariff Act (19 U.S.C. 1675(a)(1)) and § 353.53a of the Commerce Regulations (19 CFR 353.53a)

Dated: May 26, 1987.

Joseph A. Spetrini,

Acting Deputy Assistant Secretary for Import Administration.

[FR Doc. 87-12410 Filed 5-29-87; 8:45 am]

BILLING CODE 3510-DS-M

[A-475-104]

Strontium Nitrate From Italy; Final Results of Antidumping Duty Administrative Review

AGENCY: International Trade Administration, Import Administration, Commerce.

ACTION: Notice of final results of antidumping duty administrative review.

SUMMARY: On March 2, 1987, the Department of Commerce published the preliminary results of its administrative review of the antidumping duty order on strontium nitrate from Italy. The review covers one manufacturer/exporter of this merchandise and the period June 1, 1983 through May 14, 1984.

We gave interested parties an opportunity to comment on the preliminary results. We received no comments. The final results are unchanged from those presented in the preliminary results of review.

EFFECTIVE DATE: June 1, 1987.

FOR FURTHER INFORMATION CONTACT: Richard P. Bruno, or Robert J. Marenick, Office of Compliance, International Trade Administration, U.S. Department

of Commerce, Washington, DC 20230; telephone: (202) 377–5255.

SUPPLEMENTARY INFORMATION:

Background

On March 2, 1987, the Department of Commerce ("the Department") published in the **Federal Register** (52 FR 6207) the preliminary results of its administrative review of the antidumping duty order on strontium nitrate from Italy (46 FR 32864, June 25, 1981). The Department has now completed that administrative review in accordance with section 751 of the Tariff Act of 1930 ("the Tariff Act").

Scope of the Review

Imports covered by the review are shipments of strontium nitrate, a chemical compound $Sr(NO_3)_2$, currently classifiable under item 421.7400 of the Tariff Schedules of the United States Annotated.

The review covers the one known manufacturer/exporter of Italian strontium nitrate, Societa Bario e Derivati S.p.A. ("SABED"), and the period June 1, 1983 through May 14, 1984.

Final Results of the Review

We gave interested parties an opportunity to comment on the preliminary results. We received no comments. The final results of our review are the same as those presented in the preliminary results of the review, and we determined that no margins exist for Societa Bario e Derivati S.p.A. ("SABED"), for the period June 1, 1983 through May 14, 1984.

The Department will instruct the Customs Service not to assess antidumping duties on all appropriate entries. The Department will issue appraisement instructions directly to the Customs Service.

Further, as provided by section 751(a)(1) of the Tariff Act, since there was no margin the Department shall not require a cash deposit of estimated antidumping duties for SABED. For any entries of this merchandise from a new exporter not covered in this or prior administrative reviews, whose first shipments occurred after May 14, 1984 and who is unrelated to the reviewed firm, no cash deposit shall be required. These deposit requirements are effective for all shipments of Italian strontium nitrate entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice and shall remain in effect until publication of the final results of the next administrative review.

This administrative review and notice are in accordance with section 751(a)(1) of the Tariff Act (19 U.S.C. 1675(a)(1)) and § 353.53a of the Commerce Regulations (19 CFR 353.53a).

Dated: May 26, 1987.

Joseph A. Spetrini,

Acting Deputy Assistant Secretary for Import Administration.

[FR Doc. 87–12411 Filed 5–29–87; 8:45 am]

BILLING CODE 3510–DS–M

[A–588–014]

Tuners (of the Type Used in Consumer Electronic Products) From Japan; Final Results of Antidumping Duty; Administrative Review

AGENCY: International Trade Administration; Import Administration Commerce.

ACTION: Notice of final results of antidumping duty administrative review.

SUMMARY: On April 9, 1987 the Department of Commerce published the preliminary results of its administrative review of the antidumping finding on tuners (of the type used in consumer electronic products) from Japan. The review covers three manufacturers and/or exporters of this merchandise to the United States and generally the period December 1, 1982 through November 30, 1984.

We gave interested parties an opportunity to comment on the preliminary results. We received no comments.

Based on our analysis, the final results of review are unchanged from those presented in the preliminary results.

EFFECTIVE DATE: June 1, 1987.

FOR FURTHER INFORMATION CONTACT: Edward Haley or Robert J. Marenick, Office of Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC. 20230; Telephone: (202) 377–5289/5255.

SUPPLEMENTARY INFORMATION:

Background

On April 9, 1987, the Department of Commerce ("the Department") published in the **Federal Register** (52 FR 11526) the preliminary results of its administrative review of the antidumping finding on tuners (of the type used in consumer electronic products) from Japan (35 FR 18914, December 12, 1970). The Department has now completed that administrative review in accordance with section 751 of the Tariff Act of 1930 ("the Tariff Act").

Scope of the Review

Imports covered by the review are shipments of tuners (of the type used in consumer electronic products) consisting primarily of television receiver tuners and tuners used in radio receivers such as household radios, stereo and high fidelity radio systems, and automobile radios. They are virtually all in modular form, aligned and ready for simple assembly into the consumer electronic product for which they were designed. The term "consumer electronic products" includes television sets, radios, and other electronic products of the type commonly bought at retail by household consumers, whether or not used in or around the household. Excluded are complete stereophonic tuners which are consumer products themselves, but not excluded are modular-type stereophonic tuners. Tuners covered by the finding are currently classifiable under items 685.0200 and 685.3277 of the Tariff Schedules of the United States Annotated.

The review covers three manufacturers and/or exporters of Japanese tuners to the United States and generally the period December 1, 1982 through November 30, 1984. There were no known shipments of this merchandise to the United States by the three firms during the period, and there are no known unliquidated entries.

Final Results of Review

We invited interested parties to comment on the preliminary results, and we received no comments. Based on our analysis, the final results of review are the same as those presented in the preliminary results of review, and we determine that the following margins exist during the periods indicated.

Manufacturer/exporter	Time period	margin (percent)
Marubeni Corp.	9/01/84–11/30/84	[1] 23.66
Murata Manufacturing Co., Ltd.	9/01/84–11/30/84	[1] 1.9
Toa electric Co., Ltd.	12/01/82–11/30/84	[1] 1.9

[1]No shipments during the period.

The Department will instruct the Customs Service to assess antidumping duties on all appropriate entries. We will issue appraisement instructions directly to the Customs Service.

In accordance with section 751 (a)(1) of the Tariff Act, a cash deposit of estimated antidumping duties based on the above margins shall be required for

these firms. For any further shipments from the remaining known manufacturers and/or exporters not covered in this review, a cash deposit shall be required at the rates published in the final results of the last administrative review for each of those firms (49 FR 31316, August 6, 1984). The above margins do not change the current zero percent for cash deposits of estimated antidumping duties for shipments from a new exporter (52 FR 5478, February 23, 1987). These deposit requirements are effective for all shipments of Japanese tuners (of the type used in consumer electronic products) entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice and shall remain in effect until publication of the final results of the next administrative review.

This administrative review and notice are in accordance with section 751(a)(1) of the Tariff Act (19 U.S.C. 1675(a)(1)) and § 353.53a of the Commerce Regulations (19 CFR 353.,53a).

Dated: May 26, 1982.

Joseph A. Sperini,

Acting Deputy Assistant Secretary for Import Administration.

[FR Doc. 87-12412 Filed 5-29-87; 8:45 am]

BILLING CODE 3510-DS-M

[C-357-001]

Leather Wearing Apparel From Argentina; Final Results of Countervailing Duty; Administrative Review

AGENCY: International Trade Administration, Import Administration Commerce.

ACTION: Notice of final results of countervailing duty administrative review.

SUMMARY: On April 8, 1987, the Department published the preliminary results of its adminstrative review of the countervailing duty order on leather wearing apparel from Argentina. We determine the total bounty or grant for July 1, 1983 through December 31, 1984 to be zero.

EFFECTIVE DATE: June 1, 1987.

FOR FURTHER INFORMATION CONTACT: Sylvia Chadwick or Bernard Carreau, Office of Compliance, International Trade Administration, U.S. Department of Commerce, Washinton, DC 20230; Telephone: (202) 377-2786.

SUPPLEMENTARY INFORMATION:

Background

On April 8, 1987, the Department of Commerce ("the Department") published in the **Federal Register** (52 FR 11300) the preliminary results of its administrative review of the countervailing duty order on leather wearing apparel from Argentina (48 FR 11480; March 18, 1983). On September 17, 1985, an interested party, the Amalgamated Clothing and Textile Workers Union, AFL/CIO, requested in accordance with 19 CFR 355.10 an administrative review of the order. We published the initiation on May 30, 1986 (51 FR 19580). The Department has now conducted this adminstrative review in accordance with section 751 of the Tariff Act of 1930 ("the Tariff Act").

Scope of Review

Imports covered by the review are shipments of Argentine leather wearing apparel, currently classifiable under items 791.7620, 791.7640 and 791.7660 of the Tariff Schedules of the United States Annotated.

The review covers the period July 1, 1983 through December 31, 1984 and three programs: (1) The reembolso, a cash rebate of taxes; (2) pre-export financing; and (3) incentives for exports from southern ports.

Final Results of Review

We gave interested parties an opportunity to comment on the preliminary results. We received no comments. The final results of the review are the same as the preliminary results.

The Department will instruct the Customs Service not to assess countervailing duties on any shipments of this merchandise exported on or after July 1, 1983 and on or before December 31, 1984.

Further, the Department will instruct the Customs Service not to collect a cash deposit of estimated countervailing duties, as provided by section 751(a)(1) of the Tariff Act, on any shipments of leather wearing apparel from Argentina entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice. This deposit requirement shall remain in effect until publication of the final results of the next adminsitrative review.

This administrative review and notice are in accordance with section 751(a)(1) of the Tariff Act (19 U.S.C. 1675(a)(1)) and §355.10 of the Commerce Regulations (19 CFR 355.10).

Dated: May 26, 1987.

Joseph A. Spetrini,

Acting Deputy Assistant Secretary, Import Administration.

[FR Doc. 87-12413 Filed 5-29-87; 8:45 am]

BILLING CODE 3510-DS-M

DEPARTMENT OF EDUCATION

Office of Educational Research and Improvement

Intent To Repay to the Indiana State Library Funds Recovered as a Result of a Final Audit Determination

AGENCY: Department of Education.

ACTION: Notice of intent to award grantback funds.

SUMMARY: Pursuant to section 456 of the General Education Provisions Act, as amended (GEPA) (20 U.S.C. 1234e), the Secretary intends to repay to the Indiana State Library Agency (State Agency), under a grantback arrangement, an amount equal to 75 percent of the $1,579,091 audit debt recently recovered by the Department of Education (Department). This notice describes the State Agency's plans for the use of the funds which the Secretary intends to repay and the terms and conditions under which the Secretary intends to make these funds available to the State Agency.

DATE: All written comments should be received by the Department of Education on or before July 1, 1987.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Klassen, Director, Public Library Support Staff, U.S. Department of Education, 555 New Jersey Avenue, NW. (Suite 404), Washington, DC 20208. Telephone: (202) 357-6303.

SUPPLEMENTARY INFORMATION:

A. Background

In an audit report dated May 25, 1982, the Office of Inspector General of the U.S. Department of Education issued the results of a special audit of the State Agency's obligation and expenditure of funds under Titles I and III of the Library Services and Construction Act, as amended (LSCA) (20 U.S.C. 351 *et seq.*). The audit covered the period from October 1, 1975 through September 30, 1977. The limited purpose of the audit was to determine the extent of obligations and expenditures of funds beyond the allowable time period for obligations and expenditures of grant funds as defined by Section 412(b) of GEPA (Tydings Amendment). Based on findings of the auditors, the Assistant Secretary determined that $1,579,091 had been expended after the funds had lapsed and requested payment by the State of Indiana. After completion of appeal proceedings, the State Agency remitted a check for $1,590,934 ($1,579,091 plus interest) to the Department on June 13, 1986. Subsequently the State Agency

submitted an additional check for $35,796.84 in interest.

B. Authority for Awarding a Grantback

Section 456(a) of GEPA provides that whenever the Secretary has recovered funds following a final audit determination with respect to an applicable program, the Secretary may consider those funds to be additional funds available for that program and may arrange to repay to the State Agency affected by that determination an amount not to exceed 75 percent of the recovered funds. The Secretary may enter into this so-called "grantback" arrangement if the Secretary determines that:

(1) The practices and procedures of the State Agency that resulted in the audit determination have been corrected and that the State Agency, in all other respects, is in compliance with requirements of the applicable program;

(2) The State Agency has submitted to the Secretary a plan for the use of funds to be awarded under the grantback arrangement which meets the requirements of the program and, to the extent possible, benefits the population that was affected by the failure to comply or by the misexpenditures that resulted in the audit exception; and

(3) The use of the funds to be awarded under the grantback arrangement in accordance with the State Agency's plan would serve to achieve the purposes of the program under which funds were originally granted.

C. Plan for Use of Funds Awarded Under a Grantback Arrangement

In accordance with section 456(a)(2) of GEPA, in its August 1, 1986 request for a grantback, the State Agency submitted a plan for the proposed use of the requested funds. The State proposes to use the Title I portion of the grantback to extend public library services to populations in the State with access to less than adequate public library services, and to use the Title III portion of the grantback to promote resource sharing, through two projects which would:

(1) Fund under Title I the improvement of inadequate public library services through technical assistance functions of the Area Library Services Authority (ALSA) which—

(a) coordinates interlibrary loans through accessing the collections of 97% of the 239 public libraries in the State;

(b) delivers reference-referral support to public libraries too small to adequately provide such services (79% serve populations of less than 25,000 persons);

(c) provides training and consultation services to the public libraries under contract to each ALSA, and;

(2) Fund under Title III resource sharing by various types of libraries through the technical assistance functions of the Indiana Cooperative Library Services Authority which—

(a) provides consultant services on the applications of new technology;

(b) arranges group contracts for database services, training, demonstration programs, and cooperative hardware purchasing; and

(c) maintains a training center on the use of national bibliographic networks, automated circulation, electronic spreadsheets, and word processing.

D. The Secretary's Determination

The Secretary has carefully reviewed the State Agency's request for the repayment of funds, the State Agency's plan, and other information submitted by the State Agency. Based upon that review, the Secretary has determined that the conditions contained in section 456 of GEPA have been met.

These determinations are based upon the best information available to the Secretary at the present time. If this information is not accurate or complete, the Secretary is not precluded from taking appropriate administrative action.

E. Notice of the Secretary's Intent To Enter Into a Grantback Arrangement

Section 456(d) of GEPA requires that, at least thirty days prior to entering into an arrangement to award funds under a grantback, the Secretary must publish in the Federal Register a notice of intent to do so, and the terms and conditions under which the payment will be made.

In accordance with the requirement of section 456(d) of GEPA, notice is hereby given that the Secretary intends to make funds available to the Indiana State Library Agency under a grantback arrangement, as authorized by section 456. The grantback award will be in the amount of $1,184,318. This amount is 75 percent—the maximum percentage authorized by Section 456—of the amount of the audit debt principal recovered by the Department. The Secretary's intention to award the maximum amount of grantback funds possible under Section 456 is based upon the determinations outlined in Section D of this notice.

F. Terms and Conditions Under Which Payments Under a Grantback Arrangement Will Be Made

Section 456(b) of GEPA provides that any payments made under a grantback arrangement shall be subject to terms and conditions which the Secretary deems necessary to accomplish the purposes of the affected programs including the submission of periodic reports on the use of the repaid funds and evidence that the State Agency has consulted with parents or representatives of the population that benefits from the grantback award.

The State Agency agrees to comply with the following terms and conditions under which payments under a grantback arrangement will be made:

(1) The State Agency will expend the funds awarded under the grantback in accordance with:

(a) All applicable statutory and regulatory requirements, including those relating to the sole purposes for which LSCA Title I and Title III funds may be used, that is, for benefitting public libraries and public library clientele and for promoting cooperation among various types of libraries, respectively; and

(b) The plan that was submitted in conjunction with the August 1, 1986 request for grantback and that has been approved by the Secretary.

(2) Pursuant to section 456(c) of GEPA, the State Agency will obligate all funds received under this grantback not later than September 30, 1989, which is three fiscal years following the fiscal year of the Department's final decision on the audit appeal.

(3) The State Agency will, not later than January 1, 1990, submit a report to the Secretary which:

(a) Indicates how the funds awarded under the grantback have been used;

(b) Shows that the funds awarded under the grantback have been liquidated;

(c) Describes the results and effectiveness of the project for which the funds were spent; and

(d) Describes the consultation with parents or representatives of the population that will benefit from the grantback payments.

(4) The State Agency will maintain separate accounting records documenting the expenditure of the grantback funds.

(Catalog of Federal Domestic Assistance Number (CFDA) 84.034 (Library Services) and 84.035 (Interlibrary Cooperation and Resource Sharing))

Dated: May 27, 1987.

William J. Bennett,

Secretary of Education.

[FR Doc. 87-12415 Filed 5-29-87; 8:45 am]

BILLING CODE 4000-01-M

Office of Elementary and Secondary Education

Intent To Repay to the New Mexico State Department of Education Funds Recovered as a Result of a Final Audit Determination

AGENCY: Department of Education.

ACTION: Intent to award grantback funds.

SUMMARY: Under section 456 of the General Education Provisions Act (GEPA), the U.S. Secretary of Education (Secretary) intends to repay to the New Mexico State Department of Education, the State educational agency (SEA), an amount equal to 75 percent of the funds recovered by the U.S. Department of Education as a result of a final audit determination. This notice describes the SEA's plan, submitted on behalf of the Santa Fe Public Schools, for the use of the repaid and the terms and conditions under which the Secretary intends to make those funds available. The notice invites comments on the proposed grantback.

DATE: All written comments must be received on or before July 1, 1987.

ADDRESS: All written comments should be submitted to Dr. James Spillane, Director, Division of Program Support, Compensatory Education Programs, U.S. Department of Education, 400 Maryland Avenue, SW. (Room 2047, MS–6276), Washington, DC 20202.

FOR FURTHER INFORMATION CONTACT: Dr. James Spillane, Telephone: (202) 732–4694.

SUPPLEMENTARY INFORMATION:

A. Background

In April 1985, the U.S. Department of Education recovered $105,675.30 from the New Mexico Department of Education (SEA) in satisfaction of claims arising from an audit covering fiscal years (FYs) 1972 and 1973. The claims involved the SEA's administration of Title I of the Elementary and Secondary Education Act of 1965 (Title I), a program that addressed the special educational needs of educationally deprived children in areas with high concentrations of children from low-income families. Specifically, the SEA had approved the FY 1973 project application for the Santa Fe local educational agency (LEA) that did not satisfy the Title I comparability requirements. Those requirements provided that an LEA could receive Title I funds only if it used its State and local funds in each Title I area to provide services that "taken as a whole, (were) at least comparable to services being provided in (non-Title I) areas" 20 U.S.C. 241e (a)(3)(C)(1976).

B. Authority for Awarding a Grantback

Section 456(a) of GEPA, 20 U.S.C. 1234e(a), provides that whenever the Secretary has recovered funds following a final audit determination with respect to an applicable program, the Secretary may consider those funds to be additional funds available for the program and may arrange to repay to the SEA or LEA affected by that determination an amount not to exceed 75 percent of the recovered funds. The Secretary may enter into this "grantback" arrangement if the Secretary determines that the—

(1) Practices and procedures of the SEA or LEA that resulted in the audit determination have been corrected, and the SEA or LEA is, in all other respects, in compliance with the requirements of the applicable program;

(2) SEA has submitted to the Secretary a plan for the use of the funds to be awarded under the grantback arrangement which meets the requirements of the program, and, to the extent possible, benefits the population that was affected by the failure to comply or by the misexpenditures that resulted in the audit exception; and

(3) Use of funds to be awarded under the grantback arrangement in accordance with the SEA's plan would serve to achieve the purposes of the program under which the funds were originally granted.

C. Plan for Use of Funds Awarded Under a Grantback Arrangement

Pursuant to section 456(a)(2) of GEPA, the SEA has applied for a grantback of $79,256 and has submitted a plan on behalf of the Santa Fe LEA for use of the grantback funds to meet the special educational needs of educationally deprived children in programs administered under Chapter 1 of the Education Consolidation and Improvement Act of 1981. 20 U.S.C. 3801 *et seq.* The final audit determination against the SEA resulted from improper expenditures of Title I funds. However, since Chapter 1 has superseded Title I, the SEA's proposal reflects the requirements in Chapter 1—a program, similar to Title I, designed to serve educationally deprived children in low-income areas.

The SEA's plan proposes that the Santa Fe LEA will use the grantback funds to augment the Chapter 1 reading and mathematics programs funded from the regular Chapter 1 entitlement for school year 1986–87. Educationally deprived children in 18 elementary and 5 secondary schools are participating in Chapter 1 reading and mathematics programs. Approximately 995 of these children are participating in Chapter 1 reading programs and 150 in Chapter 1 mathematics programs. Over 100 of these children attend nonpublic schools.

With the grantback funds, the LEA will purchase supplementary materials, supplies, and equipment for the Chapter 1 reading and mathematics classes. The purchases will include audiovisual materials, computer software, instructional supplies, printers, cassette players, computers, etc. Additionally, the funds will be used for supplementary inservice training, substitute Chapter 1 teachers, and indirect costs.

Eligible children in private schools will receive services equitable to those provided to eligible children in public schools.

D. The Secretary's Determinations

The Secretary has carefully reviewed the plan submitted by the SEA. Based upon that review, the Secretary has determined that the conditions under section 456 of GEPA have been met.

These determinations are based upon the best information available to the Secretary at the present time. If this information is not accurate or complete, the Secretary is not precluded from taking appropriate administrative action.

E. Notice of the Secretary's Intent To Enter Into a Grantback Arrangement

Section 456(d) of GEPA requires that, at least 30 days before entering into an arrangement to award funds under a grantback, the Secretary must publish in the **Federal Register** a notice of intent to do so, and the terms and conditions under which the payment will be made.

In accordance with section 456(d) of GEPA, notice is hereby given that the Secretary intends to make funds available to the New Mexico SEA under a grantback arrangement. The grantback award would be in the amount of $79,256, which is 75 percent—the maximum percentage authorized by the statute—of the funds recovered by the Department as a result of the audit.

F. Terms and Conditions Under Which Payments Under a Grantback Arrangement Would Be Made

The SEA and LEA agree to comply with the following terms and conditions under which payment under a grantback arrangement would be made:

(1) The funds awarded under the grantback must be spent in accordance with—

(a) All applicable statutory and regulatory requirements;

(b) The plan that the SEA submitted and any amendments to that plan that are approved in advance by the Secretary; and

(c) The budget that was submitted with the plan and any amendments to the budget that are approved in advance by the Secretary.

(2) All funds received under the grantback arrangement must be obligated by September 30, 1987, in accordance with section 456(c) of GEPA and the SEA's plan.

(3) The SEA, on behalf of the LEA, will, not later than January 1, 1988, submit a report to the Secretary which—

(a) Indicates that the funds awarded under the grantback have been spent in accordance with the proposed plan and approved budget, and

(b) Describes the results and effectiveness of the project for which the funds were spent.

(4) Separate accounting records must be maintained documenting the expenditures of funds awarded under the grantback arrangement.

(Catalog of Federal Domestic Assistance Number 84.010, Educationally Deprived Children—Local Educational Agencies)

Dated: May 27, 1987.

William J. Bennett,

Secretary of Education.

[FR Doc. 87-12416 Filed 5-29-87; 8:45 am]

BILLING CODE 4000-01-M

DEPARTMENT OF ENERGY

Bonneville Power Administration

Policy to Implement the Council—Recommended Conservation Surcharge

AGENCY: Bonneville Power Administration (BPA), DOE.

ACTION: Notice of Revised Proposed Policy and Request for Comment.

SUMMARY: In accordance with the Pacific Northwest Electric Power Planning and Conservation Act, the Northwest Power Planning Council (Council) has developed model conservation standards (MCS) and recommended to the BPA Administrator that a surcharge be imposed on BPA's customers for those portions of their loads within the region that are within States or political subdivisions which have not adopted the MCS or other conservation measures which achieve savings of electricity comparable to the standards. BPA is requesting comment on a revised proposed policy to implement the Council-recommended conservation surcharge (Surcharge Policy). This revised proposed policy focuses on the submission and content of utility plans to implement the residential and commercial MCS and the identification of near-term surchargeable events. The policy applies to all BPA customers that purchase firm power pursuant to a Power Sales Contract under the Priority Firm Power, Firm Capacity, and New Resource Firm Power rate schedules or participate in the Residential Purchase and Sales Agreement/Exchange Transmission Credit Agreement.

Responsible Official: John D. Carr, Director, Division of Planning and Evaluation, Office of Conservation, is the official responsible for developing the policy.

DATES: A public comment forum will be held on June 22, 1987, from 1–4 p.m. in Room 464 of the BPA's main building, 1002 NE. Holladay, Portland, OR. Written comments must be received at the Public Involvement office by 5 p.m., July 15, 1987. BPA plans on finalizing the policy by September 1, 1987.

FOR FURTHER INFORMATION CONTACT: John D. Carr, Director, Divison of Planning and Evaluation, Office of Conservation, at 503–230–4021; or, Robert J. Procter, Public Utilities Specialist, at 503–230–4304.

Or, contact the BPA Public Involvement office at the above address or 503–230–3478. Oregon callers outside of Portland may use the toll-free number 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 E. 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 Street, Eugene, Oregon 97401, 503–687–6952.

Mr. Wayne R. Lee, Upper Columbia Area Manager, Room 561, West 920 Riverside Avenue, Spokane, Washington 99201, 509–456–2518.

Mr. Ronald K. Rodewald, Wenatchee District Manager, P.O. Box 741, Wenatchee, Washington 98801, 509–662–4377, extension 379.

Mr. George E. Eskridge, Montana District Manager, 800 Kensington, Missoula, Montana 59801, 406–329–3060.

Mr. Terence G. Esvelt, Puget Sound Area Manager, 201 Queen Anne Ave., North, Seattle, Washington 98109, 206–442–4130.

Mr. Thomas 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.

Mr. Frederic D. Rettenmund, Boise District Manager, 550 W. Fort Street, Rm. 376, Boise, Idaho 83724, 208–334–9137.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background of Policy

A. Introduction

The proposed Surcharge Policy is a response to recommendations made by the Northwest Power Planning Council (Council) in its 1986 Northwest Conservation and Electric Power Plan (Plan) and its Model Conservation Standards (MCS) for New Residential and Commercial Construction (Plan Amendment). There are three overriding policy objectives:

1. Identify ways in which utilities can avoid a surcharge;

2. Identify what criteria will be used to evaluate a utility's proposed approach to achieving MCS level electrical savings; and

3. Identify how the surcharge will be calculated and collected.

B. Statutory Direction

Section 4(e)(3) of the Act provides for the development of MCS as part of the Council's Plan. These standards, as described in section 4(f)(1) of the Act, are to include standards applicable to new and existing structures and to utility and government conservation programs. Such standards should reflect geographic and climatic differences and produce all power savings that are cost-effective for the region and economically feasible for consumers.

Section 4(f)(2) of the Act provides that the Council may recommend to the BPA Administrator the imposition of a surcharge on customers for those portions of their loads within the region that are within States or political subdivisions which have not, or on the customers which have not, implemented the standards or other conservation measures that achieve energy savings comparable to the standards. Finally, section 4(e)(3)(G) of the Act mandates that the Council develop a methodology for calculating the surcharge.

II. Past and Present Surcharge Policy Development Efforts

Part A of this section summarizes past MCS and surcharge actions undertaken by the Council. Part B summarizes BPA's past surcharge-related activities. Part C describes the Council's 1987 surcharge recommendation as contained in their Plan Amendment of January 30, 1987.

A. Council Activities to Date

On April 27, 1983, the Council adopted its first Northwest Conservation and Electric Power Plan. As required by the Act, the Council's 1983 Plan contained MCS for newly constructed residential and commercial buildings, and for conversion of existing residential and commercial buildings to electric space heating and conditioning.

In the 1983 Two-Year Action Plan (Chapter 10 of the 1983 Plan), the Council identified tasks to be undertaken by BPA, the Council, and other regional entities. That Plan mandated that BPA include in its surcharge policy a consistent procedure for certifying compliance with MCS and a procedure for reviewing and evaluating alternative plans.

In accordance with the 1983 Plan, State governments, local governments, or utilities were to adopt and enforce the MCS as building codes or utility service standards by January 1, 1986. Where such standards were not adopted, an alternative plan to achieve comparable savings should have been in place by January 1, 1986. Where neither action had occurred, the Council recommended that the Administrator impose a surcharge.

The Council voted on October 31, 1984, to adopt an amendment which greatly simplified the surcharge calculation. The Council recommended that a 10 percent surcharge be levied on the customer's power bill for that portion of its loads which were not complying with the standard.

On July 26, 1985, the Council proposed to enter rulemaking to amend the MCS. On December 4, 1985, the Council voted to amend that portion of the 1983 Plan dealing with MCS. The amended MCS thermal performance levels for both new residential and commercial buildings were equivalent to the MCS set forth and amended by the Council in its 1983 Plan. The Council also recommended that BPA develop a surcharge policy based on MCS implementation and performance.

In the 1986 Action Plan, the Council identified specific actions that BPA should take towards regionwide implementation of the MCS. BPA was to (1) have utilities submit to BPA a plan declaring how they intended to comply with the MCS, (2) design a process to collect utility specific data on the savings that would be achieved if all buildings were constructed to MCS levels, (3) continue development and implementation of a procedure to measure compliance with the MCS, (4) review alternative plans for achieving compliance with the MCS, and (5) develop a new surcharge policy.

On November 20, 1986, the Council proposed to enter further rulemaking to amend part of their 1986 Plan dealing with MCS and the surcharge. After public comment, the Plan Amendment was published on January 30, 1987. Notice of the Plan Amendment, which included the Council's 1987 MCS, was published in the **Federal Register** on March 26, 1987 (52 FR 9738, March 26, 1987).

B. BPA Activities to Date

BPA began the development of a surcharge policy in early 1984 through a series of informal meetings with State government, local government, utility, and Council representatives. BPA staff informally discussed the various issues that might surround the development of a policy to implement the Council recommendation to impose a surcharge. These informal discussions formed the basis of a **Federal Register** Notice of Intent to develop a policy to implement the Council-Recommended Conservation Surcharge. The notice (49 FR 34891, September 4, 1984) was mailed to the public on August 28, 1984.

BPA elected to delay publication of a proposed policy until after final Council action on amendment of the surcharge methodology. Public review and comment on the proposed policy took place between March 13, 1985, and May 17, 1985.

BPA suspended action on the surcharge policy when the Council entered rulemaking to amend the MCS in the summer of 1985. After the Council amended its MCS recommendation in December 1985, BPA developed a revised proposed policy and received public comment on that proposal during July and August 1986. As part of the Administrator's decision about whether or not to finalize the revised proposed Surcharge Policy, BPA undertook an analysis of the cost-effectiveness and consumer economic feasibility of the MCS contained in the Council's 1986 Plan. BPA concluded that some of the recommended measures were not cost-effective and on December 19, 1986, BPA's MCS findings were published.

Based in part on that analysis, the Council entered rulemaking to amend their MCS and surcharge recommendations. In turn, BPA suspended the development of a final Surcharge Policy. Following publication of the Council's Plan Amendment on January 30, 1987, BPA undertook a second revision of the proposed Surcharge Policy. Over the last several months, BPA has been in contact with the Council, utilities, and conservation interest groups.

This version of the proposed Surcharge Policy, entitled "Model Conservation Standards Surcharge Policy," is BPA's response to Council recommendations to develop a surcharge policy.

C. Council's 1987 Surcharge Recommendation

Compared to the Council's MCS and surcharge recommendations contained in their 1986 Plan, their Plan Amendment of January 30, 1987, made several major changes in those earlier recommendations. The most significant change was the Council's move away from a performance surcharge. A summary of the Council's 1987 surcharge recommendation appears below.

1. Residential Surcharge Recommendation

The Council recommended that a 10 percent surcharge be imposed on utilities which do not submit, by a deadline set by BPA, (1) an initial plan for implementation of the BPA/Utility Residential MCS Program; (2) a plan for implementation of an alternative

program which is approved by BPA as being equivalent; or (3) a declaration, approved by BPA, that the MCS for residential buildings will be met by building codes. This surcharge would continue in effect until a utility has filed an initial plan and has obtained the necessary BPA approvals.

2. Commercial Surcharge Recommendation

The Council recommended that a 10 percent surcharge be imposed on utilities which do not submit, by a date set by BPA: (1) An initial plan for implementation of the BPA/Utility Commercial MCS Program; (2) a plan for implementation of an alternative program which is approved by BPA as equivalent; or (3) a declaration, approved by BPA, that the MCS for commercial buildings will be met by building codes at the MCS levels. The Council recommended that the surcharge continue in effect until a utility has filed an initial plan and has obtained the BPA approvals.

3. Conversion Surcharge Recommended

The Council's MCS for residential and commercial buildings converting to electric space heating/conditioning stated that State or local governments or utilities should take actions through codes and/or alternative programs to achieve electric power savings from buildings which convert to electric space heating/conditioning. The savings should be comparable to those savings that would be achieved in each building converting to electric space heating/conditioning were upgraded to include all cost-effective electricity conservation measures. The Council highly recommended this conversion standard, but did not recommend that a surcharge be imposed for failure to adopt the standard.

4. Combined Commercial/Residential Code

One provision of the Plan Amendment allowed for a combined residential/commercial MCS strategy by a utility. This approach allowed for less than MCS program savings to be achieved in one sector as long as the shortfall is recouped in the other sector. This alternative was to be applicable only to the subcommittee of alternative codes or utility service standards.

5. Exemptions

The Council has determined that no exemptions are needed at this time.

6. The Council excluded Federal loads and generic MCS from this surcharge.

III. Proposed Policy

SECTION 1. Application of the Proposed Surcharge Policy

BPA is requesting that by November 1, 1987, utilities either (a) submit a plan to implement and enforce the Super GOOD CENTS Program, or (b) submit an alternative program or utility service standard for BPA approval, or (c) certify that jurisdictions within its service territory will implement and enforce the Early Adopter Program or a BPA-approved building code.

BPA is proposing that a surcharge, as calculated in section 3 of this policy, be imposed beginning February 1, 1988, on customers who do not implement a BPA-approved residential MCS plan.

Further, BPA is requesting that by May 1, 1988, utilities either (a) submit a plan to implement and enforce BPA's Commercial MCS Program, or (b) submit an alternative utility commercial program or utility service standard in the commercial sector, or (c) certify that jurisdictions within its service territory have met the Council's commercial MCS through codes.

BPA is proposing that a surcharge, as calculated in section 3 of this policy, be imposed beginning August 1, 1988, on customers who have not implemented a BPA-approved commercial MCS plan.

[One alternative considered by BPA was to limit this version of the surcharge policy to the residential sector. Then, at some future date, a separate Commercial Surcharge Policy would be developed. BPA's initial position is to keep the commercial surcharge in this policy but stagger the submission date. This position has been taken in order to treat the commercial and residential surcharges as a package and to focus attention on the commercial MCS and surcharge. BPA is seeking comment on this proposed approach.]

The next submission cycle will occur in fall 1988. At this time BPA expects that both commercial and residential plans will be submitted.

[BPA is requesting comment on the number of years which a plan should cover. One option is to request multiyear submissions as opposed to annual submissions.]

Each of the appendices to this policy represents a different approach to avoid a surcharge. These appendices contain more specific submission and evaluation criteria for each of the surcharge avoidance paths and are part of this policy.

SECTION 2. Evaluation of Alternative Utility Plans

An alternative utility plan is any plan relying on an approach other than a BPA/Utility MCS support Program and/or Early Adopter Program participation to achieve MCS savings. Further explanation is included in appendices 2 and 4–7 of this policy. These plans will be evaluated using three criteria: (1) Electrical savings, (2) enforcement, and (3) indoor air quality (IAQ) and ventilation.

Electrical savings estimates in the residential sector are dependent on both a thermal performance level for a structure and an estimated penetration rate. If a utility is proposing to achieve electrical savings by implementing an alternative residential utility program, e.g., Super GOOD CENTS, a utility service standard, and/or jurisdictions within its service territory plan to implement an equivalent residential building code, BPA will use the prospective total electrical savings of its Super GOOD CENTS Program (which is dependent on the expected penetration rate of the Program and the savings of structures built to MCS as compared with current practice) to determine whether the utility's proposed approach will at least meet the appropriate residential electrical savings level. At this time, BAP expects that 40 percent of new electrically heated homes constructed in 1988 in the service territory of Super GOOD CENTS utilities will be built to Super GOOD CENTS standards.

[BPA may revise this penetration estimate as additional information becomes available this year.]

Alternative utility commercial MCS programs will be evaluated relative to the Council's commercial MCS code standard and the design assistance provisions of BPA's Commercial MCS Program.

All thermal performance evaluations will rely on BPA's Code Equivalency Determination Procedures, using the prototypes contained in those procedures.

A utility will have more discretion in proposing an approach which will meet the second evaluation criteria—enforcement. BPA is recommending that any customer contemplating submission of an alternative utility plan refer to BPA's Super GOOD CENTS, Early Adopter, and Commercial MCS Program descriptions for guidance. A plan must contain a requirement for site inspection.

Finally, an alternative utility plan must contain information on how the utility and/or jurisdiction plans to achieve IAQ and ventilation rate (.35 air changes per hour) at least comparable to those achieved in Super GOOD CENTS homes for residential. A proposed alternative utility plan judged

inadequate on either IAQ or ventilation will not result in a surcharge, but BPA will make this determination public.

[BPA has considered two other approaches to the evaluation of an alternative utility plan's IAQ and ventilation requirements. One option is not to evaluate an alternative utility plan on IAQ and ventilation grounds. Another option is to refuse to accept any alternative utility plan which BPA evaluation indicates may result in inadequate IAQ and/or ventilation. In this case, the utility would be subject to a surcharge. BPA is soliciting public comment on all of these approaches.]

SECTION 3. Calculating a Surcharge

A. Not less than 30 days prior to a final decision on the imposition of a residential surcharge the Administrator shall provide written notice to the customer including a determination of:

1. The fraction of the customer's residential load covered by the BPA/Utility Residential MCS Program as of the effective date of the surcharge, (A1). If a customer is a program participant, A1=1.0.

2. The fraction of a customer's load found to be covered by a BPA-approved alternative residential program, (A2). If a customer has implemented an approved program throughout its service territory, A2=1.0.

3. The fraction of a customer's residential load within jurisdictions which are participating in BPA's Early Adopter Program, or have implemented a BPA-approved residential building code, (A3).

4. The fraction of a customer's residential load covered by a BPA-approved residential utility service standard, (A4). If a customer has imposed a residential utility service standard throughout its service territory, A4=1.0.

5. The fraction of the customer's load subject to the surcharge, B=[1−(A1+A2+A3+A4). If A1+A2+A3+A4 exceed 1.0, B=0.

6. The level of the residential surcharge, B × .10.

B. Not less than 30 days prior to a final decision on the imposition of a commercial surcharge the Administrator shall provide written notice to the customer including a determination of:

1. The fraction of the customer's commercial load covered by the BPA/Utility Commercial MCS Program as of the effective date of the surcharge, (C1). If a customer is a program participant, C1=1.0.

2. The fraction of a customer's load found to be covered by a BPA-approved alternative utility commercial MCS program, (C2). If a customer has implemented an approved program throughout its service territory, C2=1.0.

3. The fraction of a customer's commercial load within jurisdiction(s) which are participating in BPA's Early Adopter Program or have implemented a BPA-approved commercial building code, (C3).

4. The fraction of a customer's commercial load covered by a BPA-approved utility service standard, (C4). If a customer has imposed a commercial utility service standard throughout its service territory, C4=1.10.

5. The fraction of a customer's load subject to the surcharge, D=[1−(C1+C2+C3+C4)]. If C1+C2+C3+C4 exceed 1, D=0.

6. The level of the commercial surcharge, D × .10.

C. At no time will a customer simultaneously be assessed a surcharge for failure to comply with the requirements in the residential sector *and* a surcharge for failure to comply with the requirements in the commercial sector.

D. The resulting level of the residential or commercial surcharges will be applied to all power purchases and/or exchanges made by the customer under the applicable rate schedules, using the Council's surcharge methodology, and will be applied subsequent to any other rate adjustments.

E. The customer and other interested parties shall be afforded an opportunity to provide comments regarding the determinations made in sections 3(A) and 3(B). Such comments may be made in writing or orally at a public meeting convened at the request of the customer for this purpose by BPA. This public meeting will be held between the time of the written Notice of Intent to surcharge and the final surcharge decision. Included in the Intent to Surcharge will be an initial determination of the fraction of a customer's load subject to the surcharge, based on sections 3(A) and 3(B). Following the receipt and evaluation of comments, the Administrator shall provide written notice to the customer of the final surcharge decision.

F. Beginning with the effective date of the surcharge, the Administrator shall review the findings made in sections 3(A) and 3(B) after the customer, or a jurisdiction served by the customer, has taken an action that affects those findings. Customers may request such review by providing evidence in accordance with this section that the customer or a jurisdiction served by that customer has taken actions subsequent to the effective date of the surcharge.

SECTION 4. Collecting a Surcharge.

A. Those customers receiving a final written notice of a load subject to the surcharge shall be billed for the surcharge beginning with the first full billing period following issuance of such notice.

B. Any power purchases made on or after the effective date of the surcharge, but before receipt of final notice finding the load subject to a surcharge, may be retroactively billed to the effective date of the surcharge. Such retroactive billing shall collect the retroactive surcharge over a like number of billing periods as elapsed from the effective date of the surcharge to the receipt of final written notice of a surcharge.

C. The level of surcharge is applied to all power purchases and/or exchanges made by the customer under the applicable rate schedules and/or exchanges pursuant to the Residential Purchase and Sales Agreement/Exchange Transmission Credit Agreement, using the Council's surcharge methodology, and is applied subsequent to any other rate adjustments.

1. For customers purchasing power under the rate schedules subject to the surcharge, the surcharge is applied to the customer's monthly power bill.

2. For customers participating in the Residential Purchase and Sale Agreement, the surcharge shall be included in the charges for determining the BPA price of residential exchange power.

3. For customers both purchasing firm power under the rate schedules subject to the surcharge and participating in the Residential Purchase and Sale Agreement/Exchange Transmission Credit Agreement, the surcharge is applied to the total firm power purchase from BPA and the portion of a utility's exchange load not served by firm power purchases from BPA. In this situation, the surcharge shall be multiplied by the percent of utility's exchange load not served with firm power purchases from BPA. This percentage shall be calculated based on a utility's total load and total firm power purchases from BPA and rounded to the nearest 0.1 percent.

D. If a customer participating in the Residential Exchange is currently in a deemer status, the surcharge shall be accumulated in the account established for this purpose as specified in the respective agreement, and shall be included in the obligation a utility must repay prior to receiving a direct payment from BPA. If a customer is not in a deemer status, the surcharge shall be included in the determination of the net payment made by BPA.

E. The collection of the surcharge shall continue until the Administrator determines that the surcharge is no longer required under the terms of this policy.

F. Surcharges collected on purchases for periods in which loads are subsequently found to be in compliance with this policy shall be credited to the customer in the first full billing period following final written notice of such finding. Surcharges on loads which are subsequently found not to have been in compliance with the terms of this policy for specified periods shall be billed to the customer in the first full billing period following final written notice of such finding.

SECTION 5. Definitions

A. Alternative Code

Codes implemented in the residential and commercial sectors which, in aggregate, achieve total electrical savings at least as large as would have been expected had the Council's prescriptive MCS been implemented in the residential and commercial sectors.

B. Alternative Utility Plan

An Alternative Utility Plan is any plan not relying on BPA/Utility MCS Support Program and/or Early Adopter Program participation to achieve MCS savings. That is, any plan relying on appendices 2 and 4–7.

C. Alternative Utility Program

For the residential sector, an Alternative Utility Program is a utility MCS support program designed to achieve at least the same level of total expected electrical savings, and IAQ and ventilation requirements, at BPA's Super GOOD CENTS Program. For the commecial sector, it is a utility MCS support program designed to promote at least the same MCS measures as contained in the Council's commercial MCS and providing comparable design assistance services as contained in the BPA/Utility MCS support program.

D. Current Code or Practice

BPA will analyze the residential electrical savings from MCS assuming that, in the absence of MCS, a residence would have been built to one of the following: (a) In Oregon, 1986 code; (b) in Washington, 1986 code; or (c) in either Idaho or Montana, HUD Minimum Property Standards. In cases where these codes are not definitive regarding the level of building practice employed, BPA will use the best information available. Electrical savings in the commercial sector will be evaluated assuming: (a) 1986 code in Oregon and Washington, (b) 1983 National Energy Code in Montana, and (c) individual jurisdiction codes in Idaho. Regional progress to full MCS electrical savings will include the electrical savings achieved in Oregon and Washington between their respective 1983 and 1986 residential codes.

E. Customer

For purposes of this policy, a utility which contracts for the purchase of firm power from BPA or participates in the Residential Exchange Program.

F. Equivalent Code

Codes which achieve, by sector, at least the same level of expected total electrical savings had BPA's Super GOOD CENTS program and the Council's commercial MCS been implemented.

G. Jurisdiction

For purposes of this policy, any unit of government including Indian Tribes, State governments, and local governments and municipal corporations.

H. Total Load

The number of firm kWh's sold by a customer during the last 12-month period prior to the application of this policy.

Issued in Portland, Oregon, on May 21, 1987.

Steven G. Hickok,

Executive Assistant Administrator, Bonneville Power Administration.

Appendix 1

Avoiding a Surcharge by Adopting the BPA/Utility MCS Support Program

A. Residential Sector

BPA customers opting for this path are assured that enrollment in the Super GOOD CENTS Program and subsequent implementation and enforcement will result in avoidance of a residential surcharge under the current surcharge policy. BPA will offer special assistance to those utilities which would experience a hardship in implementing BPA's Super GOOD CENTS Program.

Those utilities which implement the MCS measures contained in the Super GOOD CENTS Program, but do not implement the required incentives, will be treated as filing an Alternative Utility Plan. Those utilities are advised to refer to Appendix 2 for a discussion of that option.

A utility which is currently enrolled in and implementing the Super GOOD CENTS Program need only submit a copy of their budget worksheet and Federal Assistance Form, SF–1813 and provide evidence that they are implementing the Program.

Those customers wishing to avoid a surcharge under this path must agree by November 1, 1987, to enroll in the residential program, and must have entered into a binding BPA/Utility Program Agreement no later than February 1, 1988.

B. Commercial Sector

BPA customers opting for this path are assured that enrollment in the BPA Commercial MCS Program, and subsequent implementation and enforcement, will result in avoidance of a commercial surcharge under the current Surcharge Policy. All customers wishing to avoid a surcharge under this path must agree to comply with the IAQ and data reporting requirements and other technical specifications of the respective program.

Those customers wishing to avoid a surcharge under this path must agree by May 1, 1988, to enroll in the commercial program and must have entered into a binding BPA/Utility Program Agreement no later than August 1, 1988.

Customers may obtain a copy of the BPA Draft Commercial MCS Program Description by contacting Paul Johnson or Jim Dowty at 503–230–5869 and 503–230–5993, respectively.

Appendix 2

Avoiding a Surcharge by Adopting an Alternative Utility Program

A. Residential

An Alternative Utility Residential Program is the customer's proposed approach to meeting the standards of BPA's and Super GOOD CENTS Program. A proposed alternative program will be evaluated relative to the: (1) Total electrical savings expected if the customer had implemented Super GOOD CENTS, (2) the IAQ and ventilation levels attained by the provisions of Super GOOD CENTS, and (3) the proposed enforcement method.

Total electrical savings will be evaluated taking account of the estimated electrical savings per structure and the likely market penetration that will be achieved by the proposed program. This will be compared against the total electrical savings expected from Super GOOD CENTS. At this time, BPA expects that 40 percent of new electrically heated housing starts in 1988 will be constructed under the Super GOOD CENTS Program. [BPA may modify this estimate in the final Surcharge Policy.]

Finally, BPA recommends that the utility offer and make the program available throughout its service territory. If the program is offered in only a portion of the service territory, the utility must indicate what fraction of its residential load is covered by the program. If any portion of its load is not covered by an alternative utility

program, or one of the other options discussed in these appendices, the utility will be subject to the surcharge.

In order for BPA to verify that the proposed program will be equivalent energy savings, the following information must be submitted:

1. The standard(s) to be used. Utilities should provide a base-case prescriptive path for the alternative standard they are proposing. This base case should be in a format which can easily be compared to the comparable Super GOOD CENTS Base Case prescriptive path for the climate zone using a WATTSUN analysis and BPA's prototypes.

2. The penetration levels expected for the proposed standard(s). This penetration level would represent the percent market penetration of each standard among electrically heated homes completed in that utility's service area during the calendar year. If possible, the customer should submit data indicating what penetration levels have been achieved in prior years with the proposed or a similar program.

3. List of activities to be undertaken to achieve the targeted penetration (one or more of the following): promotion and sales, advertising, incentives (type and level), technical assistance, certification, and any other applicable information. In addition, customers will be required to submit quarterly reports listing the activities undertaken and resources utilized in the market effort.

4. Plan for how the utility will collect and provide to BPA by January 30 of the following year:

a. Total new homes (all fuels) constructed in the utility's service area during the past calendar year (broken out by single-family, multifamily, modular, and HUD-code homes).

b. Total new electrically heated homes constructed in the utility's service area during the past calendar year (broken out by single-family, multifamily, modular, and HUD-code homes).

c. Total new electrically heated homes constructed, in the utility's service area during the past calendar year, to the standard(s) described in the customer's plan (broken out by single-family, multifamily, modular, and HUD-code homes).

5. List of activities to assure that IAQ and ventilation rates achieved in Super GOOD CENTS homes will be offered and achieved under the Alternative Utility Program.

The Alternative Utility Program path is not generally recommended for utilities without prior experience in operating such programs. An established track record with a well-defined package of measures will be extremely helpful, if not essential, in obtaining BPA approval for Alternative Utility Programs. Nonetheless, BPA staff will work with customers interested in pursuing this path to help explain the data submission requirements and the other complexities involved in this approach.

Because of these complexities, utilities interested in this path should submit their proposals to BPA at the earliest possible date, after the surcharge policy has been finalized, and in no event later than the November 1, 1987, deadline. An approved program will have to be implemented by February 1, 1988.

If BPA finds it necessary to reject the proposed alternative program, a short additional grace period *may* be allowed for customers to reformulate their proposed program or to choose another surcharge-avoidance path. This decision will be made on a case-by-case basis.

B. Commercial

An Alternative Utility Commercial Program is the customer's proposed approach to meeting the standards of the BPA/Utility Commercial MCS Program. A proposed alternative program will be evaluated relative to the: (1) Level and type of activities and services to be offered, (2) method of marketing and performing the services, (3) penetration levels expected for the proposed program activities, and (4) proposed inspection method.

In order to perform the necessary review, BPA will require the following information:

1. List of activities and services the customer plans on offering (i.e., modeling, design assistance, design handbook, information services, and training opportunities) to achieve the targeted penetration.

2. Reporting requirements specified in the cooperative agreement.

3. Management and oversight consistent with BPA practices.

4. Proposed method to submit to BPA quarterly reports listing the activities undertaken and resources used in the marketing effort.

For 1988, BPA is projecting that design assistance services will be offered to 30–35 percent of the new commercial building constructed in service territories of utilities participating in BPA's Commercial MCS Program.

For either sector, please refer to the latest version of BPA's Code Equivalency Determination Procedures for a detailed discussion of the submission requirements and thermal performance evaluation procedure. These procedures are available by contacting the BPA Public Involvement office by calling: 503–230–3478. Oregon callers outside of Portland may use 800–452–8429. Callers in California, Idaho, Montana, Nevada, Utah, Washington, and Wyoming may use 800–547–6048.

Appendix 3

Avoiding a Surcharge by Participating in the Early Adopter Program

This is a pre-approved path for avoidance of the surcharge if all the jurisdictions within a utility's service territory are Early Adopter Program participants. If the customer serves several jurisdictions which are not Early Adopter Program participants, then the utility will be subject to the surcharge unless those jurisdictions have implemented a BPA-approved building code or the utility has implemented a utility program or a BPA-approved service standard.

The essential feature of the Early Adopter Program is the adoption by the jurisdiction of the MCS contained in the Early Adopter Program description. Additional program features include specific activities to ensure that no degradation in IAQ results, some form of enforcement method to assure MCS construction, and some data reporting requirements.

A. Residential

For customers with jurisdictions within their service territory who are currently participating in the Early Adopter Program (EAP), the customer must submit a letter indicating: (a) The jurisdiction(s) who are EAP participants, (b) their award number for each jurisdiction, and (c) a copy of the ordinance adopted by each jurisdiction. In addition, customers must indicate what fraction of its residential load lies within Early Adopting jurisdictions. Any jurisdiction considering adoption must implement the code by February 1, 1988, for the utility to avoid a surcharge, if the utility will not be operating an approved utility MCS program at that time.

Finally, the utility will collect and provide to BPA by January 30 of the following year:

1. Total new homes (all fuels) constructed in the utility's service area during the past calendar year (broken out by single-family, multifamily, modular, and HUD-code homes).

2. Total new electrically heated homes constructed in the utility's service area during the past calendar year (broken out by single-family, multifamily, modular, and HUD-code homes).

3. Total new electrically heated homes constructed, in the utility's service area during the past calendar year, to the

standard(s) described in the customer's plan (broken out by single-family, multifamily, modular, and HUD-code homes).

[While some of the these data requests exceed those required by the Early Adopter Program, the data are being requested so that a more complete record of the region's progress towards MCS may be kept.]

Customers who are operating a utility program and/or a utility service standard should take all necessary steps in order to avoid double-counting when reporting the above information.

B. Commercial

To avoid a surcharge, customers with jurisdiction within their service territory considering enrolling in this program must notify BPA by May 1, 1988, of the jurisdiction's intent to enroll in the program and the jurisdiction must have officially adopted the MSC by August 1, 1988, if the utility is not operating an approved Commercial MCS Program.

For customers with jurisdictions within their service territory who are currently participating in the Early Adopter Program, the customer must provide a copy of the ordinance adopted by each jurisdiction and include a copy of BPA's letter of approval. In addition, customers must indicate what fraction of its commercial load lies within Early Adopting jursidictions.

Finally, the utility will collect and provide to BPA by January 30 of the following year:

1. Total new commercial buildings (all fuels) constructed in the utility's service area during the past calendar year.

2. Total new electrically heated commercial buildings constructed in the utility's service area during the past calendar year.

3. Total new commercial buildings constructed, in the utility's service area during the past calendar year, to the standard(s) described in the customer's plan, broken out by BPA prototype and square footage.

Customers who are operating a utility program and/or a utility service standard should take all necessary steps in order to avoid double-counting when reporting the above information.

Early Adopter contract materials can be obtained by calling Jan Slater at 503–230–5320. Prospective proposers may also direct technical questions about the Program to Peggy Crossman at 503–230–7516, Jane Selby at 503–230–7518, or Suzanne Rowan at 503–230–4630.

Appendix 4

Avoiding a Surcharge by Adopting a Codified Version of the MCS

A. Residential

Several codified versions of the MCS contained in the Early Adopter Program will be available early summer 1987 These are pre-approved codified versions of the Council's prescriptive MCS paths.

Under this alternative, the customer must submit the codified version of the MCS which a jurisdiction in its service territory is proposing for adoption or which has been adopted. The enforcement methods should be specified. The addition, the customer must indicate what steps the jursidiction will take to address the IAQ and ventilation requirements of BPA's Early Adopter Program. Finally, the customer must indicate what fraction of its residential load lies within a jurisdiction which has implemented a BPA-approved residential building code.

By November 1, 1987, the customer is to submit the above information to BPA. The statute or ordinance must be operative no later than Feburary 1, 1988.

In order to comply with the Council MCS reporting requirements as specified in their Plan Amendment, BPA will also require the customer provde to BPA by January 30:

1. Total new homes (all fuels) constructed in the utility's service area during the past calendar year (broken out by single-family, multifamily, modular, and HUD-code homes).

2. Total new electrically heated homes constructed in the utility's service area during the past calendar year (broken out by single-family, multifamily, modular, and HUD-code homes).

3. Total new electrically heated buildings constructed, in the utility's service area during the past calendar year, to the standard(s) described in the customer's plan (broken out by single-family, multifamily, modular, and HUD-code homes).

Customers who are operating a utility program and/or a utility service standard should take all necessary steps in order to avoid double-counting when reporting the above information.

B. Commercial

Under this alternative, the customer must submit the codified version of the MCS which a jurisdiction in its service territory is proposing for adoption or which has been adopted. The enforcement methods should be specified. In addition, the customer must indicate what steps the jurisdiction will take to address IAQ and ventilation requirements of BPA's Early Adopter Program. Finally, the customer must indicate what fraction of its commercial load lies within jurisdictions which have or will be implementing a BPA-approved commercial building code.

By May 1, 1988, the customer is to submit the above information to BPA The statute or ordinance must be operative no later than August 1, 1988.

Finally, the utility will collect and provide to BPA by January 30, of the following year:

1. Total new commercial buildings (all fuels) constructed in the utility's service area during the past calendar year.

2. Total new electrically heated commercial buildings constructed in the utility's service area during the past calendar year.

3. Total new coimmercial buildings constructed, in the utility's service area during the past calendar year, to the standard(s) described in the customer's plan, broken out be BPA prototype and square footage.

Appendix 5

Avoiding a Surcharge by Adopting or Equivalent Building Codes

An alternative code is designed to achieve total electrical savings which, in aggregate, are at least as large as the electrical savings expected had the Council's residential and commercial MCS been implemented. [One alternative to this definition would be to compare the electrical savings from the residential code to the electrical savings had Super GOOD CENTS been implemented in the same area.] A jurisdiction proposing to adopt an alternative code, in which one sector's total electrical savings is expected to exceed the target electrical savings level for that sector, can use those electrical savings to offset electrical savings below the target in the other sector. The alternative code path may be pursued only when the aggregate electrical savings target is based on the Council's MCS.

As compared to altenative codes, equivalent codes examine each sector individually. They differ from the pre-approved codified versions mentioned earlier, but provide equivalent savings. An equivalent code must achieve at least the same level of total savings, in each sector separately, as would have been achieved by implementing BPA's Super GOOD CENTS Program and the Council'a MCS recommendations.

A customer must submit a copy of the proposed alternative or equivalent code. In addition, the customer must indicate how the jurisdication plans on meeting

IAQ and ventilation requirements of BPA's program for that sector. Finally, the customer must indicate what fraction of its residential and commercial loads lie within jurisdictions which have or will be implementing a BPA-approved residential and/or commercial building code. BPA staff will attempt to assist customers and jurisdictions wishing to formulate improved building codes.

If an alternative code path is pursued, customers are encouraged to submit their alternative codes at the earliest possible date, but no later than November 1, 1987. Both codes would have to be implemented and enforced by February 1, 1988.

If an equivalent code path is pursued, the customer must submit its residential plan by November 1, 1987, and its commercial plan by May 1, 1988. Then the residential code must be implemented and enforced by February 1, 1988, and the commercial code must be implemented and enforced by August 1, 1988.

Finally, a customer's plan must specify how the utility will collect and provide to BPA, by January 30 of the following year:

A. Total new homes and commercial buildings (all fuels) constructed in the utility's service area during the past calendar year (for residential, broken out by single-family, multifamily, modular, HUD-code homes).

B. Total new electrically heated homes and commercial buildings, constructed in the utility's service area during the past calendar year (for residential, broken out by single-family, multifamily, modular, and HUD-code homes).

C. Total new electrically heated homes and commercial buildings, constructed in the utility's service area during the past calendar year, to the standard(s) described in the customer's plan (for residential, broken out by single-family, multifamily, modular, and HUD-code homes, for commercial, broken out by BPA prototype and square footage).

Customers who are operating a utility program and/or a utility service standard should take all necessary steps in order to avoid double-counting when reporting the above information.

For a complete discussion of the data required to evaluate an altenative or equivalent code, refer to the latest version of BPA's MCS Code Equivalency Determination Procedures. A copy of these procedures can be obtained by contacting BPA's Public Involvement office at: 503–230–3478. Or, in Oregon but outside of Portland, use: 800–452–8429. Callers in California, Idaho, Montana, Nevada, Utah, Washington, and Wyoming may use 800–547–6048.

Appendix 6

Avoiding a Surcharge by Adopting a Codified Version of the MCS as a Utility Service Standard [1]

A. Residential

This path essentially involves adoption of a legally enforceable electric utility hook-up standard for new electrically heated residential buildigs. The customer would simple decline toserve new electrically heated buildings not built to the standard's specifications. A grace period would be allowed for buildings considered by BPA to be "under construction" at the time the standard was adopted.

Customers wishing to avoid a surcharge with this approach must submit a residential plan by November 1, 1987, and the residential service standard must become effective by February 1, 1988. A plan must contain: (1) A copy of the standard to be imposed, (2) how the customer plans on monitoring compliance with the standard, and (3) what IAQ measures and activities will be pursued to assure that the IAQ and ventilation goals of BPA's Super GOOD CENTS Program are met. Finally, the proposed plan must indicate what fraction of the customer's residential load will be covered by using utility service standards if the standard does not apply to the utility's entire service territory.

No surcharge will be imposed on any customer relying on such a service requirement which is subsequently invalidated by court action. In such an event, the customer will be given a reasonable period of time to choose and implement another option.

Finally, the customer is to submit to BPA a plan for how the utility will collect and provide to BPA by January 30 of the following year:

1. Total new homes and commercial buildings (all fuels) constructed in the utility's service area during the past calendar year (broken out by single-family, multifamily, modular, and HUD-code homes).

2. Total new electrically heated homes constructed in the utility's service area during the past calendar year (broken out by single-family, multifamily, modular, and HUD-code homes).

3. Total new electrically heated homes constructed in the utility's service area during the past calendar year, to the standard(s) described in the customer's plan (broken out by single-family, multifamily, modular, and HUD-code homes; for commercial, broken out by BPA prototype and square footage).

B. Commercial

This path essentially involves adoption of a legally enforceable electric utility hook-up standard for new electrically heated commercial buildings. The customer would simply decline to serve new electrically heated buildings not built to the standard's specifications. A grace period would be allowed for buildings considered by BPA to be "under construction" at the time the standard was adopted.

Customers wishing to avoid a surcharge with this approach must submit a commercial plan by May 1, 1988, and the commercial service standard must become effective by May 1, 1988. A plan must contain: (a) a copy of the standard to be imposed, and (b) how the customer plans on monitoring compliance with the standard. Finally, the proposed plan must indicate what fraction of the customer's commercial load will be covered by using utility service standards if the standard does not apply to the utility's entire service territory.

No surcharge will be imposed on any customer relying on such a service requirement which is subsequently invalidated by court action. In such an event, the customer will be given a reasonable period of time to choose and implement another option.

Finally, the customer is to submit to BPA a plan for how the utility will collect and provide to BPA by January 30 of the following year:

1. Total commercial buildings (all fuels) constructed in the utility's service area during the past calendar year (for residential, broken out by single-family, multifamily, modular, and HUD-code homes).

2. Total new electrically heated commercial buildings constructed in the utility's service area during the past calendar year (broken out by PBA prototype).

3. Total new electrically heated commercial buildings, constructed in the utility's service area during the past calendar year, to the standard(s) described in the customer's plan (broken

[1] Many customers have questioned whether they have legal authority, under State laws to impose such a service requirement. BPA has examined this question under the State laws of Oregon, Washington, Idaho, and Montana and have reached the tentative conclusion that no clear legal impediments exist in these States to conservation-oriented utility service requirements. While BPA does not offer legal advice to customers, particularly on questions of State law, BPA legal staff are available to discuss these preliminary conclusions with customers and their legal counsel. Any utility considering such a path would have to obtain independent legal advice on this question.

out by BPA prototype and square footage].

Appendix 7

Avoiding a Surcharge by Adopting an Alternative or Equivalent Utility Service Standard

This path is actually two alternative paths. If an equivalent utility service standard approach is pursued, a customer may choose to adopt a utility service standard which is not one of the codified versions, but which is expected to achieve at least the same level of total electrical savings in each sector separately as would have been achieved by adopting PBA's Super GOOD CENTS Program and the Council's Commercial MCS. Alternatively, the customer may choose to adopt utility service standards for the residential and commercial sectors which, when taken together, achieves at least the same level of total electrical savings as would have been achieved by adopting the Council's commercial and residential MCS. This is referred to as an alternative utility service standard.

[One alternative approach is to allow an alternative code approach using the Council's commercial MCS and PBA's Super GOOD CENTS to set the target electrical savings].

If an alternative utility service standard approach is pursued, a customer must submit to BPA (1) a copy of the proposed service standard(s), (2) a description of the enforcement method(s), (3) a description of the methods used to ensure IAQ to at least the level attained in Super GOOD CENTS, (4) a copy of the analysis used to verify that the proposed service standard(s) will achieve the required total electrical savings. This material must be submitted by November 1, 1987, and both service standards must be operative by February 1, 1988.

If an equivalent code approach is pursued, the above information must be submitted by November 1, 1987, for the residential sector; and by May 1, 1988, for the commercial sector. The residential sector service standard must be operative by February 1, 1988; and the commercial service standard must be operative by August 1, 1988.

Any plan submitted must also indicate what fraction of a utility's load will be covered by the service standard. If an alternative utility service standard approach is pursued, this determination shall be based on both the residential and commercial sectors. If an equivalent code approach is pursued, the determination shall occur separately for the residential and commercial sectors.

Finally, the customer is to submit to BPA a plan for how the utility will collect and provide to BPA, by January 30 of the following year, accurate reporting of:

A. Total new homes and commercial buildings (all fuels) constructed in the utility's service area during the past calendar year (for residential, broken out by single-family, multifamily, modular, and HUD-code homes).

B. Total new electrically heated homes and commercial buildings constructed in the utility's service area during the past calendar year (for residential, broken out by single-family, multifamily, modular, and HUD-code homes).

C. Total new electrically heated homes and commercial buildings, constructed in the utility's service area during the past calendar year, to the standard(s) described in the customer's plan (for residential, broken out by single-family, multifamily, modular, and HUD-code homes; for commercial, broken out by BPA prototype and square footage).

For a detailed description of the data required to evaluate an alternative or equivalent code, and the evaluation criteria, the customer and/or jurisdiction is advised to consult the latest version of BPA's MCS Code Equivalency Determination Procedures. A copy of these procedures can be obtained by contacting BPA's Public Involvement office at: 503–230–3478. Or, in Oregon but outside of Portland, use: 800–452–8429. In California, Idaho, Montana, Nevada, Utah, Washington, and Wyoming use: 800–547–6048.

[FR Doc. 87–12491 Filed 5–28–87; 3:57 pm]

BILLING CODE 6450–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. GP87–33–000]

Well Category Determination; Petition to Vacate

May 26, 1987.

In the matter of State of Oklahoma Section 108 NGPA Determination Exxon Corporation Lowry Gas Unit No. 1 Well FERC No. JD86–28121.

On February 27, 1987, Exxon Corporation petitioned the Commission under section 503(d) of the Natural Gas Policy Act of 1978[1] and § 275.205 of the Commission's regulations [2] to reopen this proceeding and vacate a final determination that gas produced from the captioned well, located in the Anadarko Basin (Red Fork) Field, Oklahoma, qualifies as stripper well gas under NGPA section 108.[3] That determination was made by the Oklahoma Corporation Commission upon petition of Exxon and filed with this Commission where it became final on August 17, 1986, under § 275.202(a) of the Commission's regulations.[4]

In support of its petition, Exxon states that data upon which gas from the Lowry Gas Unit No. 1 well qualified as stripper well gas showed production by the will of 966 Mcf in 53 production days, resulting in an average production of 18 Mcf per production day. However, Exxon states that a review of the production records indicates these data are erroneous and that the well actually produced 965 Mcf in 15 production days for an average production of 64 Mcf per production day, more than the 60 Mcf maximum specified for stripper well status in NGPA section 108.

Exxon states that if this determination is reopened and Exxon is permitted to withdraw its filing, Exxon will not be required to make refunds to the purchaser, El Paso Natural Gas Company, because collections were based on a contractual price that was less than the otherwise applicable NGPA maximum lawful price.

Any person desiring to be heard or to protest this petition should file a motion to intervene or protest in accordance with Rules 214 [5] or 211 [6] of the Commission's Rules of Practice and Procedure. All motions to intervene or protests should be submitted to the Federal Energy Regulatory Commission, 825 North Capitol Street, NE.,

[1] 15 U.S.C. 3413(d) (1982).

[2] 18 CFR 275.205 (1986).

[3] Exxon states that it has a 76.6 percent interest in gas produced from the subject well and that the other working interest owners are Mr. Robert W. Moore, Ennex Ltd. II, Mr. Donald Gray, Fabco Oil Co., Inc., Pinion Oil Co., Buffalo Royalty Corp., Cities Service Oil Co., Wood Oil Co., Moody Oil Co., MCF Energy Corp., Larry O. Hulsey & Co., and Danden Petroleum Co.

[4] 18 CFR 275.202(a) (1986).

[5] 18 CFR 385.214 (1986).

[6] 18 CFR 385.211 (1986).

Washington, DC 20426, not later than 15 days following publication of this notice in the Federal Register. All protests will be considered by the Commission, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene in accordance with Rule 214. Copies of the petition are on file with the Commission and available for public inspection.

Kenneth F. Plumb,

Secretary

[FR Doc. 87-12389 Filed 5-29-87; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. GP87-24-000]

Pennsylvania Department of Environmental Resources, et al.; Petition to Reopen, Vacate, and Withdraw Final Well Category Determinations

May 26, 1987.

In the matter of Pennsylvania Department of Environmental Resources, Bureau of Oil and Gas Management, NGPA Section 102, Fox Oil & Gas, Inc., Earl Buterbaugh No. 2, Well, FERC No. JD84-12150, and Anthony Bernecky No. 1 Well, FERC No. JD84-12986.

Take notice that on January 9, 1987, Fox Oil & Gas Incorporated (Fox) filed pursuant to § 275.205 of the Commission's regulations, [1] a petition to reopen and vacate new onshore well category determinations made pursuant to section 102 (c) of the Natural Gas Policy Act of 1978 (NGPA) [2] for the Earl Buterbaugh No. 2 Well and the Anthony Bernecky No. 1 well and to withdraw the applications for the determinations. The Pennsylvania Department of Environmental Resources, Bureau of Oil and Gas Management determined that the Earl Buterbaugh and the Anthony Bernecky wells qualified as new onshore wells and notified this Commission of those determinations on December 15, 1983 and December 23, 1983, respectively. Those determinations became final, pursuant to § 275.204 of the Commission's regulations, on January 29, 1984 and February 6, 1984, respectively—45 days following the respective notifications.

Fox states that it filed its application for ths subject well category determination based on available date with the belief that its wells were with 2.5 miles of a marker well. Now, Fox states that it has subsequently discovered that its data were in error and accordingly is requesting that the Commission reopen, vacate and permit it to withdraw its application for the above-mentioned wells.

Fox filed its application to withdraw the NGPA section 102 determinations for the subject wells in response to a Commission staff audit which indicated that each of the wells were within 2.5 miles of three market wells. The determination for the Bernecky No. 1 well was made pursuant to section 102(c)(1)(B)(i) [2.5 mile market well test]. However, the determination for the Buterbaugh No. 2 Well was made pursuant to section 102(c)(1)(B)(ii) of the Commission's regulations [1000 feet deeper test]. Four of the six producing zones in the Buterbaugh No. 2 well do not qualify under section 102(c)(1)(B)(ii) of the Commission's regulations because those zones are less than 1000 feet deeper than the deepest producing zone in the three marker wells found in staff's audit. The disqualified zones are the Balltown (3150'—3157'), Sheffield (3249'—3254'), First Bradford (3431'—3439') and Third Bradford (3560'—3568'). Because two of the producing zones underlying the Buterbaugh well, qualify under section 102(c)(1)(B)(ii), Fox's petition, with respect to the Buterbaugh No. 1 well, pertains only to the above-mentioned disqualified zones.

The question of whether refunds, plus interest calculated under § 154.102(c) of the regulations, will be required is a matter which will be considered by the Commission in ruling on the subject petition.

Any person desiring to be heard or to protest this petition should file a motion to intervene or protest in accordance with Rule 214 or 211 of the Commission's Rules of Practice and Procedure. [3] All motions to intervene or protests should be submitted to the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, not later than 30 days following publication of this notice in the **Federal Register.** All protests will be considered by the Commission but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to interevene in accordance with Rule 214. Copies of this petition are on file with the Commission and are available for public inspection.

Kenneth F. Plumb,

Secretary.

[FR Doc. 87-12390 Filed 5-29-87; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. GP87-34-000]

State of New Mexico, NGPA Section 108 and Mobil Producing Texas & New Mexico Inc., State A No. 6 Well, FERC JD No. 86-31855; Notice of Petition to Reopen, Vacate, and Withdrawn Final Well Category Determination and Notices

Issued: May 26, 1987.

Take notice that on March 3, 1987, Mobil Producing Texas & New Mexico, Inc. (MPTM) filed pursuant to § 275.205 of the Commission's regulations, [1] a petition to reopen and vacate a well category determination that the State A No. 6 well, located in Lea County, New Mexico, met the requirements for continued qualification due to temporary pressure buildup under section 108 of the Natural Gas Policy Act of 1978 (NGPA). [2] Further, MPTM seeks to withdraw the application for that determination. Also MPTM seeks to withdraw two notices of disqualification filed in connection with the well's overproduction.

MPTM states that it filed an application for the original NGPA section 108 well category determination for the well on March 31, 1986 and that the State of New Mexico determined that the said well qualified for NGPA section 108 status on October 27, 1986. Also, MPTM states that prior to New Mexico's October 27, 1986 determination if filed on August 4, 1986, an application for continued NGPA section 108 qualification of the aforementioned well due to pressure buildup. MPTM states that its continued qualification application was based on its records which showed that the subject well's production had increased during the 90-day periods ending April 30, 1986 and May 31, 1986. MPTM states also that the State of New Mexico's temporary pressure buildup determination, made in response to the August 4 application, became final on September 12, 1986. Additionally, MPTM states that the purchaser of the gas from the above-mentioned well subsequently notified it that the said well had overproduced during the 90-day period ending March 31, 1986 under circumstances disallowing continued qualification under the NGPA and the Commission's regulations, thereby causing it to file its March 3, 1987 petition. Further, MPTM that states it also seeks to withdraw the two disqualification notices filed on August 29, 1986 because of the well's overproduction for the 90-day periods ending April 30, 1986 and May 31, 1986.

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[1] 18 CFR 275.205 (1986).

[2] 15 U.S.C. 3012 (C) (1982).

[3] 18 CFR 385.214 or 385.211 (1986).

[1] 18 CFR 275.205 (1986).

[2] 15 U.S.C. 3318 (1986).

MPTM states that because the well was already disqualified such notices are ineffective.

MPTM states that no refunds are due because the purchaser of the gas has not paid the NGPA section 108 price since the disqualification on March 31, 1986.

Any person desiring to be heard or to protest this petition should file a motion to intervene or protest in accordance with Rule 214 or 211 of the Commission's Rules of Practice and Procedure.[3] All motions to intervene or protests should be submitted to the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, not later than 30 days following publication of this notice in the Federal Register. All protests will be considered by the Commission but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene in accordance with Rule 214. Copies of this petition are on file with the Commission and are available for public inspection.

Kenneth F. Plumb,

Secretary.

[FR Doc. 87-12391 Filed 5-29-87; 8:45 am]

BILLING CODE 6717-01-M

Docket No. SA87-26-000

Amoco Production Co.; Petition for Adjustment

May 26, 1987.

On March 23, 1987, Amoco Production Company filed with the Federal Energy Regulatory Commission a petition for waiver pursuant to Commission Order No. 399-A,[1] section 502(c) of the Natural Gas Policy Act of 1978,[2] and Subpart K of the Commission's Rules of Practice and Procedure.[3] Petitioner seeks waiver of that portion of its Btu refund obligation attributable to royalties paid by petitioner to (1) the Minerals Management Service of the U.S. Department of the Interior (MMS) and (2) the State of Louisiana for which petitioner has been or may be unable to collect reimbursement. Under Order No. 399, these refunds were due by November 5, 1986,[4] but this deadline has been postponed.[5] Petitioner further requests a Commission order directing its purchasers to refund all such amounts which were previously refunded to them.

Petitioner requests waiver of the Btu refund obligation as uncollectible to the extent such obligation is attributable to federal and state royalty interest owners that have refused to return royalty overpayments to petitioner. Petitioner states that the portion of its Btu refund obligation not paid by federal and state royalty owners is approximately $1 million.

The procedures applicable to the conduct of the adjustment proceeding are found in Subpart K of the Commission's Rules of Practice and Procedure. Any person desiring to participate in this adjustment proceeding must file a motion to intervene in accordance with the provisions of such Subpart K. All motions to intervene must be filed within 15 days after publication of this notice in the Federal Register.

Kenneth F. Plumb,

Secretary.

[FR Doc. 87-12384 Filed 5-29-87; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP85-119-005 et al.]

Arkla Energy Resources et al.; Filing of Pipeline Refund Reports

May 26, 1987.

Take notice that the pipelines listed in the Appendix hereto have submitted to the Commission for filing proposed refund reports. The date of filing and docket number are also shown on the appendix.

Any person wishing to do so may submit comments in writing concerning the subject refund reports. All such comments should be filed with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, on or before June 11, 1987. Copies of the respective filings are on file with the Commission and available for public inspection.

Kenneth F. Plumb,

Secretary.

Appendix

Filing date	Company	Docket No.
4/6/87	Arkla Energy Resources	RP85-119-005
4/14/87	Raton Gas Transmission Company.	TA87-1-40-004
4/21/87	Texas Eastern Gas Pipeline Company.	RP74-41-041
4/23/87	Alabama-Tennessee Natural Gas Company.	RP85-117-008
4/24/87	Granite State Gas Transmission, Inc.	RP73-17-013
4/27/87	KN Energy, Inc.	RP85-98-005

[FR Doc. 87-12392 Filed 5-29-87; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. CI87-500-000]

Champlin Petroleum Co.; Petition for a Declaratory Order

May 26, 1987.

Take notice that on April 13, 1987, Champlin Petroleum Company (Champlin) filed with the Commission pursuant to § 385.207 of the Commission's regulations (Rule 207), a petition for a declaratory order. Champlin contends that certain facilities which it proposes to acquire, as well as certain interconnecting facilities which it proposes to construct, on the outer continental shelf (OCS) are gathering facilities under section 1(b) of the Natural Gas Act (NGA), and therefore exempt from the certification requirements of section 7(c) of the NGA.

Champlin, a producer of natural gas, sells gas from its well on High Island Block A-244 to Texas Gas Transmission Corporation (Texas Gas) pursuant to an August 24, 1984 contract. These sales are exempt from the certification requirements of section 7(c) of the NGA. To take delivery of Champlin's gas, Texas Gas constructed 7.33 miles of 8⅝ inch line in the High Island Area, offshore Texas, which connects the Champlin well to an underwater connection point on the 42 inch transmission line of the High Island Offshore System (HIOS).

On September 19, 1986, Texas Gas agreed to sell its 7.33 mile line to Champlin, which will continue to use this line to convey its production from Champlin's well High Island Block 2-44 to the HIOS 42 inch transmission line.

Once Champlin acquires these gathering facilities from Texas Gas, Champlin intends to use this line to gather its gas from its nearby well on

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[3] 18 CFR 385.214 and 385.211 (1986).

[1] Refunds Resulting from Btu Measurement Adjustments, 49 F.R. 46353 (Nov. 26, 1984); FERC Stats. & Regs. [Regulations Preambles 1982-1985] ¶30,612.

[2] 15 U.S.C. 3412(c) (1982).

[3] 18 CFR 385.1101-385.1117 (1986).

[4] 49 F.R. 37735 at 37740 (Sept. 26, 1984), FERC Stats. & Regs. [Regulations Preambles 1982-1985] ¶30,597 at 31,150. In Order No. 399, the Commission established refund procedures for charges for natural gas that exceeded NGPA ceilings as a result of Btu measurements based on the water vapor content of the gas "as delivered," rather than on a water saturated basis. In so doing, the Commission was implementing the decision in Interstate Natural Gas Association of America v. Federal Energy Regulatory Commission, 716 F.2d 1 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 108 (1984).

[5] In Order No. 399-C, 37 FERC ¶ 61,091, issued November 5, 1986, the Commission postponed the November 5, 1986 deadline for payment of Btu refunds attributable to royalty payments for any first seller that has a petition on file with the Commission seeking waiver of or postponement of the deadline to pay Btu refunds attributable to royalty payments.

West Cameron Block 420. To do this, Champlin intends to build approximately 6.44 miles of interconnecting 6 inch line between its "A" platform on block A-244 and its platform on West Cameron Block 420 in the West Cameron Area, Louisiana, in order to carry production from the West Cameron Block to its block A-244 line.

Champlin states that these 2 facilities constitute gathering facilities, within the meaning of section 1(b) of the NGA, because they satisfy the "primary function" test for gathering set out in *Shell Gas Pipeline Co.*, 36 FERC ¶ 61,317 (1986) and *Farmland Industries*, 23 FERC ¶ 61,063 at 61,143 (1983). Champlin states that the primary purpose of these facilities is to collect gas from its wells so that the gas can then be made available to an interstate transmission line. Champlin thus seeks a declaratory order stating that the facilities which it proposes to acquire, as well as the line it proposes to construct in the OCS waters, fall under the definition of a gathering facility as set out in section 1(b) of the Natural Gas Act.

Any person desiring to be heard or to protest this declaratory order should file a motion to intervene or protest in accordance with Rule 214 or 211 of the Commission's rules of practice and procedure. All motions to intervene or protests should be submitted to the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, within 30 days after publication of this notice in the **Federal Register**. All protests will be considered by the Commission but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene in accordance with Rule 214. Copies of the petition filed in this proceeding are on file with the Commission and available for public inspection.

Kenneth F. Plumb,

Secretary.

[FR Doc. 87-12388 Filed 5-29-87; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. SA87-43-000]

Colonial Corp.; Petition for Adjustment

May 26, 1987.

Take notice that on April 20, 1987, Colonial Corporation, a Kansas Corporation (Colonial), filed with the Commission a petition for adjustment pursuant to section 502(c) of the Natural Gas Policy Act of 1978 and Part 385 (Subpart K) of the Commission's regulations. Colonial seeks waiver of its obligation to Williams Natural Gas Company under Commission Order Nos. 399, 399-A, and 399-B requiring payment of Btu adjustment refunds by first sellers of natural gas.

In support of its petition, Colonial states the following: (1) That the 13 natural gas producers from whom Colonial purchases gas are not able to reimburse Colonial for Order 93 refunds; (2) that Colonial has never earned a profit and is unable to repay its secured lender the funds advanced for construction of the pipeline; (3) that payment of the refund obligation would represent a special hardship causing Colonial to file a Chapter 7 bankruptcy proceeding.

The procedures applicable to the conduct of this waiver proceeding are found in Subpart K of the Commission's rules of practice and procedure. Any person desiring to participate in this adjustment proceeding must file a motion to intervene in accordance with the provisions of Rules 214 and 1106 of the Commission's rules of practice and procedure. All motions to intervene must be filed within 15 days after publication of this notice in the **Federal Register.**

Kenneth F. Plumb,

Secretary.

[FR Doc. 87-12385 Filed 5-29-87; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. SA87-40-000]

Forest Oil Corp.; Petition for Adjustment

May 26, 1987.

On March 16, 1987, Forest Oil Corporation filed with the Federal Energy Regulatory Commission a petition for waiver pursuant to Commission Order No. 399-A,[1] section 502(c) of the Natural Gas Policy Act of 1978,[2] and Subpart K of the Commission's Rules of Practice and Procedure.[3] Forest seeks waiver concerning that portion of its Btu refund obligation attributable to certain royalties paid by it to the Minerals Management Service of the U.S. Department of the Interior (MMS). Under Order No. 399, these refunds were due by November 5, 1986,[4] but this deadline has been postponed.[5]

In support of its petition, Forest states that by letter of June 11, 1986, it has requested refunds from MMS relative to such royalties, but has received no response. It indicates that MMS has taken the position that refunds not filed for within the statute of limitations period under section 10 of the Outer Continental Shelf Lands Act are barred.

The procedures applicable to the conduct of this adjustment proceeding are found in Subpart K of the Commission's Rules of Practice and Procedure. Any person desiring to participate in this adjustment proceeding must file a motion to intervene in accordance with the provisions of Subpart K. All motions to intervene must be filed within 15 days after publication of this notice in the **Federal Register.**

Kenneth F. Plumb,

Secretary.

[FR Doc. 87-12386 Filed 5-29-87; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. SA87-39-000]

The Louisiana Land and Exploration Company and LLOXY Holdings, Inc.; Petition for Adjustment

May 26, 1987.

On March 13, 1987, the Louisiana Land and Exploration Company and LLOXY Holdings, Inc. filed with the Federal Energy Regulatory Commission a petition for waiver pursuant to Commission Order No. 399-A, [1] section 502(c) of the Natural Gas Policy Act of 1978, [2] and Subpart K of the

[1] Refunds Resulting from Btu Measurement Adjustments, 49 FR 46353 (Nov. 26, 1984); FERC Stats. & Regs. [Regulations Preambles 1982-1985] ¶ 30,612.

[2] 15 U.S.C. 3412(c) (1982).

[3] 18 CFR 385.1101-385.1117 (1986).

[4] 49 FR 37,735 at 37,740 (Sept. 26, 1984), FERC Stats. & Regs. [Regulations Preambles 1982-1985] ¶ 30,597 at 31,150. In Order No. 399, the Commission established refund procedures for charges for natural gas that exceeded NGPA ceilings as a result of Btu measurements based on the water vapor content of the gas "as delivered," rather than on a water saturated basis. In so doing, the Commission was implementing the decision in Interstate Natural Gas Association of America v. Federal Energy Regulatory Commission, 716 F. 2d 1 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1108 (1984).

[5] In Order No. 399-C, issued November 5, 1986, the Commission postponed the November 5, 1986 deadline for payment of Btu refunds attributable to royalty payments for any first seller that has a petition on file with the Commission seeking waiver of or postponement of the deadline to pay Btu refunds attributable to royalty payments.

[1] Refunds Resulting from the Btu Measurement Adjustments, 49 FR 46,353 (Nov. 26, 1984); FERC Stats. & Regs. [Regulations Preambles 1982-1985] ¶ 30,612.

[2] 15 U.S.C. 3412(c) (1982).

Commission's Rules of Practice and Procedure. [3] Petitioners seek waiver of that portion of their Btu refund obligation attributable to royalty paid by petitioners to (1) the Minerals Management Service of the U.S. Department of the Interior (MMS) and (2) the State of Louisiana. Under Order No. 399, these refunds were due by November 5, 1986, [4] but this deadline has been postponed. [5]

Petitioners submit that MMS has taken the position that certain Btu refunds related to royalty payments paid prior to November 9, 1981, are barred by section 10 of the Outer Continental Shelf Lands Act. [6] Petitioners assert that such payments are uncollectible and should be waived.

Petitioners state that the Louisiana State Mineral Board has adopted a resolution which provides that producers are not authorized to recover Btu refund amounts attributable to state royalty payments by deductions from royalty payments. With respect to the Louisiana royalties and certain MMS royalties paid after November 9, 1981, petitioners assert that since both MMS and the State Mineral Board have indicated that recoupment from future royalties will not be allowed and repayment will not be made, these refunds should also be deemed uncollectible. Petitioners further assert that denial of the requested relief would result in irreparable injury to petitioners and an unfair distribution of burdens.

The procedures applicable to the conduct of this adjustment proceeding are found in Subpart K of the Commission's Rules of Practice and Procedure. Any person desiring to participate in this adjustment proceeding must file a motion to intervene in accordance with the provisions of such Subpart K. All motions to intervene must be filed within 15 days after publication of this notice in the **Federal Register.**

Kenneth F. Plumb,

Secretary.

[FR Doc. 87-12387 Filed 5-27-87; 8:45 am]

BILLING CODE 6717-01-M

[3] 18 CFR 385.1101-385.1117 (1986).

[4] 49 FR 37,735 at 37,740 (Sept. 26, 1984), FERC Stats. & Regs. [Regulations Preambles 1982-1985] ¶ 30,597 at 31,150. In Order No. 399, the Commission established refund procedures for charges for natural gas that exceeded NGPA ceilings as a result of Btu measurements based on the water vapor content of the gas "as delivered," rather than on a water saturated basis. In so doing, the Commisison was implementing the decision in Interstate Natural Gas Association of America v. Federal Energy Regulatory Commission, 716 F. 2d 1 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1108 (1984).

[5] In Order No. 399-C, 37 FERC ¶ 61,091, issued November 5, 1986, the Commission postponed the November 5, 1986 deadline for payment of Btu refunds attributable to royalty payments for any first seller that has a petition on file with the Commission seeking waiver of or postponement of the deadline to pay Btu refunds attributable to royalty payments.

[6] 43 U.S.C. 1339 (1982).

FEDERAL COMMUNICATIONS COMMISSION

Applications for Consolidated Hearing; Reed Broadcasting et al.

1. The Commission has before it the following mutually exclusive applications for a new FM station:

Applicant and city/state	File No.	MM docket No.
A. Terry D. Reed and Laura W. Reed d/b/a Reed Broadcasting, A Partnership; Buckhannon, WV.	BPH-850710ND	87-155
B. Black Media Communications; Buckhannon, WV.	BPH-850712YD	.....
C. Mountainaire Broadcasting Corp.; Buckhannon, WV.	BPH-850712YE	.....
D. Upshur Broadcasting, Inc.; Buckhannon, WV.	BPH-850712Z9	.....
E. Elaine C. Eicher; Buckhannon, WV.	BPH-850712YF	(1)

[1] Dismissed.

2. Pursuant to section 309(e) of the Communications Act of 1934, as amended, the above applications have been designated for hearing in a consolidated preceding upon the issues whose headings are set forth below. The text of each of these issues has been standardized and is set forth in its entirety under the corresponding headings at 51 FR 19347, May 29, 1986. The letter shown before each applicant's name, above, is used below to signify whether the issue in question applies to that particular applicant.

Issue Heading and Applicants

1. Main Studio, C
2. Air Hazard, C
3. Comparative, A, B, C, D
4. Ultimate, A, B, C, D

3. If there is any non-standardized issue(s) in this proceeding, the full text of the issue and the applicant(s) to which it applies are set forth in an Appendix to this Notice. A copy of the complete HDO in this proceeding is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street NW., Washington, DC. The complete text may also be purchased from the Commission's duplicating contractor, International Transcription Services, Inc., 2100 M Street NW., Washington, DC 20037 (Telephone (202) 857-3800).

W. Jan Gay,

Assistant Chief Audio Services Division, Mass Media Bureau.

[FR Doc. 87-12338 Filed 5-29-87; 8:45 am]

BILLING CODE 6712-01-M

Applications for Consolidated Hearing; Yellowstone Broadcasting, Ltd., et al.

1. The Commission has before it the following mutually exclusive applications for a new station:

Applicant and city/state	File no.	M docket no.
A. Amanda Kelton, d/b/a Yellowstone Broadcasting, Ltd., Billings, MT.	BPCT-861117KY	87-157
B. Echonet Corporation, Billings, MT.	BPCT-870212KH	

2. Pursuant to section 309(e) of the Communications Act of 1934, as amended, the above applications have been designated for hearing in a consolidated proceeding upon the issues whose headings are set forth below. The text of each of these issues has been standardized and is set forth in its entirety under the corresponding headings at 51 FR 19347, May 29, 1986. The letter shown before each applicant's name, above, is used below to signify whether the issue in question applies to that particular applicant.

Issue Heading and Applicant(s)

1. Air Hazard, A,B
2. Comparative, A,B
3. Ultimate, A,B

3. If there is any non-standardized issue(s) in this proceeding, the full text of the issue and the applicant(s) to which it applies are set forth in an Appendix to this Notice. A copy of the complete HDO in this proceeding is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW., Washington, DC. The complete text may also be purchased from the Commission's duplicating contractor, International Transcription Services, Inc., 2100 M Street NW., Washington, DC 20037 (Telephone No. (202) 857-3800.)

Roy J. Stewart,

Chief, Video Services Division, Mass Media Bureau.

[FR Doc. 87-12339 Filed 5-29-87; 8:45 am]

BILLING CODE 6712-01-M

FEDERAL HOME LOAN BANK BOARD

[No. AC-628]

Prince George's Federal Savings and Loan Association; Upper Marlboro, MD; Final Action; Approval of Conversion Application

Dated: May 26, 1987.

Notice is hereby given that on May 18, 1987, the Office of the General Counsel of the Federal Home Loan Bank Board, acting pursuant to the authority delegated to the General Counsel or his designee, approved the application of Prince George's Federal Savings and Loan Association, Upper Marlboro, Maryland for permission to convert to the stock form of organization. Copies of the application are available for inspection at the Office of the Secretariat at the Federal Home Loan Bank Board, 1700 G Street, NW., Washington, DC 20552, and at the Office of the Supervisory Agent at the Federal Home Loan Bank of Atlanta, 1475 Peachtree Street, NW., Atlanta, Georgia 30309.

By the Federal Home Loan Bank Board.

Jeff Sconyers,

Secretary.

[FR Doc. 87-12381 Filed 5-29-87; 8:45 am]

BILLING CODE 6720-01-M

[No. AC-627]

St. Clair Federal Savings and Loan Association; Pell City, AL; Final Action; Approval of Conversion Application

Dated: May 26, 1987.

Notice is hereby given that on May 18, 1987, the Office of the General Counsel of the Federal Home Loan Bank Board, acting pursuant to the authority delegated to the General Counsel or his designee, approved the application of St. Clair Federal Savings and Loan Association, Pell City, Alabama, for permission to convert to the stock form of organization. Copies of the application are available for inspection at the Office of the Secretariat at the Federal Home Loan Bank Board, 1700 G Street, NW., Washington, DC 20552, and at the Office of the Supervisory Agent at the Federal Home Loan Bank of Atlanta, 1475 Peachtree Street, NE., Atlanta, Georgia 30348.

By the Federal Home Loan Bank Board.

Jeff Sconyers,

Secretary.

[FR Doc. 87-12382 Filed 5-29-87; 8:45 am]

BILLING CODE 6720-01-M

FEDERAL MARITIME COMMISSION

Agreement(s) Filed

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, DC Office of the Federal Maritime Commission, 1100 L Street, NW, Room 10325. Interested parties may submit comments on each agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days after the date of the **Federal Register** in which this notice appears. The requirements for comments are found in § 572.603 of Title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Agreement No.: 224-010897-001
Title: Port of Kodiak Terminal Agreement
Parties:
City of Kodiak (Kodiak)
Sea-Land Service, Inc. (Sea-Land)
Synopsis: The proposed agreement would allow Kodiak to reduce the leased area at the Port of Kodiak and reduce the associated lease rental charges.

Agreement No.: 224-200002
Title: Virginia Port Authority Terminal Agreement
Parties:
Virginia International Terminals, Inc. (VIT)
Lykes Bros. Steamship Co., Inc. (Lykes)
Synopsis: The proposed agreement would provide Lykes crane rental and wharfage concessions in consideration for Lykes making Norfolk International Terminal, operated by VIT, a Mid-Atlantic port of call. The parties have requested a shortened review period.

Agreement No.: 224-200003
Title: Charleston Terminal Agreement
Parties:
South Carolina State Ports Authority (Authority)
Associated Container Transport and Columbus Line (ACT-CL)
Synopsis: The proposed agreement would allow the Authority to assess ACT-CL a reduced wharfage rate in consideration for specified amounts of ACT-CL container tonnage annually.

Dated: May 27, 1987.

By Order of the Federal Maritime Commission.

Joseph C. Polking,

Secretary.

[FR Doc. 87-12396 Filed 5-29-87; 8:45 am]

BILLING CODE 6730-01-M

Agreement(s) Filed

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of ech agreement at the Washington, DC Office of the Federal Maritime Commission, 1100 L Street, NW., Room 10325. Interested parties may submit comments on each agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days after the date of the **Federal Register** in which this notice appears. The requirements for comments are found in § 572.603 of Title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Agreement No.: 202-009648A-040
Title: Inter-American Freight Conference
Parties:
A. Bottacchi. S.A. De Navegacion C.F.I.e.I
American Transport Lines, Inc.
A/S Ivarans Rederi
Brazil-American 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.
Frota Amazonica
Georgia-Aztec Line
Van Nievelt Goudriaan & Co. B.V.
Sea-Land Service, Inc.
Transportacion Maritima Mexicana, S.A.
Synopsis: The proposed amendment would provide for independent action on freight forwarder compensation payable to licensed customs brokers in connection with export shipments.

Agreement No.: 218-011103
Title: Nonexclusive Transshipment Agreement Between Moller-Maersk Line, and Totem Ocean Trailer Express, Inc.
Parties:
Moller-Maersk Line
Totem Ocean Trailer Express, Inc.
Synopsis: The proposed amendment would establish a nonexclusive,

transshipment arrangement between the parties in the trade between points in Alaska and points in the Far East, with transshipment at Seattle or Tacoma, Washington. The parties have requested a shortened review and a waiver of certain filing requirements of the Commission's regulations.

Agreement No.: 218–011104
Title: Nonexclusive Transshipment Agreement Between Japan Line and Totem Ocean Trailer Express, Inc.
Parties:
Japan Line
Totem Ocean Trailer Express, Inc.
Synopsis: The proposed amendment would establish a nonexclusive, transshipment arrangement between the parties in the trade between points in Alaska and points in the Far East, with transshipment at Seattle or Tacoma, Washington. The parties have requested a shortened review and a waiver of certain filing requirements of the Commission's regulations.

Agreement No.: 218–011105
Title: Nonexclusive Transshipment Agreement Between Kawasaki Kisen Kaisha, Ltd. and Totem Ocean Trailer Express, Inc.
Parties:
Kawasaki Kisen Kaisha, Ltd.
Totem Ocean Trailer Express, Inc.
Synopsis: The proposed amendment would establish a nonexclusive, transshipment arrangement between the parties in the trade between points in Alaska and points in Japan and Korea, with transshipment at Seattle or Tacoma, Washington. The parties have requested a shortened review and a waiver of certain filing requirements of the Commission's regulations.

Agreement No.: 218–011106
Title: Nonexclusive Transshipment Agreement Between Showa Line Limited and Totem Ocean Trailer Express, Inc.
Parties:
Showa Line Limited
Totem Ocean Trailer Express, Inc.
Synopsis: The proposed agreement would establish a nonexclusive, transshipment arrangement between the parties in the trade between points in Alaska and points in the Far East, with transshipment at Seattle or Tacoma, Washington. The parties have requested a shortened review and a waiver of certain filing requirements of the Commission's regulations.

Agreement No.: 218–011107
Title: Nonexclusive Transshipment Agreement Between Nippon Yusen Kaisha Line and Totem Ocean Trailer Express, Inc.
Parties:
Nippon Yusen Kaisha Line
Totem Ocean Trailer Express, Inc.
Synopsis: The proposed agreement would establish a nonexclusive, transshipment arrangement between the parties in the trade between points in Alaska and points in the Far East, with transshipment at Seattle or Tacoma, Washington. The parties have requested a shortened review and a waiver of certain filing requirements of the Commission's regulations.

Agreement No.: 218–011108
Title: Nonexclusive Transshipment Agreement Between Westwood Shipping Lines and Totem Ocean Trailer Express, Inc.
Parties:
Westwood Shipping Lines
Totem Ocean Trailer Express, Inc.
Synopsis: The proposed agreement would establish a nonexclusive, transshipment arrangement between the parties in the trade between points in Alaska and points in the Far East, with transshipment at Seattle or Tacoma, Washington. The parties have requested a shortened review and a waiver of certain filing requirements of the Commission's regulations.

Agreement No.: 218–011109
Title: Nonexclusive Transshipment Agreement Between American President Lines, Ltd. and Totem Ocean Trailer Express, Inc.
Parties:
American President lines, Ltd.
Totem Ocean Trailer Express, Inc.
Synopsis: The proposed agreement would establish a nonexclusive, transshipment arrangement between the parties in the trade between points in Alaska and points in the Far East, with transshipment at Seattle or Tacoma, Washington. The parties have requested a shortened review and a waiver of certain filing requirements of the Commission's regulations.

Agreement No.: 218–011110
Title: Nonexclusive Transshipment Agreement Between Mitsui O.S.K. Line, and Totem Ocean Trailer Express, Inc.
Parties:
Mitsui O.S.K. Line
Totem Ocean Trailer Express, Inc.
Synopsis: The proposed agreement would establish a nonexclusive, transshipment arrangement between the parties in the trade between points in Alaska and points in the Far East, with transshipment at Seattle or Tacoma, Washington. The parties have requested a shortened review and a waiver of certain filing requirements of the Commission's regulations.

Agreement No.: 318–011111
Title: Nonexclusive Transshipment Agreement between Hapag-Lloyd A.G. and Totem Ocean Trailer Express, Inc.
Parties:
Hapag-Lloyd A.G.
Totem Ocean Trailer Express, Inc.
Synopsis: The proposed agreement would establish a nonexclusive, transshipment arrangement between the parties in the trade between points in Alaska and points in Europe, with transshipment at Seattle or Tacoma, Washington. The parties have requested a shortened review and a waiver of certain filing requirements of the Commission's regulations.

Agreement No.: 218–011112
Title: Nonexclusive Transshipment Agreement between Orient Overseas Container Line, Ltd. and Totem Ocean Trailer Express, Inc.
Parties:
Orient Overseas Container Line, Ltd.
Totem Ocean Trailer Express, Inc.
Synopsis: The proposed agreement would establish a nonexclusive, transshipment arrangement between the parties in the trade between points in Alaska and points in the Far East, with transshipment at Seattle or Tacoma, Washington. The parties have requested a shortened review and a waiver of certain filing requirements of the Commission's regulations.

Agreement No.: 218–011113
Title: Nonexclusive Transshipment Agreement between Star Shipping (USWC), Inc. and Totem Ocean Trailer Express, Inc.
Parties:
Star Shipping (USWC), Inc.
Totem Ocean Trailer Express, Inc.
Synopsis: The proposed agreement would establish a nonexclusive, transshipment arrangement between the parties in the trade between points in Alaska and points in the Far East, with transshipment at Seattle or Tacoma, Washington. The parties have requested a shortened review and a waiver of certain filing requirements of the Commission's regulations.

Agreement No.: 218–011114
Title: Nonexclusive Transshipment Agreement between Neptune Orient Line, Ltd. and Totem Ocean Trailer Express, Inc.

Parties:
Neptune Orient Line, Ltd.
Totem Ocean Trailer Express, Inc.
Synopsis: The proposed agreement would establish a nonexclsive, transshipment arrangement between the parties in the trade between points in Alaska and points in the Far East, with transshipment at Seattle or Tacoma, Washington. The parties have requested a shortened review and a waiver of certain filing requirements of the Commission's regulations.

Agreement No.: 218–011115
Title: Nonexclusive Transshipment Agreement between Johnson Scanstar and Totem Ocean Trailer Express, Inc.
Parties:
Johnson Scanstar
Totem Ocean Trailer Express, Inc.
Synopsis: The proposed agreement would establish a nonexclusive, transshipment arrangement between the parties in the trade between points in Alaska and points in Europe, with transshipment at Seattle or Tacoma, Washington. The parties have requested a shortened review and a waiver of certain filing requirements of the Commission's regulations.

Agreement No.: 218–011116
Title: Nonexclusive Transshipment Agreement between Yamashita-Shinnihon Steamship Company Ltd., and Totem Ocean Trailer Express, Inc.
Parties:
Yamashita-Shinnihon Steamship Company, Ltd.
Totem Ocean Trailer Express, Inc.
Synopsis: The proposed agreement would establish a nonexclusive, transshipment arrangement between the parties in the trade between points in Alaska and points in the Far East, with transshipment at Seattle or Tacoma, Washington. The parties have requested a shortened review and a waiver of certain filing requirements of the Commissin's regulations.

Dated: May 27, 1987.

By Order of the Federal Maritime Commission.

Joseph C. Polking

Secretary

[FR Doc. 87–12399 Filed 5–29–87; 8:45 am]

BILLING CODE 6730–01–M

FEDERAL RESERVE SYSTEM

Community Bancorp, Inc., et al.; Applications To Engage de Novo in Permissible Nonbanking Activities

The companies listed in this notice have filed an application under § 225.23(a)(1) of the Board's Regulation Y (12 CFR 225.23(a)(1)) for the Board's approval 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to commence or to engage *de novo*, either directly or through a subsidiary, in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies. Unless otherwise noted, such activities will be conducted throughout the United States.

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than June 19, 1987.

A. **Federal Reserve Bank of St. Louis** (Randall C. Sumner, Vice President) 411 Locust Street, St. Louis, Missouri 63166:

1. *Community Bancorp, Inc.*, Manchester, Missouri; to engage *de novo* through its subsidiary, First Banks, Inc., Manchester, Missouri, in the issuance of travelers checks through a license agreement with MasterCard International, Inc., pursuant to § 225.25(b)(12) of the Board's Regulation Y. This activity will be conducted in Illinois and Missouri.

2. *Independent Southern Bancshares, Inc.*, Brownsville, Tennessee; to engage *de novo* in investment or financial advice pursuant to § 225.25(b)(4) of the Board's Regulation Y.

B. Federal Reserve Bank of Kansas City (Thomas M. Hoenig, Vice President) 925 Grand Avenue, Kansas City, Missouri 64198:

1. *Harrison County Bancshares, Inc.*, Bethany, Missouri; to engage *de novo* in acting as agent in the sale of general insurance in the town of Bethany, Missouri, purusuant to § 225.25(b)(8)(iii) of the Board's Regulation Y; and offering discount brokerage services pursuant to § 225.25(b)(15) of the Board's Regulation Y.

Board of Governors of the Federal Reserve System, May 26, 1987.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 87–12343 Filed 5–29–87; 8:45 am]

BILLING CODE 6210–01–M

Omnibancorp; Acquisition of Company Engaged in Permissible Nonbanking Activities

The organization listed in this notice has applied under §225.23(a)(2) or (f) of the Board's Regulation Y (12 CFR 225.23(a)(2) or (f)) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to acquire or control voting securities or assets of a company engaged in a nonbanking activity that is listed in §225.25 of Regulation Y as closely related to banking and permissible for bank holding companies. Unless otherwise noted, such activities will be conducted throughout the United States.

The application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompainied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Comments regarding the application must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than June 18, 1987.

A. **Federal Reserve Bank of Kansas City** (Thomas M. Hoenig, Vice President) 925 Grand Avenue, Kansas City, Missouri 64198:

1. *Omnibancorp,* Denver, Colorado; to acquire MSHC, Inc., Denver, Colorado, and thereby engage in the activity of making and servicing loans as would be conducted by a mortgage company pursuant to §225.25(b)(1) of the Board's Regulation Y.

Board of Governors of the Federal Reserve System, May 26, 1987.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 87–12344 Filed 5–29–87; 8:45 am]

BILLING CODE 6210–01–M

Peoples Bancorp, Inc., et al.; Formations of; Acquisitions by; and Mergers of Bank Holding Companies

The companies listed in this notice have applied for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) and § 225.14 of the Board's Regulation Y (12 CFR 225.14) to become a bank holding company or to acquire a bank or bank holding company. The factors that are considered in acting on the applications are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank or to the offices of the Board of Governors. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Unless otherwise noted, comments regarding each of these applications must be received not later than June 19, 1987.

A. **Federal Reserve Bank of Cleveland** (John J. Wixted, Jr., Vice President) 1455 East Sixth Street, Cleveland, Ohio 44101:

1. *Peoples Bancorp, Inc.,* Marietta, Ohio; to acquire 100 percent of the voting shares of First National Bank of Chesterhill, Chesterhill, Ohio.

B. **Federal Reserve Bank of Kansas City** (Thomas M. Hoenig, Vice President) 925 Grand Avenue, Kansas City, Missouri 64198:

1. *First Financial Services, Inc.,* Falls City, Nebraska; to acquire an additional 2.16 percent of the voting shares of Packers Management Company, Inc., Omaha, Nebraska, and thereby indirectly acquire Packers Bank and Trust Company, Omaha, Nebraska. Comments on this application must be received by June 15, 1987.

C. Federal Reserve Bank of Dallas (W. Arthur Tribble, Vice President) 400 South Akard Street, Dallas, Texas 75222:

1. *First Albany, Bancshares, Inc.,* Albany, Texas; to become a bank holding company by acquiring 100 percent of the voting shares of The First National Bank of Albany, Albany, Texas.

2. *Henrietta Bancshares, Inc.,* Henrietta, Texas; to acquire 80 percent of the voting shares of First State Bank, Hubbard, Texas.

Board of Governors of the Federal Reserve System, May 26, 1987.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 87–12345 Filed 5–29–87; 8:45 am]

BILLING CODE 6210–01–M

GENERAL SERVICES ADMINISTRATION

Procedures for Ordering FY 1988 Updates to the 1984 Looseleaf Edition of the Federal Information Resources Management Regulation (FIRMR)

AGENCY: Information Resources Management Service, GSA.

ACTION: Notice of procedures for Federal agencies/departments to order FY 1988 updates to the looseleaf edition of the FIRMR.

SUMMARY: This notice is to advise Federal agencies/departments to submit their FY 1988 copy requirements for the looseleaf edition of the FIRMR to the Government Printing Office (GPO). Individual agency offices are responsible for making their requirements known to their agency GPO Liaison Officer. Agency GPO Liaison Officers are responsible for submitting agency copy requirements to GPO through their printing and Publishing Official. Agencies failing to submit orders will not receive FIRMR updates distributed in FY 1988.

APPLICABLE DATES: The looseleaf edition of the FIRMR is distributed to agencies by GPO based on agency-established copy requirements. Copy requirements are submitted to GPO annually. Agencies must submit their FY 1988 FIRMR copy requirements to GOP by June 19, 1987.

FOR FURTHER INFORMATION CONTACT: Carolyn A. Thomas, Regulations Branch (KMPR), Information Resources Management Service, telephone (202) 566–0194 or FTS, 566–0194.

SUPPLEMENTARY INFORMATION: (1) The Federal Information Resources Management Regulation (FIRMR) established on April 1, 1984, is located in the Code of Federal Regulations at Title 41, Chapter 201. It provides Governmentwide regulations for the management, acquisition, and use of information resources (including automatic data processing, office automation, records management, and telecommunications).

(2) The basic 1984 Looseleaf Edition of the FIRMR was distributed to agencies by the GPO in March of 1985, based on agency-established copy requirements for FY 1985. Updates to the basic edition were distributed in FY 1986 and 1987, also based on agency-established copy requirements for those years. GPO now requires agencies to submit their FY 1988 FIRMR copy requirements by June 19, 1987. (GPO will accept agency copy requirements, including amended requirements, for the FIRMR after the June 19th due date.) Agencies not submitting copy requirements for 1988 will not longer receive FIRMR updates after September 30, 1987.

(3) Agency GPO Liaison Officers responsible for managing FIRMR distribution are being reminded to consolidate their agency's FY 1988 FIRMR copy requirements and make those requirements known to GPO through their agency Printing and Publication Official. By Circular Number 278, dated April 30, 1987, GPO advised Federal Printing and Publication Officials to submit their agencies' FY 1988 copy requirements for all open requisitions (including the FIRMR) by June 19, 1987.

(4) FIRMR materials issued in FY 1988 will consist of updates to the basic looseleaf edition only. The basic 1984 Looseleaf Edition of the FIRMR and updates distributed prior to October 1, 1987, will not be preprinted for distribution in FY 1988. Federal employees unable to obtain the basic looseleaf edition and updates through their agency GPO Liaison Officer may subscribe to the FIRMR directly with GPO by following the procedures in paragraph six below.

(50 FIRMR updates in FY 1988 will continue to be issued under Transmittal Circulars (TC's) which will include amendments, temporary regulations, and bulletins and other informational guides. TC's will continue to contain "Transmittal Circular 84–XX" as part of the title to indicate that attachments should be filed in the basic 1984 Looseleaf Edition of the FIRMR text. All

FY 1988 production costs will be prorated to participating agencies by GPO. Based on previous year estimates, per user costs for FY 1988 are expected to be within the $10.00 to $12.00 range.

(6) Private sector companies, associations, businesses, and other interested parties wishing to receive the basic 1984 Looseleaf Edition of the FIRMR and all updates may place subscription orders with GPO by writing or calling, Superintendent of Documents, Government Printing Office, Washington, DC 20405, telephone: (202) 783-3238. The price for each subscription order is $66.00 domestic and $82.50 foreign. (GPO requires payment in advance unless charged to MasterCard, Visa, or GPO charge account.) Individuals already having a FIRMR subscription with GPO are not required to reorder at this time.

Dated: May 21, 1987.

Larry L. Jackson,

Director, Policy and Regulations Division.

[FR Doc. 87-12325 Filed 5-29-87; 8:45 am]

BILLING CODE 6820-25-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

[BERC-411-NC]

Medicare Program; Update of Ambulatory Surgical Center Payment Rates; Comment Period

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Notice with comment period.

SUMMARY: This notice implements section 9343(b)(1) of the Omnibus Budget Reconciliation Act of 1986, which requires that the payment rates for ambulatory surgical center services be reviewed and updated by July 1, 1987.

DATES: Effective Date: This notice is effective on July 1, 1987.

Comment Date: Comments will be considered if we receive them at the appropriate address, as provided below, no later than 5:00 p.m. on July 31, 1987.

ADDRESS: Mail comments to the following address: Health Care Financing Administration, Department of Health and Human Services, Attention: BERC-411-NC, P.O. Box 26676, Baltimore, Maryland 21207.

If you prefer, you may deliver your comments to one of the following addresses:

Room 309-G, Hubert H. Humphrey Building, 200 Independence Ave., SW., Washington, DC, or

Room 132, East High Rise Building, 6325 Security Boulevard, Baltimore, Maryland.

In commenting, please refer to file code BERC-411-NC. Comments received timely will be available for public inspection as they are received, generally beginning approximately three weeks after publication of a document, in Room 309-G of the Department's offices at 200 Independence Ave., SW., Washington, DC, on Monday through Friday of each week from 8:30 a.m. to 5:00 p.m. (phone: 202-245-7890).

FOR FURTHER INFORMATION CONTACT: Vivian Braxton, (301) 594-8452.

SUPPLEMENTARY INFORMATION:

I. Background

A. General Information

Section 1832(a)(2)(F)(i) of the Social Security Act (the Act), as amended by section 934 of the Omnibus Reconsiliation Act of 1980 (Pub. L. 96-499), provides that, under Part B of Medicare (Supplementary Medical Insurance), benefits include services furnished in connection with those surgical procedures that, under section 1833(i)(1)(A) of the Act, are specified by the Secretary and that are performed in an ambulatory surgical center (ASC). As defined in 42 CFR 416.2, an ASC means any distinct entity that—

- Operates exclusively for the purpose of providing surgical services to patients not requiring hospitalization;
- Has an agreement with HCFA to participate in the Medicare program as an ASC; and
- Meets specified conditions for coverage set forth in Subpart B of 42 CFR Part 416.

Generally, there are two elements in the total charge for a surgical procedure—a charge for the physician's professional services for performing the procedure, and a charge for the facility's services (such as use of an operating room). The physician's professional services furnished in connection with these surgical procedures when performed in an ambulatory setting are paid at 100 percent of the reasonable charge (or 100 percent of the reasonable cost in the case of a health maintenance organization reimbursed under section 1876 of the Act) if the physician agrees to accept assignment (§ 416.110). If the physician does not accept assignment for these services, payment is made at 80 percent of the reasonable charge.

Section 1833(i)(2)(A) of the Act authorizes the Secretary to pay ASCs a prospectively determined rate for facility services associated with covered surgical procedures meeting the criteria specified under section 1833(i)(1)(A) of the Act. Since the authorizing legislation (section 934 of Pub. L. 96-499) waived the usual Medicare Part B 20 percent coinsurance and the deductible requirements, participating ASCs are currently paid at 100 percent of the prospectively determined rate. The amount paid is expected to represent the Secretary's estimate of a fair fee that approximates the cost of facility services provided in conjunction with a procedure. The rate is a standard overhead amount that does not include physicians' fees and other medical items and services (for example, prosthetic devices) for which separate payment may be authorized under other provisions of the Medicare program.

The Report of the Senate Committee on Finance accompanying section 934 of Pub. L. 96-499 (S. Rep. 96-471, 96th Cong., 1st Sess., 35 (1979)) states, "The overhead factor is expected to be calculated on a prospective basis (and periodically updated) utilizing sample survey and similar techniques to develop reasonable estimated overhead allowances for each of the listed procedures * * *." In addition, section 1833(i)(2)(A)(ii) of the Act requires that the ASC facility payment rate must result in substantially less Medicare expenditure than would have been paid if the same procedure was performed on an inpatient hospital hasis.

On March 23, 1982, we proposed to implement section 934 of Pub. L. 96-499 concerning facility services provided in an ASC setting (47 FR 12574). On August 5, 1982, we issued two documents in the **Federal Register** to implement the two sections of the Act noted above. The first was a final rule to add to the benefits available under Part B of Medicare the facility services associated with certain surgical procedures provided in an ASC setting. (See 47 FR 34082.) In the second document, which was a final notice, the Secretary, after consulting with appropriate medical organizations, specified the surgical procedures that may be performed safely on an ambulatory basis in an ASC. (See 47 FR 34099.)

The covered surgical procedures are classified into four separate groups for which four separate ASC payment rates apply as follows:

Group 1—$231
Group 2—$275
Group 3—$296
Group 4—$336

The August 5, 1982 final rule provided that for facility services associated with ambulatory surgery, payment to the ASC is made at 100 percent of the ASC prospectively determined rate, adjusted

for geographic variations (§ 416.120(c)(1)). If two or more procedures are performed in the same operation, payment to the ASC is at 100 percent for the procedure classified in the highest payment group and 50 percent of the applicable groups for the other procedures (§ 416.120(c)(2)). Freestanding facilities and hospital-based ASCs electing to participate under the ASC benefit are paid at the same rates.

B. New Legislation

On October 21, 1986, the Omnibus Budget Reconciliation Act of 1986 (Pub. L. 99-509) was enacted. Section 9343 Pub. L. 99-509 includes the following provisions that affect the payment of ASC facility services. All of these provisions, except for section 9343(b)(1), will be implemented in other Federal Register documents and through our administrative issuances system.

- Section 9343(a) limits payments for approved ASC procedures performed in hospital outpatient departments after September 30, 1987 to the lesser of the outpatient department's costs or charges (in the aggregate), or a blend of hospital costs and ASC payment rates.
- Section 9343(b)(1) revises section 1833(i)(2) of the Act to require annual rather than periodic updating of the ASC payment rates effective July 1, 1987.
- Section 9343(b)(2) requires review and updating of the list of procedures for which ASC payment may be made by April 21, 1987, and every two years thereafter.
- Section 9343(e) repeals the waiver of the Medicare Part B coinsurance and deductible requirements for ASC facility services. Thus, ASC facility services will be paid at 80 percent of the prospectively determined rate, and beneficiaries will be responsible for a 20 percent coinsurance and deductible.

II. Provisions of this Notice

We are updating the ASC facility payment rates for service furnished on or after July 1, 1987 by increasing the current rates by the projected change in the consumer price index for urban consumers (CPI-U) (U.S. city average).

III. Update of Facility Payment Rates

This section provides an explanation of how the facility payment rates were developed and our changes to them.

A. Methodology for Ratesetting—Computation of Rates in 1982

The payment methodology published in the August 5, 1982 final rule established four facility payment rate groups based on 1979 and 1980 cost and charge information obtained from approximately 40 ASCs. Using these data, we developed an indexing method for ranking each covered procedure based on a facility's charge for an individual procedure as compared to its average charge for all procedures offered. By indexing procedures, we were able to remove the effects of geographic differences and facility specific variations, such as those related to cost and efficiency differences. Thus, we were able to determine the value a particular facility places on a covered procedure in relation to other procedures it offers. We calculated the average of the index numbers across all facilities for each procedure, and then arrayed the procedures by this national average index. After determining the national average index for each procedure, we then classified the covered procedures into four groups by that value. We used interval points to establish group breaking points as follows:

Group 1—index less than .9
Group 2—index between .9 and 1.0
Group 3—index between 1.0 and 1.1
Group 4—index greater than 1.1

The index value is used exclusively for classification purposes. For determining the actual payment rate of a group, as described below, we used actual charge and cost information reported by the facilities.

To establish the payment rates for each of the four groups, we used a four-step procedure.

Step 1—We adjusted (that is, deflated) the actual charges for each procedure to remove the effects of area wage differences using the hospital wage index published on June 30, 1981 (46 FR 33641). Based on our analysis of submitted financial reports, we determined that on average the labor portion is approximately one-third of the charge for each procedure. Assuming facilities' charges to be similarly related to costs, we adjusted one-third of the charge for each procedure by the wage index.

Step 2—After labor deflating each procedure charge for wage differences, we then calculated the average charge-per-procedure for each covered procedure by summing the wage-adjusted charges for all facilities in our data base that furnished a given procedure and dividing by the number of ASCs performing the same procedure.

Step 3—We determined a cost-to-charge ratio of 0.9 in order to make Medicare payments to ASCs cost-related as required under section 1833(i)(2) of the Act.

Step 4—The average wage-adjusted charges were classified into the four groups and arrayed separately. The payment rate for each group was set at the 60th percentile of the average wage-adjusted charge in the group.

B. Updated Payment Rates

The ASC facility payment rates set forth below are based on the projected increase (18.7 percent) in the CPI-U from September 1982 (the effective date of the current ASC payment rates) through January 1988 (the midpoint of the 12-month period beginning July 1, 1987) using Data Resources, Incorporated forecasts for the fourth quarter calendar year 1987 and the first quarter calendar year 1988 index levels to calculate the January 1988 index level. The CPI-U is a generalized index reflecting increases in the prices paid for a representative market basket of goods and services, and we believe that it is appropriate as the adjustment factor for purposes of this notice. Congress itself mandated use of the CPI-U for HCFA'a annual updating of fee schedules for clinical diagnotic laboratory tests (section 1833(h) of the Act as amended by section 2303(d) of the Deficit Reduction Act of 1984 (Pub. L. 98-369)), and HCFA has provided for use of the CPI-U to update the inflation-indexed charge used in determining reasonable charges for non-physician services (§ 405.509).

Thus, the ASC facility services payment rates (calculated by multiplying the August, 1982 ASC rates by 1.187) are as follows:

Group 1—$274
Group 2—$326
Group 3—$351
Group 4—$399

C. Calculation of an Individual ASC Payment Rate

We will continue to apply the wage index currently in use for ASCs, which was initially published on June 30, 1981 (46 FR 33641) and subsequently republished in the November 26, 1984 **Federal Register** (49 FR 46495).

The following is an example of how the payment would be determined for a Group 4 rate ($399) for an ASC located in Baltimore, Maryland. The appropriate wage index number is 1.1698.

Adjusted rate
$= [(\$399 \times ⅓) \times 1.1698] + (\$399 \times ⅔)$
$= (\$133 \times 1.1698) + \$266$
$= \$155.58 + \$266$
$= \$421.58$

D. Future ASC Update

Between May and August 1986, we distributed to all Medicare participating ASCs (approximately 500 ASCs) the Ambulatory Surgical Center Payment Rate Survey (Form HCFA-452) to

determine facility overhead expenses and procedure specific charges. In addition, in January and February 1987, we conducted a nationwide audit of 97 ASCs to validate the accuracy of the reported data. We had hoped the survey data and audits would be complete and analyzed in time for the July 1, 1987 update. Unfortunately, as a result of delays beyond HCFA's control in completing audits, and as a result of observed discrepancies in the raw data that make it imperative that the audit sample be completed, we are unable to use the new survey data to update the ambulatory surgical center rates in time to meet the statutorially mandated deadline of July 1, 1987. We intend to conduct a complete analysis of the data and the audits to determine whether changes in the methodology for computing ambulatory surgical center rates are warranted as soon as possible and to implement any changes in methodology determined to be appropriate to update the ASC facility payment rates for July 1, 1988.

IV. Regulatory Impact Statement

Executive Order (E.O.) 12291 requires us to prepare and publish an initial regulatory impact analysis for any notice such as this that meets one of the E.O. criteria for a "major rule"; that is, that would be likely to result in: an annual effect on the economy of $100 million or more; a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

In addition, we generally prepare an initial regulatory flexibility analysis that is consistent with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 through 612), unless the Secretary certifies that a notice such as this would not have a significant economic impact on a substantial number of small entities. For purposes of the RFA, we treat all ASCs as small entities.

ASCs have shown explosive growth, beginning in September 1982 with 41 ASCs and growing to 690 ASCs by December 1986. Nonetheless, the surgical procedures performed in ASCs constitute a small volume of total Part B expenditures for these types of services; most such procedures are performed in hospitals or doctors' offices. Based on available data, which are imcomplete, we believe that our 1984 Medicare payments for ASC facility services did not exceed 15 million dollars. This increase in ASC national base payment rates would have a negligible effect on total Part B expenditures.

The 18.7 percent increase for each of the four ASC national base payment rates, when examined by itself, will benefit all ASCs. However, independently of this notice, we will also be implementing the statutory imposition of Medicare Part B deductible and coinsurance on ASC facility services. As a result, Medicare trust fund expenditures for ASC services will not show a net increase. An ASC's total revenues will depend on the success of each ASC in collecting deductible and coinsurance amounts. Another result of the statutory imposition of deductible and coinsurance of ASC facility services is that these rate increases will also increase beneficiary liability for those services above what that liability would have been. However, this liability will still be less than for the same procedures performed in a hospital outpatient department and will be substantially less than the deductible obligation for inpatient services.

For these reasons, we have determined that a regulatory impact analysis is not required. Further, we have determined, and the Secretary certifies, that this notice will not have a significant economic impact on a substantial number of small entities.

V. Other Required Information

A. Paperwork Reduction Act

This notice does not impose information collection requirements. Consequently, it need not be reviewed by Executive Office of Management and Budget under the authority of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501–3511).

B. Waiver of Prior Public Comment Period

As discussed above, section 9343(B)(1) of Pub. L. 99–509 requires that the ASC payment rates be updated on an annual basis effective with services furnished after June 30, 1987. In addition, section 9343(e) of Pub. L. 99–509 provides that beneficiaries will be responsible for a 20 percent coinsurance and deductible for ASC facility services, also effective with services furnished after June 30, 1987. To update the rates as required by the law, we would ordinarily publish a proposed notice in the **Federal Register** to afford a period for public comment on the proposed update rates. However, we believe that a proposed notice would be impractical and contrary to the public interest.

If we were to publish a notice of proposed rates with a 60-day comment period (which would be our customary practice), the final notice with the updated ASC payment rates would not be published until several months after the July 1, 1987 statutory effective date. In the interim, ASCs would continue to be paid, based on the rates currently in effect, as they submit their bills. Consequently, once the revised rates were published as final, and made effective as of July 1, 1987, carriers would be required to reprocess ASC payments. This means that the carriers would be processing bills twice for services furnished after June 30, 1987; that is, the initial claim under the current rates and a retroactive claim for the difference in payment for services provided during the period beginning July 1, 1987 and ending on the effective date of the final notice.

Similarly, ASCs would also be placed in a position of billing beneficiaries for the coinsurance twice. The later bill for the coinsurance would represent twenty percent of the difference in payment between the rates currently in effect and the updated ASC payment rates. We expect that beneficiaries would be confused by the additional billing, and that ASCs would incur additional expense and might also encounter administrative difficulty in collecting such amounts. In addition, the costs incurred by ASCs for billing these additional coinsurance amounts might exceed the amounts to be billed.

For these reasons, we find good cause to waive the usual prior public comment period. We acknowledge that we are no' in compliance with our own regulations (§ 416.130) by publishing a notice esatablishing the updated rates (without proposing the revised rates), but we believe these regulations are superseded in this case by the recently enacted legislative requirement to update the rates by July 1, 1987. However, we are providing a 60-day period for public comment beginning today, and we will take into consideration comments that we receive by the date and time specified above in the "Dates" section. Because of the large number of items of correspondence we normally receive concerning published notices, we cannot acknowledge or respond to the comments individually. However, if we find it necessary to issue another notice, we will respond to the comments in that notice.

(Sections 1832(a) and 1833(i) of the Social Security Act (42 U.S.C. 1395k(a) and 1395l(i)); 42 CFR 416.120)

(Catalog of Federal Domestic Assistance Program No. 13.774, Medicare—Supplemental Medical Insurance

Dated: March 16, 1987.

William L. Roper,

Administrator, Health Care Financing Administration.

Approved: April 9, 1987.

Otis R. Bowen,

Secretary.

[FR Doc. 87–12359 Filed 5–29–87; 8:45 am]

BILLING CODE 4120–01–M

National Institutes of Health

National Cancer Institute; Meeting of the Biometry and Epidemiology Contract Review Committee

Pursuant to Pub. L. 92–463, notice is hereby given of the meeting of the Biometry and Epidemiology Contract Review Committee, National Cancer Institute, National Institutes of Health, June 22, 1987, Building 31A, Conference Room 4, 9000 Rockville Pike, Bethesda, Maryland 20892.

This meeting will be open to the public on June 22 from 2:30 p.m. to 3:00 p.m. to discuss administrative details. Attendance by the public will be limited to space available.

In accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5, U.S.C. and section 10(d) of Pub. L. 92–463, the meeting will be closed to the public on June 22 from 3:00 p.m. to adjournment for the review, discussion and evaluation of individual contract proposals. The proposals and the discussions could reveal confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Mrs. Winifred Lumsden, Committee Management Officer, National Cancer Institute, Building 31, Room 10A06, National Institutes of Health, Bethesda, Maryland 20892 (301/496–5708) will furnish summaries of the meeting and a roster of committee members upon request.

Dr. Harvey P. Stein, Executive Secretary, Biometry and Epidemiology Contract Review Committee, National Cancer Institute, National Institutes of Health, Room 804 Westwood Building, Bethesda, Maryland 20892 (301/496–7030) will furnish substantive program information.

Dated: May 20, 1987.

Betty J. Beveridge,

Committee Management Officer, NIH.

[FR Doc. 87–12318 Filed 5–29–87; 8:45 am]

BILLING CODE 4140–01–M

National Cancer Institute; Meeting of the Cancer Clinical Investigations Review Committee

Pursuant to Pub. L. 92–463, notice is hereby givern of the meeting of the Cancer Clinical Investigations Review Committee, National Cancer Institute, June 29–30, 1987, at the Historic Inns of Annapolis, 16 Church Circle, Annapolis, MD 21401.

This meeting will be open to the public on June 29 from 8:30 a.m. to 9 a.m. for reports by the Executive Secretary and Chairman of the Cancer Clinical Investigaions Review Committee. Attendance by the public will be limited to space available.

In accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5, U.S.C. and section 10(d) of Pub. L. 92–463, the meeting will be closed to the public on June 29 from approximately 9 a.m. until recess and on June 30 from 8:30 a.m. to adjournment for the review, discussion and evaluation of individual grant applications and cooperative agreements. These grants applications and cooperative agreements and the discussions could reveal confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with these applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Mrs. Winifred Lumsden, the Commitee 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.

Dr. Mary Ann Sestili, Executive Secretary, Cancer Clinical Investigations Review Committee, National Cancer Institute, Westwood Building Room 836, National Institutes of Health, Bethesda, Maryland 20892, (301/496–7481) will provide substantive program information upon request.

Dated: May 20, 1987.

Betty J. Beveridge,

Committee Management Officer, NIH.

[FR Doc. 87–12319 Filed 5–29–87; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Houlton Band Tax Fund; Establishment and Transfer of Funds and Related Information

May 20, 1987.

AGENCY: Eastern Area Office, Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: This notice sets forth the establishment in the United States Treasury a fund to be known as the "Houlton Band Tax Fund" in which the amount of $200,000.00 was deposited on February 3, 1987, in accordance with the Houlton Band of Maliseet Indians Supplementary Claims Settlement Act of 1986, Pub. L. 99–566. The Secretary shall manage the Houlton Band Tax Fund in accordance with Section 1 of the Act of June 24, 1938 (25 U.S.C. 162a), and shall utilize the principal and interest of such Funds only as provided in section 3(d) of Pub. L. 99–566 and for no other purposes.

FOR FURTHER INFORMATION CONTACT: Bill D. Ott, Area Director, Eastern Area Office, 1951 Constitution Avenue, NW., Washington, DC 20245, telephone number: (703) 235–2571.

SUPPLEMENTARY INFORMATION: On October 27, 1986, Congress passed the Houlton Band of Maliseet Indians Supplementary Claims Settlement Act of 1986, hereinafter referred to as the Act to establish a property tax fund for the Houlton Band of Maliseet Indians in furtherance of the Maine Indian Claims Settlement Act of 1980 and for other purposes. In accordance with the Act, the Secretary of the Interior is required to publish a notice in the **Federal Register** whenever funds are transferred to the Houlton Band Tax Fund. On February 3, 1987, such a fund was established in the United States with the deposit of $200,000.

Notwithstanding the provisions of section 8727 of Title 31, United States Code, the Secretary shall pay out of the Houlton Band Tax Fund all valid claims for taxes, payments in lieu of property taxes, and fees, together with any interest and penalties thereon for which the Houlton Band of Maliseet Indians are determined to be liable under the terms of section 6208–A(2) of the amended Maine Implementing Act, which are final and not subject to further administrative or judicial review, and which have been certified by the Commissioner of Finance and Administration of the State of Maine as valid claims (within the meaning of section 6208–A(2) of the amended Maine

Implementing Act) that meets the requirements of section 3(d) of the Act. Notwithstanding any other provisions of law, if the Houlton Band of Maliseet Indians is liable to the State of Maine or any county, district, municipality, city, town, village, plantation, or any other political subdivision thereof for any tax, payment in lieu of property tax, or fees, together with any interest or penalties thereon, and there are insufficient funds in the Houlton Band Tax Fund to pay such tax, payment, or fee (together with any interest or penalties thereon) in full, the deficiency shall be paid by the Houlton Band of Maliseet Indians only from income-producing property owned by such Band which is not held in trust for such Band by the United States, and such Band shall not be required to pay such tax, payment, or fee (or any interest or penalty thereon) from any other source.

The Secretary shall, after consultation with the Commissioner of Finance and Administration of the State of Maine and the Houlton Band of Maliseet Indians, prescribe written procedures governing the filing and payment of claims under section 3 of the Act and section 6208–A of the amended Maine Implementing Act.

Ronald L. Esquerra,

Deputy to the Assistant Secretary, Indian Affairs (Operations).

[FR Doc. 87–12371 Filed 5–29–87; 8:45 am]

BILLING CODE 4310-02-M

Plan for the Use and Distribution of the Leech Lake Band of the Minnesota Chippewa Tribe Judgement Funds in Docket 188 Before the United States Claims Court

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice. This notice is published in exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary for Indian Affairs by 209 DM 8.

EFFECTIVE DATE: This Plan was effective as of April 2, 1987.

FOR FURTHER INFORMATION CONTACT: Terry Lamb, Historian, Bureau of Indian Affairs, Branch of Acknowledgement and Research, Mail Stop 32–SIB, 1951 Constitution Avenue NW., Washington, DC 20245.

SUPPLEMENTARY INFORMATION: The Act of October 19, 1973, (Pub. L. 93–134, 87 Stat. 466), as amended, requires that a plan be prepared and submitted to Congress for the use and distribution of funds appropriated to pay a judgment of the Indian Claims Commission or Court of Claims to any Indian tribe. Funds were appropriated on November 18, 1985, in satisfaction of the award granted to the Leech Lake Band of the Minnesota Chippewa Tribe in Docket 188. The plan for the use and distribution of the funds was submitted to the Congress with a letter dated November 3, 1986, and was received (as recorded in the Congressional Record) by the Senate on January 6, 1987, and by the House of Representatives on January 6, 1987. The plan became effective on April 2, 1987, as provided by the 1973 Act as amended by Pub. L. 97–458, since a joint resolution disapproving it was not enacted. The plan reads as follows:

For the Use and Distribution of Judgement Funds to the Leech Lake Band of the Minnesota Chippewa Tribe in Docket 188 before the United States Claims Court

The funds appropriated on November 18, 1985, in satisfaction of the award granted to the Leech Lake Band of the Minnesota Chippewa Tribe in Docket 188 before the United States claims court, less attorney fees and litigation expenses, and including all interest and investment income accrued, shall be used and distributed as follows:

Per Capita Aspect

The Secretary of the Interior shall make a per capita distribution of eighty (80) percent of the funds, in a sum as equal as possible, to each member of the Leech Lake Band born on or prior to and living on the effective date of this plan. The per capita distribution made from these funds shall be made to those individuals enrolled with the Pillager and Lake Winnibigoshish Bands of Chippewa Indians and the Mississippi Bands of Chippewa Indians of the Leech Lake Reservation, for which the award was made. The Leech Lake tribal roll shall be made current to the effective date of this plan.

Any remaining amount, after the per capita payment to the members, shall revert to the tribe for use in the programing aspect of this plan.

Programing Aspect

Twenty (20) percent of the funds including principal, interest and investment income accrued shall be available on a budgetary basis for economic development purposes, subject to the approval of the Secretary. Such economic development purposes may include: bonding for construction projects, early debt retirement, investment capital, matching funds for economic development projects, and seed money to attract industry to the reservation. None of these funds shall be available for dividend or per capita payements.

General Provisions

The per capita share of living, competent adults shall be paid directly to them. The per capita shares of deceased individual beneficiaries shall be determined and distributed in accordance with 43 CFR Part 4, Subpart D. Per capita shares of legal incompetents and minors shall be handled as provided in the Act of October 19, 1973, 87 Stat. 466, as amended January 12, 1983, 96 Stat. 2512.

None of the funds made available under this plan for programing or per capita distribution shall be subject to Federal or State income taxes, nor shall such funds nor their availability be considered as income or resources nor otherwise utilized as the basis for denying or reducing the financial assistance or other benefits to which such household or member would otherwise be entitled under the Social Security Act or, except for per capita shares and dividend payments in excess of $2,000, any Federal or federally assisted program.

Ronald L. Esquerra,

Deputy to the Assistant Secretary, Indian Affairs (Operations).

[FR Doc. 87–12326 Filed 5–29–87; 8:45 am]

BILLING CODE 4310-02-M

Bureau of Land Management

Opening of Public Lands; Nevada

[NV–930–07–4212–13; N–41048]

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Conveyance and Order Providing for Opening of Public Lands.

SUMMARY: On May 22, 1987, the United States issued an exchange conveyance document to Transamerica Title Insurance Company, a California Corporation, as Trustee under Trust No. 5809, for the following described Federal lands pursuant to Sec. 206 of the Act of October 21, 1976 (43 U.S.C. 1716):

Mount Diablo Meridian, Nevada

T. 22 S., R. 61 E.,
Sec. 14, W½SW¼NE¼NW¼NE¼, N½NW¼NW¼NE¼, SE¼NW¼NW¼NE¼, E½SW¼NW¼NW¼NE¼, NW¼SW¼NW¼NE¼, W½NE¼SW¼NW¼NE¼, S½SW¼NW¼NE¼, W½SE¼NW¼NE¼, W½NE¼SW¼NE¼, N½NW¼SW¼NE¼, SE¼NW¼SW¼NE¼, E½SW¼NW¼SW¼NE¼, N½SW¼SW¼NE¼, E½SE¼SW¼SW¼NE¼, W½SW¼SW¼SW¼NE¼, SE¼SW¼SW¼NE¼, W½NW¼SW¼SE¼NE¼, W½SW¼SW¼SE¼NE¼, N½NE¼NE¼NW¼, SW¼NE¼NE¼NW¼, W½SE¼

NE¼NE¼NW¼, N½SE¼NE¼NW¼, SW¼SE¼NE¼NW¼, W½SE¼ SE¼NE¼NW¼, NE¼SE¼NW¼, E½NW¼SE¼NW¼, S½SE¼ SE¼NW¼, NE¼SE¼SE¼NW¼,

comprising 97.5 acres in Clark County, Nevada.

In exchange for these lands, the United States acquired the following non-Federal lands:

Parcel 1

All that certain real property being portions of sections 1, 2, 11, 12, 13, and 14, Township 16 North, Range 18 East, M.D.B.&M., Washoe County, State of Nevada, more particularly described as follows:

Beginning at the Northwest corner of Section 1, Township 16 North, Range 18 East, M.D.B.&M., Washoe County, State of Nevada; thence South 89°28'56" East 2622.04 feet to the North ¼ corner of said Section 1; thence South 89°07'01" East 2649.69 feet to the Northeast corner of said Section 1; thence South 00°49'44" West 2649.61 feet to the East ¼ corner of said Section 1; thence South 00°39'33" West 2639.42 feet to the Southeast corner of said Section 1; thence North 88°15'29" West 1333.68 feet to the Southwest corner of the Southeast ¼ of the Southeast ¼ of said Section 1; thence South 00°42'39" West 3890.54 feet; thenc South 57°53'34" West 5036.91 feet to a point on the Easterly Boundary Line of that certain parcel deeded to TYROLIAN VILLAGE, INC., Washoe County File No. 91156; thence along the boundary of last said parcel the following eight courses and distances; North 22°54'21" East 643.86 feet; North 18°01'29" West 662.51 feet; North 14°25'15" West 180.69 feet; North 13°40'17" West 190.39 feet; North 33°59'47" East 259.33 feet; North 59°51'31" East 358.47 feet; North 19°26'24" West 90.14 feet; North 48°48'51" West 212.81 feet to a point on the West line of Section 12, Township 16 North, Range 18 East; thence North 01°12'55" East 1851.00 feet to the West ¼ corner of said Section 12; thence continuing along the West line of said Section 12, North 01°12'55" East 2029.79 feet; thence leaving said West line West 904.16 feet; thence South 30°19'02" West 3207.63 feet to a point on the Easterly right-of-way line of Nevada State Highway No. 27, as it now exists; thence along said Easterly right-of-way line the following 12 courses and distances; South 83°10'39" West 50.00 feet; Northwesterly along the arc of a curve concave Westerly, having a radius of 500.00 feet, a central angle of 02°05'39" and the tangent of which bears North 06°49'21" West 9.14 feet; an arc distance of 18.28 feet; Northwesterly along the arc of a tangent spiral curve concave to the Southwest, having a spiral angle of 17°57'00" and the chord to which bears North 20°20'55" West 280.52 feet; Northwesterly along a tangent spiral curve concave to the Norteast, having a spiral angle of 11°18'00" and the chord to which bears North 23°14'47" West 255.95 feet; Northwesterly along the arc of a curve concave Northeasterly having a radius of 600.00 feet, a central angle of 08°04'00" and the tangent to which bears North 15°34'00" West 42.31 feet, an arc distance of 84.47 feet; Northerly along a tangent spiral curve, concave to the East having a spiral angle of 11°18'00" and the chord of which bears North 00°10'45" East 255.96 feet; Northerly along a tangent spiral curve, concave Westerly, having a spiral angle of 08°48'00 and the chord to which bears North 00°47'24" East 291.51 feet; Northwesterly along the arc of a curve concave Westerly, having a radius of 1000.00 feet, a central angle of 20°08'00" and the tangent to which bears North 05°00'00" West 177.53 feet, an arc distance of 351.39 feet; Northwesterly along the arc of a tangent spiral curve, concave Southwesterly, having a spiral angle of 08°48'00" and the chord to which bears North 30°55'24" West 291.51 feet; North 33°56'00" West 361.88 feet; Northwesterly along the arc of a tangent curve to the right, having a radius of 2900.00 feet and a central angle of 29°04'00", an arc distance of 1471.20 feet; North 04°52'00" West 9.94 feet to a point on the North line of Section 11, Township 16 North, Range 18 East; thence continuing Northerly along the Easterly right-of-way line of said highway the following four courses and distances; North 04°52'00" West 3434.72 feet to a tangent curve to the right having a radius of 1162.75 feet and a central angle of 70°18'00"; Northwesterly, Northerly and Northeasterly along the arc of said curve an arc distance of 1426.66 feet; thence North 65°26'00" East 1039.49 feet to a tangent curve to the left having a radius of 1501.48 feet and a central angle of 12°41'46"; Northeasterly along the arc of last said curve an arc distance of 332.71 feet to a point in the North line of Section 2, Township 16 North, Range 18 East; thence South 89°19'15" East 2241.76 feet to the Northeast corner of said Section 2, which is also the Northwest corner of said Section 1 and the true point of beginning of this description.

Parcel 2

All that certain real property being portions of Sections 13, 23, and 24, Township 16 North, Range 18 East, M.D.B.&M., Washoe County, State of Nevada, more particularly described as follows:

Section 13: Excepting Therefrom the property described in the following Deeds:

1. Deed to INCLINE VILLAGE GENERAL IMPROVEMENT DISTRICT, recorded June 13, 1963, as Document No. 386659, Deed Records.

2. Deed to INCLINE VILLAGE GENERAL IMPROVEMENT DISTRICT, recorded November 3, 1967, in Book 285, Page 738, as Document No. 100992, Official Records.

3. Deed to JAPAN GOLF PROMOTION (U.S.A.) INC., recorded August 15, 1973, in Book 755, Page 454, as Document No. 297722, Official Records.

Further Excepting Therefrom that portion of Section 13 described in Parcel 1 herein.

Section 23: South ½ Southeast ¼ Excepting Therefrom the property described in the following deeds:

2. Deed to INCLINE VILLAGE GENERAL IMPROVEMENT DISTRICT, recorded June 13, 1963, as Document No. 386659, Deed Records.

2. Deed to CHARLES M. EMRICH and VIRGINIA M. EMRICH, recorded July 17, 1963, as Document No. 389120, Deed Records.

3. Deed to DONALD L. CARANO and PADDY K. CARANO, recorded January 26, 1967, as Document No. 79848, Official Records.

4. Deed to WILLIAM A. ANDERSON and JOYCE E. ANDERSON, recorded February 15, 1967, in Book 237, page 396, as Document No. 81208, Official Records.

5. Deed to WILLIAM A. ANDERSON and JOYCE E. ANDERSON, recorded February 5, 1968, in Book 301, Page 589, as Document No. 107673, Official Records.

6. Deed to PONDEROSA RANCH, INC., recorded August 22, 1972, in Book 663, Page 51, as Document No. 255652, Official Records.

Further Excepting Therefrom any portion of COMMERICAL SUBDIVISION NO. 1, Incline Village, Washoe County, Nevada, according to the map thereof, filed in the office of the County Recorder of Washoe County, State of Nevada, on March 2, 1965, lying within the exterior boundary of said portion of Section 23. Section 24: West ½, Northeast ¼; South ½, Southeast ¼; West ½

Excepting Therefrom the property described in the following deeds:

1. Deed to INCLINE VILLAGE GENERAL IMPROVEMENT DISTRICT, recorded June 13, 1963, as Document No. 386659, Deed Records.

2. Deed to PONEROSA RANCH, INC., recorded August 22, 1972, in Book 663,

Page 51, as Document No. 255652, Official Records.

Further Excepting Therefrom any of the above described properties that portion thereof traversed by the new Mt. Rose State Highway, as described in the two deeds to the State of Nevada, recorded under Filing No. 279172 (Containing 136.5 acres, more or less) and No. 281899 (Containing 12.64 acres, more or less), Deed Records. Comprising 2,265.85 acres in Washoe County, Nevada.

The purpose of this exchange was to acquire non-Federal lands within the Toiyabe National Forest having high public values. The public interest was served through completion of this exchange.

The values of the Federal lands and the non-Federal lands in the exchange were appraised at $1,510,000.00 and $1,150,000.00, respectively. An equalization payment in the amount of $360,000.00 was paid to the United States.

Title to the non-Federal lands was accepted on May 15, 1987. In accordance with 43 CFR 2200.3(c), these lands are hereby transferred to the Secretary of Agriculture as part of the Toiyabe National Forest and are subject to all the laws, rules, and regulations applicable thereto.

DATES: At 10 a.m. on July 1, 1987, the lands shall be open to such forms of disposition as may by law be made of national forest lands, including location and entry under the United States mining laws. Appropriation of lands described in this order under the general mining laws prior to the date and time of restoration is unauthorized. Any such attempted appropriation, including attempted adverse possession under 30 U.S.C. Sec. 38, shall vest no rights against the United States. Acts required to establish a location and to initiate a right of possession are governed by State law where not in conflict with Federal law. The Bureau of Land Management will not intervene in disputes between rival locators over possessory rights since Congress has provided for such determinations in local courts.

At 10 a.m. on July 1, 1987, the lands will be opened to applications and offers under the mineral leasing laws.

FOR FURTHER INFORMATION CONTACT: Forest Supervisor, Toiyabe National Forest, 1200 Franklin Way, Sparks, Nevada 89431.

Dated: May 27, 1987.

Marla B. Bohl,

Acting Deputy State Director, Operations.

[FR Doc. 87-12435 Filed 5-29-87; 8:45 am]

BILLING CODE 4310-HC-M

[UT-020-07-4212-11-2410; U-54874]

Salt Lake District; Notice of Intent To Amend Tooele Management Framework Plan

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Intent.

SUMMARY: The Bureau of Land Management (BLM), Salt Lake District proposes to amend planning decision 10-2-2 of the Tooele Management Framework Plan (MFP). The proposed amendment would allow year-round motorized vehicle access to 2.5 acres of public land presently closed to motorized vehicles from January 1 through April 30 each year. The 2.5 acres are on the perimeter of 14,207 acres of public land closed for the above period to protect wintering mule deer from being harassed by vehicle users. The remaining 14,204.5 acres seasonally closed in decision 10-2-2 would not be affected by the proposed amendment.

The 2.5 acres of public land subject to the proposed amendment are located about one-half mile east of Skull Valley Highway and 13 miles south of the junction of that highway with Interstate Highway 80.

Issues to be addressed include vegetation loss and impacts to wildlife habitat. An environmental assessment (EA) will be completed to evaluate the proposed amendment. The following resources/programs will be evaluated in the EA: lands, vegetation, wildlife habitat, recreation, livestock grazing, watershed, realty, minerals, and archeology.

The Iosepa Historical Association proposes to obtain Recreation and Public Purposes (R&PP) lease on the 2.5 acres of public land that are the subject of the proposed planning amendment. This public land includes a small fraction of the existing Iosepa Cemetery and land adjacent to the east side of the cemetery. The Association proposes to re-establish grave markers in the cemetery and to develop a 30-unit campsite, 40-space parking lot, monument/memorial, pavilion, stage, water tank, and Imu (underground oven).

An EA will be prepared on the R&PP lease proposal simultaneously with the EA on the proposed amendment of Tooele MFP decision 10-2-2. Public participation is requested to identify issues on the proposed amendment and/or the proposed R&PP lease. Oral and/or written comments should be made by July 6, 1987 to: Mr. Howard Hedrick, Pony Express Resource Area Manager, Bureau of Land Management, Salt Lake City District, 2370 South 2300 West, Salt Lake City, Utah 84119, Phone (801) 524-5348.

Deane H. Zeller,

District Manager.

[FR Doc. 87-12321 Filed 5-29-87; 8:45 am]

BILLING CODE 4310-DQ-M

[CO-010-07-4351-2600]

Craig, Colorado Advisory Council Meeting

In accordance with Pub. L. 94-579, notice is hereby given that there will be a meeting of the Craig District Advisory Council on July 22, 1987, at 10 a.m. at the Craig District Office, 455 Emerson Street, Craig, Colorado.

Agenda items will include:

1. Election of chairperson and vice-chairperson
2. Advisory Council's role
3. Oil and Gas Amendment to the Little Snake Resource Management Plan
4. BLM's role in developing sections of the Yampa River for recreation
5. Field trip to see riparian management areas

The meeting will be open to the public; interested persons may make oral statements at 10:30 a.m. Anyone interested in attending the field trip must provide his own transportation. Summary minutes of the meeting will be maintained in the Craig District Office.

Dated: May 22, 1987.

William J. Pulford,

District Manager.

[FR Doc. 87-12327 Filed 5-29-87; 8:45 am]

BILLING CODE 4310-JB-M

[CA-050-07-3110-10-AKOO : CA-19382]

Realty Action; Public Lands in Humboldt County, CA

The following described public land has been determined to be suitable for disposal under the provision of Pub. L. 91-476, an act to provide for the establishment of the King Range National Conservation Area (84 Stat. 1067), and Sec. 206 of the Federal Land Policy and Management Act of 1976 (90 Stat. 2756):

Humboldt Meridian

T. 3 S., R. 3 E.,
Sec. 21: N½NE¼, SW¼NE¼
Sec. 22: SW¼NW¼
Containing 160 acres.

T. 3 S., R. 4 E.,
Sec. 8: SW¼SW¼
Containing 40 acres.

T. 5 N., R. 4 E.,
Sec. 30: SW¼SE¼
Sec. 32: NE¼SW¼
Containing 80 acres.

Containing 280 acres total.

Kermit Miller, 244 Orchard Lane, Redway, California 95560, has applied to acquire the above described lands in exchange for the following described privately owned lands:

Humboldt Meridian

T. 5 S., R. 1 E.,
Sec. 11: SE¼NE¼ (AP 108–083–13)
Sec. 12: In the S½NW¼ (AP 108–292–01): In the S½NW¼ (AP 108–292–02): In the S½NW¼ (AP 108–292–03)
Containing 78.42 acres.
T. 6 N., R. 1 W.,
Sec. 34 & 35: AP 506–061–02S: AP 506–061–17
Containing 42.00 acres.
Containing 120.42 acres total

Mineral evaluations have been conducted on the public lands. No minerals were identified, and therefore, the mineral estate of the public lands will be conveyed with the surface estate. The mineral estate, as it may be, of the privately owned lands will be conveyed to the United States with the surface.

The publication of this notice in the **Federal Register** shall segregate the applied for public lands from all other forms of appropriation under the public land laws, including the mining laws, for a period of two years. The exchange is expected to be consumated before the end of that period.

There will be reserved to the United States in the applied for lands, a right-of-way thereon for ditches and canals constructed by the authority of the United States (43 U.S.C. 945).

The purpose of this exchange is to acquire non-federal lands within the King Range National Conservation Area and adjacent to coastal public land near Manila, California. This exchange will serve to consolidate public land ownership for more effective management in the Scattered Blocks Planning Unit and is in conformance with Bureau planning and in the public interest.

Detailed information concerning the exchange, including the environmental analysis and the record of non-federal participation, is available for review at the Arcata Area Office, BLM, 1125 16th Street, P.O. Box 1112, Arcata, California 95521.

For a period of 45 days from the first publication of this notice interested parties may submit comments to the California State Director, Bureau of Land Management, Room E–2841, Federal Office Building, 2800 Cottage Way, Sacramento, California 95825. Any adverse comments will be evaluated by the California State Director, who may vacate or modify this realty action and issue a final determination. In the absence of a vacation or modification this realty action will become the final determination of the Bureau.

Alfred W. Wright,

District Manager, Bureau of Land Management, Ukiah District, 555 Leslie Street, Ukiah, California 95482.

[FR Doc. 87–12328 Filed 5–29–87; 8:45 am]

BILLING CODE 4310–40–M

[NV–930–07–7122–10–1088; N–46056]

Realty Action; Exchange of Public Lands; Elko County, NV

The following described public lands administered by the Bureau of Land Management have been determined to be suitable for disposal by exchange under section 206 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1716.

Mount Diablo Meridian, Nevada

T. 31 N., R. 53 E.,
Sec. 4, all.
T. 32 N., R. 53 E.,
Sec. 33, all.

The areas described above aggregate 1,287.44 acres.

In exchange for these lands the United States will acquire the following described private lands from Newmont Gold Company:

Mount Diablo Meridian, Nevada

T. 37 N., R. 55 E.,
Sec. 27, all.
Sec. 33, all.

The areas described above aggregate 1,307.64 acres.

The purpose of the exchange is to acquire non-Federal land with demonstrated fishery values and recreation potential. It will also improve the Bureau of Land Management's ability to manage the Dorsey Creek Watershed. The exchange is consistent with the Bureau's land use plans and the public interest will be well served. The lands to be disposed of are within Thomas J. Tomera's grazing allotment and contain a total of 137 AUMs. On March 3, 1987, Mr. Tomera signed a waiver of his two-year notification, agreeing to the cancellation of these AUMs. The mineral estate of the selected lands is not owned by the United States. Therefore, no mineral estates will be exchanged. The Bureau intends to consummate the exchange during the summer of 1987, but not sooner than 60 days after the date this notice is published in the **Federal Register.**

The above lands will be subject to an appraisal to determine the value of the lands to be exchanged. The described lands may change to reflect equal value following the completion of the appraisal.

Lands transferred from the United States will contain a reservation for a right-of-way for ditches and canals constructed by the authority of the United States pursuant to the Act of August 30, 1890 (43 U.S.C. 954). Lands conveyed to the United States will contain a reservation to allow a right-of-way of lawful width for any and all county roads herefore lawfully established and now in public use upon and across said land.

Publication of this notice in the **Federal Register** will segregate the subject lands from all appropriations under the public lands law including the mining and mineral leasing laws. This segregation will terminate upon the issuance of patent or two years from the date of this notice or upon publication of a Termination of Segregation.

Further information regarding this exchange is available for review at the Elko District Office, Bureau of Land Management, 3900 E. Idaho, Elko, Nevada 89801. For a period of 45 days from the date of publication of this notice in the **Federal Register,** interested parties may submit comments to the District Manager, Elko District, at the above address. All objections will be reviewed by the State Director who may sustain, vacate, or modify this realty action. In the absence of timely objections, this proposal shall become the final determination of the Department of the Interior.

Dated: May 19, 1987.

Merle Good,

Acting District Manager.

[FR Doc. 87–12329 Filed 5–29–87; 8:45 am]

BILLING CODE 4310–HC–M

[NM–040–07–4212–14 OK NM 56609 AND OK NM 59499]

Public Land Sale in Pittsburg and Woodward Counties, OK

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Sale.

SUMMARY: The following described lands have been examined and identified as suitable for disposal by sale under section 203 of the Federal Land Policy and Management Act (FLPMA) of 1976 (90 Stat. 2743; 43 U.S.C. 1701) at no less than the appraised fair market value. The values will be incorporated in a sales brochure that will be made available to the public three weeks prior to the sale.

Pittsburg County (PT)

Tract	Legal description	Acres
PT 5 & 6	T. 5 N., R. 15 E., I.M., Sec. 10, Krebs Townsite, Block 59, Lots 1 and 2.	0.50
Woodward County (WW)		
WW-2	T. 24 N., R. 17 W., I.M., Sec. 1, SE¼SE¼.	40.00
WW-3	T. 24 N., R. 17 W., I.M., Sec. 12, NE¼NE¼.	40.00
Total acres.		80.50

The proposed sale is consistent with the Bureau's planning system and the FLPMA of 1976. Public interest will be served by disposition of these isolated tracts that are difficult and uneconomical to manage as part of the public lands, and are not suitable for management by another Federal department or agency.

Patents, when issued, will contain the following reservations:

1. All minerals (or partial or specific mineral interests, where applicable) shall be reserved to the United States, together with the right to prospect for, mine, and remove the minerals. A more detailed description of this reservation, which will be incorporated in the patent document, is available for review at this Bureau of Land Management office.

2. The sale of the lands will be subject to all valid existing rights and reservations of record.

The tracts offered for disposal will be sold by sealed bid under competitive bidding procedures. Federal law requires that bidders be United States citizens or, in the case of a corporation, subject to the laws of any State of the United States. Sealed written bids will be considered only if received by the Bureau of Land Management, Oklahoma Resource Area Headquarters, 200 NW. Fifth Street, Oklahoma City, Oklahoma, 73102, prior to 10:00 a.m., Monday, July 27, 1987. The tract numbers should be printed on the lower left hand corner of the mailing envelope (example, Land Sale—Tract PT–5). Each written sealed bid must be accompanied by a certified check, postal money order, bank draft, or cashiers check made payable to the Department of the Interior, Bureau of Land Management, for at least twenty percent of the amount bid. The written, sealed bids will be opened and publicly declared at the beginning of each sale. If two or more envelopes containing valid bids of the same amount are received, the determination of which is to be the highest bid shall be by supplemental sealed bids.

Once a high bid price is accepted, the successful bidder shall submit the remainder of the full bid price within 180 days of the sale. Failure to pay the full bid price within 180 days shall result in concellation of the sale of the tracts, and the deposit shall be forfeited and disposed of as other receipts of sale. All bids will be either returned, accepted, or rejected within 30 days of the sale date.

If the identified tracts are not sold on the indicated sale date, they will be available for sale by sealed bid for a period of six months. Sealed bids will be opened and the high bidder will be publicly declared on the first Monday of each month at 10:00 a.m. as follows: (1) August 3, 1987; (2) September 14, 1987; (3) October 5, 1987; (4) November 2, 1987; (5) December 7, 1987; and, (6) January 4, 1988.

Comments: For a period of 45 days after the date of issuance of this Notice, interested parties may submit comments to the District Manager, Tulsa District Office, 9522–H East 47th Place, Tulsa, Oklahoma, 74145. Objections will be reviewed by the State Director who may sustain, vacate, or modify this realty action. In the absence of any objections, this Realty Action will become the final determination of the Department of the Interior.

FOR FURTHER INFORMATION CONTACT: Hans Sallani, Oklahoma Resource Area Headquarters, telephone (405) 231–5491.

Jim Sims,

District Manager.

[FR Doc. 87–12330 Filed 5–29–87; 8:45 am]

BILLING CODE 4310–FB–M

[NM–040–07–4212–14; OK NM 59499]

Public Land Sale; Woodward County, OK

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Sale.

SUMMARY: The following described land has been examined and identified as suitable for diposal by direct sale, under section 203 of the Federal Land Policy and Management Act (FLPMA) of 1976 (90 Stat. 2743; 43 U.S.C. 1701) at no less than $6,000.00:

Tract	Legal description	Acres
WW–1	T. 21 N., R. 17 W., I.M. Sec. 30, NE¼SW¼.	40.00

The tract is completely surrounded by private lands and has no legal access. Therefore, the land is being disposed of by direct sale to Mr. Robert L. Ham, the adjoining landowner. The proposed sale is consistent with the Bureau's planning system and the FLPMA of 1976. The public interest will be served by disposing of the indicated tract that is difficult and uneconomical to manage as part of the public lands, and is not suitable for management by another Federal department or agency.

The land will not be offered for sale until 60 days after the date of this notice. Patent when issued, will contain the following reservations:

1. All minerals (or partial or specific mineral interests, where applicable) shall be reserved to the United States, together with the right to prospect for, mine, and remove the minerals. A more detailed description of this reservation, which will be incorporated in the patent document, is available for review at this Bureau of Land Management office.

2. The sale of the land will be subject to all valid existing rights and reservations of record.

Comments: For a period of 45 days from the date of publication of this Notice, interested parties may submit comments to the District Manager, Tulas District Office, 9522–H East 47th Place, Tulas, Oklahoma, 74145. Objections will be reviewed by the State Director who may sustain, vacate, or modify this realty action. In the absence of any objections, this realty action will become the final determiantion of the Department of the Interior.

FOR FURTHER INFORMATION CONTACT: Hans Sallani, Oklahoma Resource Area Headquarters, 405–231–5491.

Jim Sims,

District Manager.

[FR Doc. 87–12331 Filed 5–29–87; 8:45 am]

BILLING CODE 4310–FB–M

[NM–040–07–4212–14; OK NM 63419]

Public Land Sale; Comanche County, OK

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Sale.

SUMMARY: The following described lands have been examined and

identified as suitable for disposal by direct sale, under section 203 of the Federal Land Policy and Management Act (FLPMA) of 1976 (90 Stat. 2743; 43 U.S.C. 1701) at no less than the appraised fair market value. The values will be incorporated in a sales brochure that will be made available to the public three weeks prior to the sale.

Comanche County (CM)

Tract	Legal description	Acres
CM-7	T. 4 N., R. 13 W., I.M. Sec. 3, SW¼NE¼.	40.00
CM-8	T. 3 N., R. 11 W., I.M. Sec. 29, Lot 5.	0.01
Total acres.		40.01

The proposed sale is consistent with the Bureau's planning system and the FLPMA of 1976. The public interest will be served by disposition of these isolated tracts that are difficult and uneconomical to manage as part of the public lands, and are not suitable for management by another Federal department or agency.

Patents, when issued, will contain the following reservations:

1. All minerals (or partial or specific mineral interests, where applicable) shall be reserved to the United States, together with the right to prospect for, mine, and remove the minerals. A more detailed description of this reservation, which will be incorporated in the patent document, is available for review at this Bureau of Land Management office.

2. The sale of the land will be subject to all valid existing rights and reservations of record.

The tracts offered for disposal will be sold by sealed bid, under modified competitive bidding procedures. The identified public lands are completely surrounded by private lands, and the lands have no legal access. Therefore, the adjoining landowners for Tract CM-7, Kimbell Ranch, c/o Mr. D. A. Kimbell; and, Tract CM-8, Mr. Guy Shull will be given a preference right to meet and/or exceed the high bid. The identified parties will receive a formal offer to submit their sealed bids after the sale date of July 27, 1987.

Federal law requires that bidders be United States citizens or, in the case of a corporation, subject to the laws of any State of the United States. Sealed written bids will be considered only if received by the Bureau of Land Management, Oklahoma Resource Area Headquarters, 200 N.W. Fifth Street, Room 548, Oklahoma City, Oklahoma, 73102, prior to 10:00 a.m., Monday, July 27, 1987. The tract numbers should be printed on the lower left hand corner (example: Land Sale—Tract CM-7). Each written sealed bid must be accompanied by a certified check, postal money order, bank draft, or cashiers check made payable to the Department of the Interior, Bureau of Land Management, for at least twenty percent of the amount bid. The written, sealed bids will be opened and publicly declared at the beginning of each sale. If two or more envelopes containing valid bids of the same amount are received, the determination of which is to be the highest bid shall be by supplemental sealed bids.

Once a high bid price is accepted, the successful bidder shall submit the remainder of the full bid price within 180 days of the sale. Failure to pay the full bid price shall result in cancellation of the sale for the tract, and the deposit shall be forfeited and disposed of as other receipts of sale. All bids will be either returned, accepted, or rejected within 60 days of the sale date.

If the identified tracts are not sold on the indicated sale date, they will be available for sale by sealed bid for a period of six months. Sealed bids will be opened and the high bidder will be declared on the first Monday of each month at 10:00 a.m. as follows: (1) August 3, 1987; (2) September 14, 1987; (3) October 5, 1987; (4) November 2, 1987; (5) December 7, 1987; and, (6) January 4, 1988.

Comments: For a period of 45 days from the date of issuance of this Notice, interested parties may submit comments to the District Manager, Tulsa District Office, 9522-H East 47th Place, Tulsa, Oklahoma 74145. Objections will be reviewed by the State Director who may sustain, vacate, or modify this Realty Action. In the absence of any objections, this Realty Action will become the final determination of the Department of the Interior.

FOR FURTHER INFORMATION CONTACT: Hans Sallani, Oklahoma Resource Area Headquarters, 405-231-5491.

Jim Sims,

District Manager.

[FR Doc. 87-12332 Filed 5-29-87; 8:45 am]

BILLING CODE 4310-FB-M

Minerals Management Service

Solicitation of Comments for Initiation of Discussions Leading to Resolution of the North Atlantic Outer Continental Shelf Leasing Moratorium

Purpose

To request information regarding the scope of participation and issues to be addressed with the objective of finding a long-term resolution of conflicts so that leasing in promising areas of the North Atlantic Outer Continental Shelf (OCS) can proceed.

Background

Leasing within specific portions of the North Atlantic OCS planning area has been precluded since 1984 beginning with restrictive language within the Department of the Interior (DOI) Fiscal Year (FY) 1984 Appropriations Act and continued each year thereafter. During consideration of the FY 1987 budget, the House of Representatives reviewed the merits of discussions between the DOI and the North Atlantic States concerning the area currently affected by the moratorium. The House Report language requested that the DOI pursue continuing discussions with North Atlantic State, congressional, and local representatives to address and resolve issues. The DOI is initiating with this Notice a mechanism to work to resolve the issues which have resulted in a leasing ban within specific portions of the North Atlantic planning area.

Solicitation of Interest

The States involved in the North Atlantic planning area discussions, congressional representatives, other governmental entities, and parties representing environmental, fishery, oil and gas industry groups, or other groups with an interest in participating in this process should submit comments concerning the following topics to the address provided at the end of this Notice:

1. Identification of major issues requiring resolution.

2. Suggestions concerning the appropriate forum and process to enable the DOI to pursue discussion and resolution of the conflicts over North Atlantic leasing.

3. Recommendations on ways of selecting a few principal participants who can represent broad constituencies effectively.

4. Additional information considered pertinent in resolving these issues.

Comments should be sent to the U.S. Department of the Interior, Minerals Management Service, Associate Director for Offshore Minerals Management, 18th and C Streets, NW., Room 4230, Washington, DC 20240, within 45 days of the publication of this Notice.

Dated: May 22, 1987.

Wm. D. Bettenberg,

Director, Minerals Management Service.

[FR Doc. 87-12347 Filed 5-29-87; 8:45 am]

BILLING CODE 4310-MR-M

National Park Service

Appalachian National Scenic Trail Advisory Council; Meeting

Notice is hereby given in accordance with the Federal Advisory Committee Act that a meeting of the Appalachian National Scenic Trail Advisory Council will be held in Harpers Ferry, West Virginia, on June 26, from 8:30 a.m. to 4:00 p.m. The agenda of the meeting will include a review of current Appalachian Trail protection and management issues.

The meeting will be open to the public, although space will be limited. Persons will be accommodated on a first-come, first-served basis. Any person may file with the Council a written statement concerning the matters to be discussed.

Persons wishing further information concerning this meeting or who wish to submit written statements may contact David A. Richie, Project Manager, Appalachian Trail Project Office, Harpers Ferry, West Virginia 25425, at Area Code (304) 535-2346.

Minutes of the meeting will be available for public inspection four weeks after the meeting at the above address. Copies of the minutes will also be available from Room 3120, Interior Building, 18th and C Streets, NW., Washington, DC 20240, and at the headquarters of the Appalachian Trial Conference, Washington Street, Harpers Ferry, West Virginia 25425.

Dated: May 20, 1987.

David A. Richie,

Project Manager.

[FR Doc. 87-12362 Filed 5-29-87 8:45 am]

BILLING CODE 4310-70-M

INTERSTATE COMMERCE COMMISSION

[Docket No. AB-55 (Sub-No. 203X)]

CSX Transportation, Inc.—Exemption—Abandonment at McKenzie, TN; Exemption

Applicant has filed a notice of exemption under 49 CFR 1152 Subpart F—*Exempt Abandonments* to abandon its 0.74-mile line of railroad between milepost LF 262.60 and milepost LF 263.34, at or near McKenzie, TN. The Railway Labor Executives' Association seeks imposition of labor protective conditions.

Applicant has certified: (1) That no local traffic has moved over the line for at least 2 years and that overhead traffic is not moved over the line or may be rerouted, and (2) that no formal complaint filed by a user of rail service on the line (or by a State or local governmental entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Commission or any U.S. District Court, or has been decided in favor of the complainant within the 2-year period. The appropriate State agency has been notified in writing at least 10 days prior to the filing of this notice.

As a condition to use of this exemption, any employee affected by the abandonment shall be protected pursuant to *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979).

The exemption will be effective on July 1, 1987, (unless stayed pending reconsideration). Petitions to stay must be filed by June 11, 1987, and petitions for reconsideration, including environmental, energy, and public use concerns, must be filed by June 22, 1987: Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423.

A copy of any petition filed with the Commission should be sent to applicant's representative: Peter J. Shudtz, 100 North Charles Street, Baltimore, MD 21201.

If the notice of exemption contains false or misleading information, use of the exemption is void *ab initio.*

A notice to the parties will be issued if use of the exemption is conditioned upon environmental or public use conditions

Decided: May 19, 1987.

By the Commission, Jane F. Mackall, Director, Office of Proceedings.

Noreta R. McGee,

Secretary.

[FR Doc. 87-12352 Filed 5-29-87; 8:45 am]

BILLING CODE 7035-01-M

[Docket No. AB-55 (Sub No. 204X)]

CSX Transportation, Inc.; Exemption and Discontinuance of Service in Bartow, Polk County, FL

Applicant has filed a notice of exemption under 49 CFR Part 1152, Subpart *F—Exemption Abandonments* to abandon its 0.26-mile line of railroad between milepost SV 851.40, V.S. 1494+41, and milepost SV 851.14, V.S. 1480+62, near Bartow, FL. The Railway Labor Executives' Association seeks imposition of labor protective conditions.

Applicant has certified that: (1) No local traffic has moved over the line for at least 2 years and that the line does not handle overhead traffic; and (2) no formal complaint filed by a user of rail service on the line (or by a State or local governmental entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Commission or any U.S District Court or has been decided in favor of the complainant within the 2-year period. The appropriate State agency has been notified in writing at least 10 days prior to the filing of this notice.

As a condition to use of this exemption, any employee affected by the abandonment shall be protected pursuant to *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979).

The exemption will be effective July 1, 1987 (unless stayed pending reconsideration). Petitions to stay must be filed by June 11, 1987, and petitions for reconsideration, including environmental, energy, and public use concerns, must be filed by June 22, 1987 with: Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423.

A copy of any petition filed with the Commission should be sent to applicant's representative: Peter J. Shudtz, 100 North Charles Street, Baltimore, MD 21201.

If the notice of exemption contains false or misleading information, use of the exemption is void *ab initio.*

A notice to the parties will be issued if use of the exemption is conditioned upon environmental or public use conditions.

Decided: May 26, 1987.

By the Commission, Jane F. Mackall, Director, Office of Proceedings.

Noreta R. McGee,

Secretary.

[FR Doc. 87-12450 Filed 5-29-87; 8:45 am]

BILLING CODE 7035-01-M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importers of Controlled Substances; Notice of Registration; Penick Corp.

By Notice dated March 26, 1987, and published in the **Federal Register** on April 3, 1987; (52 FR 10825), Penick Corporation, 158 Mount Olivet Avenue,

Newark, New Jersey 07114, made application to the Drug Enforcement Administration to be registered as an importer of the basic classes of controlled substances listed below:

Drug:	Schedule
Raw opium (9600)	II
Opium plant form (9650)	II
Concentrate of poppy straw (9670)	II

No comments or objections have been received. Therefore, pursuant to section 1008 (a) of the Controlled Substances Import and Export Act and in accordance with Title 21, Code of Federal Regulations, § 1311.42, the above firm is granted registration as an importer of the basic classes of controlled substances listed above.

Dated: May 22, 1987.

Gene R. Haislip,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 87-12379 Filed 5-29-87; 8:45 am]

BILLING CODE 4410-09-M

Importers of Controlled Substances; Registration; Stepan Chemical Co.

By Notice dated March 30, 1987, and published in the **Federal Register** on April 6, 1987; (52 FR 10957), Stepan Chemical Company, Natural Products Department, 100 West Hunter Avenue, Maywood, New Jersey 07607, made application to the Drug Enforcement Administration to be registered as an importer of coca leaves (9040), a basic class of controlled substance listed in Schedule II.

No comments or objections have been received. Therefore, pursuant to section 1008(a) of the Controlled Substances Import and Export Act and in accordance with Title 21, Code of Federal Regulations, § 1311.42, the above firm is granted registration as an importer of the basic class of controlled substance listed above.

Dated: May 22, 1987.

Gene R. Haislip,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 87-12414 Filed 5-29-87; 8:45 am]

BILLING CODE 4410-09-M

DEPARTMENT OF LABOR

The Labor Advisory Committee for Trade Negotiations and Trade Policy; Meeting

Pursuant to the provisions of the Federal Advisory Committee Act (Pub. L. 92-463 as amended), notice is hereby given of a meeting of the Labor Advisory Committee for Trade Negotiations and Trade Policy.

Date, time and place: June 30, 1987, 2:00-5:00 p.m., Rm. S4215 A, B & C Frances Perkins, Department of Labor Building, 200 Constitution Avenue, NW., Washington, DC 20210

Purpose: To discuss trade negotiations and trade policy of the United States.

This meeting will be closed under the authority of section 10(d) of the Federal Advisory Committee Act. The Committee will hear and discuss sensitive and confidential matters concerning U.S. trade negotiations and trade policy.

For further information, contact: Fernand Lavallee, Executive Secretary, Labor Advisory Committee, Phone: (202) 523-6565.

Signed at Washington, DC this 27th day of May 1987.

Christopher Hankin,

Associate Deputy Under Secretary for Trade, International Affairs.

[FR Doc. 87-12373 Filed 5-29-87; 8:45 am]

BILLING CODE 4510-28-M

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (87-48)]

NASA Advisory Council (NAC), Space Applications Advisory Committee (SAAC); Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Pub. L. 92-463, as amended, the National Aeronautics and Space Administration announces a forthcoming meeting of the NASA Advisory Council, Space Applications Advisory Committee, Informal Advisory Subcommittee on Remote Sensing.

DATE AND TIME: June 16, 1987, 9 a.m.-4 p.m., June 17, 1987, 8:30 a.m.-12 p.m.

ADDRESS: National Clarion Hotel, Arlington Room, 300 Army/Navy Drive, Arlington, VA 22202.

FOR FURTHER INFORMATION CONTACT: Mr. Ray J. Arnold, Code EE, National Aeronautics and Space Administration, Washington, DC 20546 (202/453-1707).

SUPPLEMENTARY INFORMATION: The Informal Advisory Subcommittee on Remote Sensing will meet to review the status of the LANDSAT and Commercialization programs. They will also review draft recommendations. The Subcommittee is chaired by Dr. James Taranik and is composed of 12 members. The meeting will be open to the public up to the seating capacity of the room (approximately 35 including the subcommittee members). It is imperative that the meeting be held on these dates to accommodate the scheduling priorities of the key participants.

Type of Meeting: Open.

Agenda:

June 16, 1987

9 a.m. Review status of LANDSAT Program.
1 p.m. Review Application/ Commercialization Program.
4 p.m. Adjourn.

June 17, 1987

8:30 a.m. Review draft recommendations.
12 p.m. Adjourn.

Richard L. Daniels,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

May 26, 1987.

[FR Doc. 87-12358 Filed 5-29-87; 8:45 am]

BILLING CODE 7510-01-M

NUCLEAR REGULATORY COMMISSION

Northeast Nuclear Energy Co., et al.; Millstone Nuclear Power Station, Unit No. 2; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of changes to the Millstone Unit 2 Technical Specifications (TS), to allow storage of consolidated spent fuel, to Northeast Nuclear Energy Company, et al. (the licensee), for the Millstone Nuclear Power Station, Unit No. 2, located in New London County, Connecticut.

Environmental Assessment

Identification of Proposed Action: The proposed changes to the Millstone Unit 2 TS would allow the storage of consolidated fuel in the existing spent fuel storage racks at Millstone Unit 2. The consolidated fuel would be produced by removing the fuel pins from the fuel assemblies and placing these

pins in a special canister which in turn would be placed in a spent fuel rack storage location. The fuel rods from approximately two fuel assemblies would fit into a single canister.

At the present time, the Millstone Unit 2 TS limits the total number of storage locations to 1112. The actual capacity of the spent fuel storage racks is 1346 storage locations. The difference between the present authorized limit and the actual capacity results from the existence of blocking devices which prevent the use of certain storage locations. The proposed storage of consolidated fuel would eventually result in the removal of these blocking devices and thus the licensee is also requesting an increase in the authorized number of storage locations from 1112 to 1346. From a practical standpoint, however, only 1277 locations can be used due to the need to achieve a five year decay time prior to consolidation of spent fuel.

The NRC is currently investigating Generic Issue 82, "Beyond Design Basis Accidents in Spent Fuel Pools," which addresses the issues of Zircaloy cladding fires and the propagation of a fire to older stored spent fuel assemblies, given the complete loss of water from the spent fuel pool. A preliminary evaluation of the likelihood of draining the pool and the consequences of a fire has also been performed. A draft report by Brookhaven National Laboratory (BNL), dated January 1987, has been critically reviewed by the NRC staff.

BNL has concluded that for PWR storage rack designs currently in use, referred to as "high density" racks, self-sustaining oxidation of the Zircaloy cladding, or a cladding fire, is likely to occur for fuel with decay times as long as two years. Propagation of the fire to older spent fuel assemblies with decay times up to three years was found to be likely. The initiation and propagation of a fire are dependent on the storage geometry, the rack geometry and the fuel assembly burnup characteristics; all very plant specific characteristics. The currently available models cannot account for relocation or degradation of the fuel assemblies or rack structures. An upper bound assumption of full fuel pool involvement in the fire was therefore addressed. A preliminary evaluation to assess the likelihood of the complete draining of a spent fuel pool was performed with emphasis on identifying events which were either of higher or estimated frequency of occurrence or not considered in previous safety studies, namely WASH-1400. Beyond design basis seismic events, shipping cask drop as a result of human error and pneumatic seal failures were considered. Other events such as loss of makeup or cooling, aircraft impact and high energy missiles were found to be similar in estimated occurrence to previous studies. Since no seismic related data, pool fragility, could be located and resources did not provide for obtaining these data an estimate of the fuel pool fragility was made based on other structures which BNL considered to be representative of spent fuel pools.

The estimated likelihood of draining the pool as a result of structural failure (beyond the available makeup) of the pool was found to be on the order of $2x10^{-5}$ per year for seismic events and about $3x10^{-5}$ per year for a cask drop resulting from human error, although cask drop failure is not a concern at the present time. BNL noted that there is a large uncertainty associated with the structural failure of the pool and recommended that structural analyses be performed to assess the uncertainties in the estimates. An integration of the consequences of a cladding fire with the estimated likelihood of draining the spent fuel pool indicates that the risk, in person-rem, is not significantly influenced by the amout of fuel assumed to be involved in the release. It was noted that the calculated interdiction area, land contamination by long-lived fission products such as cesium, was significantly greater for full pool involvement.

The uncertainties in the estimated event frequencies and the estimated releases of fission products from the spent fuel to the environment are still being assessed by the staff.

The amendment under consideration would allow a demonstration of the consolidation process via the consolidation of the ten fuel assemblies, each with at least five year's decay time, currently stored in the spent fuel pool. The resulting five consolidated storage canisters would be stored in the spent fuel racks. Thus, the fuel rod consolidation amendment proposed by the licensee would increase the potential fuel pool inventory by five assemblies, compared to the 1112 fuel assemblies currently stored in the spent fuel pool. Further, the consolidated fuel contains fuel that has decayed at least five years since reactor operation compared to the remainder of the fuel in the spent fuel pool which has decayed at least six months since reactor operation. Since Generic Issue 82 is of most concern for fuel immediately discharged from the reactor, with minimal decay time, the adverse effects due to potential zircaloy fires are low. The change in risk for the demonstration of consolidation is therefore estimated to be insignificant. The fission product inventory and the likelihood of draining the water from the spent fuel storage pool, thus, are not significantly impacted by this amendment.

The Need for the Proposed Action: The proposed license amendment is necessary to improve the spent fuel storage situation at Millstone Unit 2. At the present time, the ability to off-load a reactor core into spent fuel pool storage will be lost after 1994, and spent fuel pool storage will be full in 1998. The proposed spent fuel consolidation storage capability will allow a delay until 2009 at which time the spent fuel pool storage will be full.

Environmental Impacts of the Proposed Action: The NRC staff has evaluated the radiological (off-site and on-site) and nonradiological impacts of the proposed license amendment.

Offsite Radiological Impact Assessment

The plant contains radioactive waste treatment systems designed to collect and process gaseous, liquid, and solid waste that might contain radioactive material. The radioactive waste treatment systems are evaluated in the Final Environmental Statement (FES) dated June 1973. There will be no change in the waste treatment systems described in section 3.4.2 of the FES as a result of the expansion of the spent fuel storage capacity by the storage of consolidated fuel in the spent fuel storage pool.

Radioactive Material Released to the Atmosphere

With respect to releases of gaseous materials to the atmosphere, the only radioactive gas of significance which could be attributable to storing additional spent fuel assemblies for a longer period of time would be the noble gas radionuclide Krypton-85 (Kr-85). Experience has demonstrated that after spent fuel has decayed 4 to 6 months, there is no longer a significnt release of fission products, including Kr-85, from stored spent fuel containing cladding defects. To determine the average annual release of Kr-85, the staff conservatively assumes that all the Kr-85 available from any defective fuel discharged to the (spent fuel pool) SFP will be released to the next refueling. Enlarging the storage capacity of an SFP has no effect on the calculated average annual quantities of Kr-85 released to the atmosphere each year. There may be some small change in the calculated amounts of Kr-85 due to a change in the

fuel burnup; however, this is expected to be a small fraction of the total calculated annual quantities released. In addition, the staff notes that Iodine-131 releases from spent fuel assemblies to the SFP water will not be significantly increased due to the expansion of the fuel storage capacity since the Iodine-131 inventory in the fuel will decay to negligible levels between refuelings.

Most of the tritium in the SFP water results from activation of boron and lithium in the primary coolant. This phenomenon will not be affected by the proposed increased SFP storage capability. A relatively small amount of tritium is also contributed during reactor operation by fissioning of reactor fuel and subsequent diffusion of tritium through the fuel and the fuel cladding. Tritium release from the fuel essentially occurs while the fuel is hot, that is, during operations and, to a limited extent, shortly after shutdown. Thus, expanding the SFP capacity will not significantly increase the tritium activity in the SFP.

The storage of consolidated spent fuel is expected to increase the bulk SFP water temperature during normal refuelings from 122°F to 131°F. Therefore, it is expected that there will be an approximately 28% increase in the annual release of tritium and a very slight increase in iodine release from the SFP as a result of increased evaporation at the higher temperature. Most airborne releases of tritium and iodine result from evaporation of reactor coolant, which contains tritium and iodine in higher concentrations than the SFP. Therefore, even with the higher evaporation rate from the SFP, the increase in tritium and iodine released from the plant would be negligible compared to the amount normally released from the plant and that which was previously evaluated in the FES. The station Radiological Effluent Technical Specifications, which are not being changed by this action, limit the total releases of gaseous activity.

Radioactive Material Release to Receiving Waters

There will not be a significant increase in the liquid release of radionuclides from the plant as a result of the proposed modifications. Since the SFP cooling and cleanup systems operate as a closed system, only water originating from cleanup of the SFP floor and resin sluice water need be considered as potential sources of radioactivity. It is expected that neither the flow rate nor the radionuclide concentration of the floor cleanup water will change as a result of these modifications. The SFP demineralizer resin removes soluble radioactive materials from the SFP water. These resins are periodically sluiced with water to the spent resin storage tank. The amount of radioactivity on the SFP demineralizer resin may increase slightly due to the additional spent fuel in the pool, but the soluble radioactive material will be retained on the resins. Radioactive material that might be transferred from the spent resin to the sluice water will be effectively removed by the liquid radwaste system. After processing in the liquid radwaste system, the amount of radioactivity released to the environment as a result of the proposed modification would be negligible.

Solid Radioactive Wastes

The concentration of radionuclides in the pool water is controlled by the SFP cleanup system and by decay of short-lived isotopes. The activity is highest during operations when reactor coolant water is introduced into the pool, and decreases as the pool water is processed through the SFP cleanup system. The increase of radioactivity, if any, due to the proposed modification will be minor because of the capability of the cleanup system to continuously remove radioactivity in the SFP water to attain acceptable levels. There will not be a significant increase in the amount of solid waste generated from the SFP cleanup system due to the proposed modification (an increase of less then one percent in total waste volume shipped from Millstone Unit 2), and thus there will be no additional environmental impact.

Public Radiation Exposure

Based on the negligible increases in radioactive effluents and waste described above, the estimated increase in doses due to the exposure of individuals and the population to radioactive releases associated with the storage of consolidated fuel in the SFP are insignificant.

Onsite Radiological Impact Assessment/ Occupational Exposure

The occupational exposure associated with the storage of consolidated spent fuel is estimated by the licensee to be less than 1.0 person-rem per year based on the licensee's detailed breakdown of occupational dose. This dose is less than two percent of the average occupational dose of 500 person-rems for all plant operations. The small increase in radiation dose should not affect the licensee's ability to maintain individual occupational doses within the limits of 10 CFR Part 20, and is as low as reasonably achievable. Normal radiation control procedures as identified in the guidelines of Regulatory Guide 8.8 should preclude any significant occupational radiation exposures. Based on present and projected operations in the spent fuel pool area, the staff estimates that the proposed storage of the consolidated spent fuel should add only a small fraction to the total annual occupational radiation dose at this facility. Thus, the staff concludes that the storage of consolidated spent fuel in the modified SFP will not result in any significant increase in doses received by workers.

Nonradiological Impact Assessment

The nonradiological impacts associated with the storage of consolidated spent fuel are mostly associated with the increase in spent fuel pool temperature from 120° F to 131° F. The spent fuel pool cooling system rejects heat to the reactor building closed cooling water (RBCCW) system. The RBCCW system, in turn, is cooled by service water (seawater). Should the total increase in spent fuel pool temperature be completely discharged to the environment via the service water system, a total of 1.2×10^6 BTU/hr would be rejected to the seawater. This compares to a total of 6.7×10^9 BTU/hr which is the total Millstone Unit 2 seawater heat rejection. Thus, there will be a small increase in the temperature of the seawater discharged to the environment.

Conclusion

Based on its review of the proposed storage of consolidated spent fuel assemblies at Millstone Unit 2, the staff concludes that:

1. The estimated additional radiation doses to the general public are insignificant.

2. The licensee has taken appropriate steps to ensure that occupational doses will be maintained as low as reasonably achievable and within the limits of 10 CFR Part 20.

Therefore, the staff concludes that there will be a negligible additional environmental radiological impact attributable to the storage of consolidated spent fuel at Millstone Unit 2. In addition, there will be negligible nonradiological environmental impact due to the small additional heat rejected to the environment as a result of the increase in the spent fuel pool temperature.

Alternative Use of Resources: This action involves no use of resources not previously considered in the Final Environmental Statements for the Millstone Nuclear Power Station, Unit No. 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 not to prepare an environmental impact statement for the proposed amendment.

Based upon the foregoing environmental assessment, we conclude that the proposed action will not have significant effect on the quality of the human environment.

For further details with respect to this action, see the application for license amendment dated May 21, 1986 which is available for public inspection at the Commission's Public Document Room, 1717 H Street, NW., Washington, DC, and at the Waterford Public Library, 49 Rope Ferry Road, Waterford, Connecticut 06385.

Dated at Bethesda, Maryland this 27th day of May, 1987.

For the Nuclear Regulatory Commission.

John F. Stolz,

Director, Project Directorate I-4, Division of Reactor Projects I/II.

[FR Doc. 87-12427 Filed 5-29-87; 8:45 am]

BILLING CODE 7590-01-M

Advisory Committee on Reactor Safeguards Subcommittee on Advanced Reactor Designs; Meeting

The ACRS Subcommittee on Advanced Reactor Designs will hold a meeting on June 17, 1987, Room 1046, 1717 H Street, NW., Washington, DC.

The entire meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows:

Wednesday, June 17, 1987—8:30 A.M. Until the Conclusion of Business

The Subcommittee will discuss and review the three DOE-sponsored advanced reactor designs (one HTGR and two LMRs).

Oral statements may be presented by members of the public with the concurrence of the Subcommittee Chairman; written statements will be accepted and made available to the Committee. Recordings will be permitted only during those portions of the meeting when a transcript is being kept, and questions may be asked only by members of the Subcommittee, its consultants, and Staff. Persons desiring to make oral statements should notify the ACRS staff member named below as far in advance as is practicable so that appropriate arrangements can be made.

During the initial portion of the meeting, the Subcommittee, along with any of its consultants who may be present, may exchange preliminary views regarding matters to be considered during the balance of the meeting.

The Subcommittee will then hear presentations by and hold discussions with representatives of the NRC Staff, its consultants, and other interested persons regarding this review.

Further information regarding topics to be discussed, whether the meeting has been cancelled or rescheduled, the Chairman's ruling on requests for the opportunity to present oral statements and the time allotted therefor can be obtained by a prepaid telephone call to the cognizant ACRS staff member, Mr. Medhat El-Zeftawy (telephone 202/634-3267) between 8:15 A.M. and 5:00 P.M. Persons planning to attend this meeting are urged to contact the above named individual one or two days before the scheduled meeting to be advised on any changes in schedule, etc., which may have occurred.

Dated: May 26, 1987.

Morton W. Libarkin,

Assistant Executive Director for Project Review.

[FR Doc. 87-12429 Filed 5-29-87; 8:45 am]

BILLING CODE 7590-01-M

Advisory Committee on Reactor Safeguards, Subcommittee on Thermal Hydraulic Phenomena; Meeting

The ACRS Subcommittee on Thermal Hydraulic Phenomena will hold a meeting on June 18, 1987, Room 1046, 1717 H Street, NW., Washington, DC.

The entire meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows:

Thursday, June 18, 1987—8:30 A.M. Until the Conclusion of Business

The Subcommittee will review: MIST Program Status including results of MIST Phase III tests, IST Scaling Coordination, and plans for a follow-on test Program.

Oral statements may be presented by members of the public with the concurrence of the Subcommittee Chairman; written statements will be accepted and made available to the Committee. Recordings will be permitted only during those portions of the meeting when a transcript is being kept, and questions may be asked only by members of the Subcommittee, its consultants, and Staff. Persons desiring to make oral statements should notify the ACRS staff member named below as far in advance as is practicable so that appropriate arrangements can be made.

During the initial portion of the meeting, the Subcommittee, along with any of its consultants who may be present, may exchange preliminary views regarding matters to be considered during the balance of the meeting.

The Subcommittee will then hear presentations by and hold discussions with representatives of the NRC Staff, its consultants, and other interested persons regarding this review.

Further information regarding topics to be discussed, whether the meeting has been cancelled or rescheduled, the Chairman's ruling on requests for the opportunity to present oral statements and the time allotted therefor can be obtained by a prepaid telephone call to the cognizant ACRS staff member, Mr. Paul Boehnert (telephone 202/634-3267) between 8:15 A.M. and 5:00 P.M. Persons planning to attend this meeting are urged to contact the above named individual one or two days before the scheduled meeting to be advised of any changes in schedule, etc., which may have occurred.

Dated: May 26, 1987.

Morton W. Libarkin,

Assistant Executive Director for Project Review.

[FR Doc. 87-12430 Filed 5-29-87; 8:45 am]

BILLING CODE 7590-01-M

[Docket Nos. 50-315 and 50-316]

Indiana and Michigan Electric Co. and Donald C. Cook Nuclear Plant Units 1 and 2; Exemption

I.

The Indiana and Michigan Electric Company (IMEC, the licensee) is the holder of Facility Operating License Nos. DPR-58 and DPR-74, which authorize operation of Donald C. Cook Nuclear Plant, Unit Nos. 1 and 2 (the facilities), at a steady-state power level not to exceed 3250 and 3411 megawatts thermal, respectively. The facilities are pressurized water reactors (PWR) located in Berrien County, Michigan. These licenses provide, among other things, that the facilities are subject to all rules, regulations, and Orders of the Commission now or hereafter in effect.

II.

On November 19, 1980, the Commission published a revised § 50.48 and a new Appendix R to 10 CFR Part 50 regarding fire protection features of nuclear power plants. The revised § 50.48 and Appendix R became effective on February 17, 1981. Section III of Appendix R contains 15

subsections lettered A through O, each of which specifies requirements for a particular aspect of the fire protection features at a nuclear power plant.

One of the subsections, III.J, is the subject of the licensee's exemption request. Section III.J, requires that emergency lighting units with at least an 8-hour battery power supply shall be provided in all areas needed for operation of safe shutdown equipment and in access and egrees routes thereto.

III.

By letter dated March 6, 1987, the licensee submitted a request for exemption from the technical requirements of section III.J of Appendix R to 10 CFR Part 50. For safe shutdown of the facilities in the event of a fire, it may become necessary for plant personnel to control steam generator power-operated relief valves. In the shutdown procedures, the back-up manual operation of these valves must be accomplished from nitrogen regulator valves located in the outdoor yard area. This area does not have emergency power with at least an 8-hour battery power supply but is in an area with normal and plant outdoor lighting backed up by a 500 kW security diesel generator. In the event of a station blackout or loss of lighting in the yard area, the security diesel generator provides the lighting for security measures and, in so doing, also lights the area for manual operation of the nitrogen regulator valves.

The licensee's request is for an exemption to the requirement of section III.J of Appendix R to provide lighting in the outdoor area powered from an 8-hour battery power supply. The underlying purpose of the rule is to provide a separate lighting system not interrupted by fires for areas needed for operation of safe shutdown equipment and in access and egress routes to the equipment. The licensees' request will provide an alternative to the 8-hour battery power supply.

The 500 kW security diesel generator is controlled by circuitry and associated cables located outside the plant area that would be affected by a fire that would require activation of the safe shutdown fire procedures. The diesel is run- and load-tested monthly and receives biannual preventive maintenance. In the event of a plant fire, the normal outdoor lighting also on separate circuits should not be affected. Should a station blackout occur or the normal outdoor lighting fail concurrent with the fire, the security diesel generators are started and provide continued emergency security measures, including outdoor lighting, for the yard area. Since the normal and emergency power sources are located outside the plant, the installation of 8-hour battery powered lighting units would not significantly improve the level of protection in this area.

Based on the above evaluation, the staff concludes that the installation of an 8-hour battery powered lighting system in the yard area would not significantly improve emergency lighting and that the emergency security diesel lighting provides an acceptable alternative for the purpose of the rule.

IV.

Accordingly, the Commission has determined that, pursuant to 10 CFR 50.12(a), that (1) the exemption as described in section III is authorized by law, will not present an undue risk to the public health and safety, and is consistent with the common defense and security; and (2) special circumstances are present for the exemption in that application of the regulation in this particular circumstance is not necessary to achieve the underlying purposes of Appendix R to 10 CFR Part 50. Therefore, the Commission grants the exemption from the requirements of section III.J of Appendix R to 10 CFR Part 50 to the extent discussed in section III above.

Pursuant to 10 CFR 51.32, the Commission has determined that the granting of this exemption will have no significant impact on the environment (April 3, 1987, 52 FR 10833).

This Exemption is effective upon issuance.

Dated at Bethesda, Maryland, this 26th day of May, 1987.

For the Nuclear Regulatory Commission.

Gary M. Holahan,

Acting Director, Division of Reactor Projects III, IV, V & Special Projects, Office of Nuclear Reactor Regulation.

[FR Doc. 87-12426 Filed 5-29-87; 8:45 am]

BILLING CODE 7590-01-M

[Docket No. 50-483]

Union Electric Co.; Consideration of Issuance of Amendment to Facility Operating License and Opportunity for Prior Hearing

The United States Nuclear Regulatory Commission (The Commission) is considering issuance of an amendment to Facility Operating License No. NPF-30, issued to Union Electric Company (the licensee), for operation of the Callaway Nuclear Plant located in Callaway County, Missouri.

The amendment would revise the provisions in the Technical Specifications relating to an increase in the authorized core thermal power from 3411 to 3565 MWt, in accordance with the licensee's application for amendment dated March 31, 1987 as supplemented by letter dated April 21, 1987.

Prior to 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.

By July 1, 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 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 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 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.

A request for a hearing or a petition for leave to intervene shall be filed with the Secretary of the Commission, United States 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 10 days of the notice period, it is requested that the petitioner or representative for 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 David L. Wigginton: 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 General Counsel-Bethesda, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and to Gerald Charnoff, Esq., Shaw, Pittman, Potts & Trowbridge, 2300 N Street, NW., Washington, DC 20037, attorney for the licensee.

Nontimely findings 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 petition and/or request should be granted 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 March 31, 1987, (supplemented by letter dated April 21, 1987), which is available for public inspection at the Commission's Public Document Room 1717 H Street, NW., Washington, DC and at the Callaway County Public Library, 710 Court Street, Fulton, Missouri and the John M. Olin Library, Washington University, Skinker and Lindell Boulevards, St. Louis, Missouri.

Dated at Bethesda, Maryland, this 27th day of May 1987.

For the Nuclear Regulatory Commission.

Thomas W. Alexion,

Project Manager, Project Directorate III–3, Division of Reactor Projects.

[FR Doc. 87–12425 Filed 5–29–87; 8:45 am]

BILLING CODE 7590–01–M

[Docket No. 50–186, License No. R–103, EA 86–191]

University of Missouri; Order Imposing Civil Monetary Penalty

I

University of Missouri (the licensee) is the holder of Research Reactor License No. R–103 (the license) issued by the Atomic Energy Commission on October 11, 1966. The responsibilities of the Atomic Energy Commission were assumed by the Nuclear Regulatory Commission (NRC/Commission) in 1974. The license authorizes the licensee to operate a research reactor in Columbia, Missouri in accordance with the conditions specified therein.

II

An inspection of the licensee's activities was conducted from August 26 through October 3, 1986 in response to an overexposure reported to the NRC by the licensee in a letter dated August 20, 1986. The results of this inspection indicated that the licensee had not conducted its activities in full compliance with NRC requirements. A written Notice of Violation and Proposed Imposition of Civil Penalty was served upon the licensee by letter dated January 15, 1987. The Notice stated the nature of the violations, the provisions of the NRC's requirements that the licensee has violated, and the amount of the proposed civil penalty for the violations. The licensee responded to the Notice of Violation and Proposed Imposition of Civil Penalty by letters dated February 13, 1987.

III

After consideration of the licensee's response and the statements of fact, explanation, and argument for mitigation contained therein, the Deputy Executive Director for Regional Operations has determined, as set forth in the Appendix to this Order, that the violations occurred as stated and that the penalty proposed for the violations designated in the Notice of Violation and Proposed Imposition of Civil Penalty should be imposed.

IV

In view of the foregoing and pursuant to section 234 of the Atomic Energy Act of 1954, as amended (Act), 42 U.S.C. 2282, and 10 CFR 2.205, *It is hereby ordered that:* The licensee pay a civil penalty in the amount of Four Thousand Dollars ($4,000) 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 Enforcement, U.S. Nuclear Regulatory Commission, ATTN: Document Control Desk, Washington, DC 20555.

The licensee may request a hearing within 30 days of the date of this Order. A request for a hearing should be clearly marked as a "Request for an Enforcement Hearing" and shall be addressed to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, ATTN: Document Control Desk, Washington, DC 20555, with a copy to the Assistant General Counsel for Enforcement at the same address, and to the NRC Regional Administrator, Region III, 799 Roosevelt Road, Glen Ellyn, Illinois 60137.

If a hearing is requested, the Commission will issue an Order designating the time and place of the 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. 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 was in violation of the Commission's requirements as set forth in the Notice of Violation and Proposed Imposition of Civil Penalty referenced in section II above, and

(b) Whether, on the basis of such violation, this Order should be sustained.

Dated at Bethesda, Maryland, this 21st day of May 1987.

For the Nuclear Regulatory Commission

James M. Taylor,

Deputy Executive Director for Regional Operations.

[FR Doc. 87-12428 Filed 5-29-87; 8:45 am]

BILLING CODE 7590-01-M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-24495; File No. MSE-87-7]

Self-Regulatory Organizations; Filing and Immediate Effectiveness of Proposed Rule Change of Midwest Stock Exchange, Inc. relating to waiver of transaction fees in NASDAQ/NMS securities.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1), notice is hereby given that on May 12, 1987, the Midwest Stock Exchange, Incorporated filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Midwest Stock Exchange, Incorporated (MSE) has determined to waive the application of its transaction fees in respect to trading in the 25 NASDAQ/NMS issues traded on the MSE pursuant to the granting of unlisted trading privileges. Such waiver of fees will be effective upon the start-up of trading of the issues, which is scheduled for May 15, 1987, and will continue until July 31, 1987.

II. Self/Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The MSE's current transaction fees will be waived for all trades executed in NASDAQ/NMS stocks on the MSE beginning on May 15, 1987. The waiver of such fees will facilitate the start-up of the pilot program in trading these issues and will allow the MSE to be more competitive with the over the counter market.

The proposed rule change is consistent with Section 6 of the Securities Exchange Act of 1934 in that it provides for the equitable allocation of reasonable dues, fees and other charges. The suspension of the transaction fees is temporary and will allow the MSE to examine the pilot program and review its pricing schedule as it relates to transactions in NASDAQ/NMS securities.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The Midwest Stock Exchange, Incorporated does not believe that any burdens will be placed on competition as a result of the proposed rule change.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

Comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3) of the Securities Exchange Act of 1934 and subparagraph (e) of the Securities Exchange Act Rule 19b-4. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest for the protection of investors, or otherwise in furtherance of the purposes of the Securities Exchange Act of 1934.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC. Copies of such filing will also be available for inspection and copying at the principal office of the above-referenced self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted by June 22, 1987.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Dated: May 21, 1987.

Jonathan G. Katz,

Secretary.

[FR Doc. 87-12422 Filed 5-28-87; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-24506; File No. SR-NASD-87-4]

Self-Regulatory Organizations: National Association of Securities Dealers, Inc.; Order Approving Proposed Rule Change

The National Association of Securities Dealers, Inc. ("NASD") submitted on February 3, 1987, copies of a proposed rule change pursuant to section 19(b) of the Securities Exchange Act of 1934 ("Act") and Rule 19b-4 thereunder to amend Section 6 of Appendix A to Article III, section 30 of the NASD's Rules of Fair Practice. That Section provides that purchases of certain categories of securities in special cash accounts are subject to the margin requirements of Appendix A, where the customer fails to pay for the purchased securities promptly. The NASD's proposal would exempt from those margin requirements purchases of those categories of securities, where the cash account is held by a person having net tangible assets of sixteen million dollars or more.

Notice of the proposed rule change together with the terms of substance of the proposed rule change was given by the issuance of a Commission release (Securities Exchange Act Release No. 34-24313, April 9, 1987), and by publication in the **Federal Register** (52 FR 12482, April 16, 1987). No comments were received with respect to the proposed rule change.

The Commission finds that the proposed rule change is consistent with

the requirements of the Act and the rules and regulations thereunder applicable to the NASD and, in particular, the requirements of sections 7(c) and 15A, and the rules and regulations thereunder.

It is therefore ordered, pursuant to section 19(b)(2) of the Act, that the above-mentioned proposed rule change be, and hereby is, approved.

For the Commission, by the Division of Market Regulation pursuant to delegated authority, 17 CFR 200.30-3(a)(12).

Dated: May 22, 1987.

Johathan G. Katz,

Secretary.

[FR Doc. 87-12420 Filed 5-29-87; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-24505; File No. SR-NYSE-85-1]

Self-Regulatory Organizations; Approval of Proposed Rule Change by the New York Stock Exchange Relating to Percentage Orders

I. Introduction

The New York Stock Exchange, Inc. ("NYSE" or "Exchange") submitted, on January 24, 1985, copies of a proposed rule change pursuant to section 19(b) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b-4 thereunder[2] to amend NYSE Rules 13 and 123A.30 relating to the acceptance and execution of percentage orders. The proposal subsequently was amended on May 30, 1986, and January 15, 1987.[3]

Notice of the proposal, together with its terms of substance, was provided by the issuance of a Commission release (Securities Exchange Act Release No. 21704, February 1, 1985) and by publication in the **Federal Register** (50 FR 5834, February 12, 1985). One comment was received regarding the proposal.[4] The commentator, while raising separate concerns, supported the proposed rule change.

The proposed rule change is intended to broaden the ability of an NYSE specialist to represent so-called "percentage orders" in the trading process by allowing the specialist to convert a percentage order into a limit order on a destabilizing tick,[5] provided certain conditions are met, and by allowing conversions that would have the effect of "bettering the market."[6]

II. Description of the Proposal

The NYSE has indicated in its filing that many of its members believe that the existing percentage order rules[7] are unduly restrictive in today's markets, and that greater flexibility is necessary in the specialist's use of percentage orders to satisfy block size trades.[8] Under the current percentage order rules, there exist two procedures by which percentage orders are activated into live limit orders. First, percentage orders may be activated by an "election" process. Under the election process, as trades occur at the percentage order's limit price or better, an equal number of shares of the percentage order are "elected," and treated as a limit order, which then takes its place behind other limit orders at the same price on the specialist's book.[9] The percentage order is then reduced by the number of elected shares until the entire order has been satisfied.[10]

In addition to the standard election procedures, the NYSE rules also allow a broker to authorize the specialist to convert all or part of a percentage order into a limit order, and for the specialist to be on parity with the converted percentage order.[11] Such convert and parity orders are known by their acronym, "CAP" orders. In practice, substantially all percentage orders placed on the NYSE are CAP orders. As a practical matter, these CAP orders are viewed as a necessary adjunct to the standard election procedures because they allow the specialist greater flexibility to match the order with other buying or selling interest in the market.[12] For example, assume the market for *XYZ* is 20 bid and 20¼ asked, 2,000 by 100 shares, last sale of 20⅛. If an order to sell 10,000 shares entered the market, under the standard election procedures the specialist holding a percentage order for 7,000 shares with a limit price of 20 would have to wait for 14,000 shares to be executed within the limit price before the full 7,000 shares would be executed. As a CAP order, however, the specialist

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[1] 15 U.S.C. 78s(b).

[2] 17 CFR 240.19b-4.

[3] *See* SR-NYSE-85-1, Amendment No. 1, submitted May 30, 1986 ("Amendment No. 1"); Letter from James E. Buck, Vice President and Secretary, NYSE, to Brandon Becker, Associate Director, Division of Market Regulation, SEC, dated January 15, 1987 ("Amendment No. 2").

[4] *See* Memorandum from the Organization of Two-Dollar Brokers, Inc. dated March 14, 1986.

[5] For a definition of destabilizing ticks, *see* notes 14 to 15, *infra*.

[6] *See* notes 9 to 14 and accompanying text *infra* (explaining the mechanics of percentage orders).

[7] *See* NYSE Rules 13 and 123A.30. Rule 13 defines a percentage order as "a limited price order to buy (or sell) 50% of the volume of a specified stock after its entry." Technically, a percentage order is initiated when a broker places the order with the specialist, specifying the total number of shares to be bought or sold and the limit price.

[8] *See* Letter from Santo Famularo, Assistant Vice President, NYSE, to Brandon Becker, Assistant Director, Division of Market Regulation, SEC, dated January 24, 1986 ("January 24 Letter"). The Commission notes that the number of block sized trades (10,000 or more shares) effected on the NYSE has grown dramatically in recent years. For example, in 1986, 665,587 block trades acounted for 49.9% of reported volume on the NYSE for that year. By comparison, in 1981, 145,564 block trades constituted 31.8% of total reported volume; in 1976, 47,632 block trades constituted 18.7% of total reported volume. *See* 1987 NYSE Fact Book, at 71.

[9] NYSE Rule 13 lists three types of percentage orders: "straight limit"; "last sale"; and "buy minus-sell plus." The various types of percentage orders differ only in terms of execution, and not the process by which they are elected. When a broker places a straight limit percentage order, it indicates that, subsequent to the election process, a limit order that results from the election carries a limit price equal to the percentage order limit price. A last sale percentage order differs from a straight limit percentage order in that the price of a resulting limit order is determined not by the limit price of the percentage order, but by the price of the electing transaction. For example, assume a buy last sale percentage order with a limit price of 30. Following a 200 share electing transaction at 29¾, the resulting limit order would have a limit price of 29¾, not 30 (as it would be with a straight limit). Finally, a buy minus-sell plus percentage order operates in the same fashion as a straight limit percentage order, except it places the additional requirement that elected portions of buy percentage orders be excuted on minus or zero-minus ticks, and elected portions of sell percentage orders be executed on plus or zero plus ticks.

[10] Execution of a limit order resulting from election of a percentage order does not result in further elections of the same or other percentage orders. Therefore, elected portions constitute 50% (thus "percentage orders") of the combined volume traded as a result of their executions and electing transactions. In effect, the purpose of the 50% notation is to indicate to the specialist that each share of a triggering transaction shall elect one share of the percentage order. For example, a 200 share transaction within the percentage order limit price elects 200 shares of the percentage order. Therefore, the 200 shares of the percentage order, when executed, represent 50% of the 400 share volume that resulted from the electing transaction and the percentage order.

[11] *See* NYSE Rule 123A.30. The NYSE percentage order rules provide that the broker may authorize the specialist, in writing, to be on "parity" with the percentage order, thereby allowing the specialist to trade along with the percentage order.

[12] The conversion provisions were implemented to facilitate percentage order interaction with large-sized contra interest entering the market. Percentage orders are usually of large size. When a large order on the opposite side of the percentage order enters the market, a percentage order without the conversion provisions is eligible for execution only after a triggering sale has taken place. As a result, the percentage order, instead of being "active" and therefore able to match the contra-side order, must wait to be elected by execution of the large block order, and thus will be executed in the large sized trade's "after market." Under this scenario, the election process potentially could disrupt price stability by preventing a trade between the two large, opposite side orders in one transaction. Due to these price continuity concerns, the Commission approved rules permitting the stabilizing tick conversions, thereby allowing percentage orders to interact with block orders, as well as their after market. *See* Securities Exchange Act Release No. 13568 (May 23, 1977), 42 FR 28176.

could "convert" the 7,000 shares in response to the 10,000 share selling interest and, because he was authorized to be on "parity", the specialist could provide the additional 3,000 shares to fill the entire 10,000 share sell order at 20, a minus tick. Under current procedures, the specialist may convert the unelected portion of a percentage order only if the resulting transaction is stabilizing,[13] namely minus or zero minus ticks for converted buy percentage orders, plus or zero plus ticks for converted sell percentage orders.[14]

In light of the comments of its members, the NYSE proposes to broaden the circumstances under which a specialist may convert percentage orders into limit orders. First, the NYSE amendments would broaden the provision permitting so-called "active" conversions, namely conversions of a percentage order into a limit order that would be executed immediately, by allowing such conversions on destabilizing ticks, provided certain clearly delineated conditions are satisfied.[15] The NYSE justifies its amendments allowing conversions on destabilizing ticks as a further attempt to facilitate interaction and execution between percentage orders and large contra-side interest.

Nevertheless, the NYSE proposal imposes three basic limitations on such conversions in order to limit the ability of such converted orders to have an undue influence on the direction of the market for a particular stock. First, an order only may be converted on a destabilizing tick for the purpose of participating in a trade of 10,000 or more shares. Second, the execution effected by the conversion may occur no more than ¼ point away from the last sale, although this requirement may be waived with the approval of an NYSE Floor Official. Third, the specialist cannot convert percentage orders for consecutive, or contemporaneous,[16] trades on destabilizing ticks without the approval of a Floor Governor.[17]

The proposed rule change also would permit the specialist to convert a percentage order into a limit order when and in such size as he deems appropriate, without an electing transaction, so long as the conversion is for quotation, rather than execution purposes, to "better the market."[18] Bettering the market conversions must have the effect of narrowing the spread, adding depth to a prevailing bid or offer, or establishing a new bid or offer immediately after a transaction has cleared the floor of bids and offers. The proposed bettering the market rule will permit the specialist to convert an order on a stabilizing tick to better the market in such size as is appropriate to further his market making duties. In contrast, the proposal permits the specialist to convert an order on a destabilizing tick to narrow the spread or establish a new bid or offer immediately after a transaction had cleared the floor of bids and offers, provided, however, that the conversion is within ⅛ point of the last sale. Further, a specialist may convert on a destabilizing tick, exclusive of the ⅛ point requirement, to add size to a prevailing bid or offer.[19]

As noted above, the specialist is restricted from making consecutive or contemporaneous conversions on destabilizing ticks. In the case of active conversions for the execution of block orders, the specialist may make consecutive or contemporaneous conversions only after approval by a Floor Governor. An order on a destabilizing tick converted to better the market, other than to add depth to an existing quote, only may be followed by another conversion on a destabilizing tick if there has been a "meaningful," "independent," intervening transaction.[20] The proposed rule change further notes that bettering the market transactions to narrow or establish the quotation may not precede, or follow, an active conversion without a meaningful, independent intervening transaction.[21]

The NYSE proposal also includes provisions intended to clarify the application of other Exchange rules to the specialist's conversion of percentage orders. In particular, the specialist must comply with the NYSE Rule 91.10 "double yellow" procedure if it is the contra party to a converted order.[22] Further, the proposed rules note that the specialist must provide conventional limit orders priority over converted percentage orders, and that the specialist may not convert a percentage order on a destabilizing tick to execute a transaction with one side of a block sized cross-transaction unless the

[13] NYSE Rule 123A.30. The stabilizing limitation for conversions is intended to ensure that the specialist cannot use the conversion process to force the market for his stock up or down. Transactions by specialists that are executed opposite to the direction of the market traditionally have been considered beneficial to the maintenance of a fair and orderly market, because they provide additional depth and liquidity to the market.

[14] The classification of a tick is determined by the price of the transaction in relation to the previous transaction in that market. A transaction occurs on a plus tick when its price is higher than the price of the previous transaction. A zero plus tick transaction indicates that the price of the transaction is equal to the previous transaction, but higher than the last different price. For example, if the last sale for a security was 30½, an immediately subsequent sale at 30⅝ would be considered a plus tick. Further, another execution at 30⅝ would constitute a zero plus tick, because it was equal to the previous transaction but higher than the 30½ transaction. The definitions of minus and zero minus ticks parallel those of plus and zero plus ticks when the price of a security is declining.

[15] *See* proposed amendments to NYSE Rule 123A.30, paragraph (4). A sell percentage order conversion that is executed on a minus or zero minus tick or a buy percentage order conversion on a plus or zero plus tick are termed destabilizing conversions. *See* note 14, *supra* (defining the method of determining the classification of ticks).

[16] In connection with "contemporaneous" conversions, the NYSE stated that "[w]here a specialist reasonably believes, based on prevailing market conditions (for example, a brief period of time where there is an influx of buying/selling interest and a 'fast market' condition) that it may be appropriate and necessary for him to convert percentage orders, on destabilizing ticks, in a series of trades which, while not consecutive, may be effected within a short period of time, the specialist shall first seek the approval of a Floor Governor." *See* proposed amendments to NYSE Rule 123A.30, paragraph (5).

[17] Proposed NYSE Rule 123A.30 paragraph (5) identifies the factors which a Floor Governor must evaluate in determining whether to grant a specialist request. Specifically, the Floor Governor should consider "changes in overall market conditions, and any changes in buying or selling interests in the stock in question" in determining the propriety of consecutive trades. In granting a specialist's request to make a series of contemporaneous trades, the Floor Governor must again evaluate buying and selling, and contra-side, interest. The Floor Governor must then determine a price away from the market to which the specialist may convert in a series of contemporaneous, non-consecutive trades. If the market then approaches this set price, the specialist must again consult with the Floor Governor, who will reevaluate the propriety of the conversion. In addition, the proposal provides the specialist with the option of refusing to accept the destabilizing conversion instructions. The entering broker also may withhold authorizing the specialist to convert on a destabilizing tick while, at the same time, authorizing conversions on stabilizing ticks. *See* proposed amendments to NYSE Rule 123A.30, paragraph (4).

[18] *See* proposed amendments to NYSE Rule 123A.30, paragraph (7).

[19] A conversion which establishes a quote is, in effect, treated as a transaction for the purpose of determining the tick. For example, assume the market has been quoted at 20 to 20⅜; 10,000 by 10,000; last sale at 20. A conversion of a buy percentage order to make a bid at 20⅛ (narrowing the spread) would be considered a plus, and therefore, destabilizing tick. Moreover, for the purpose of determining the tick in any further conversion activity, at 20⅛ price would be considered the last sale. *See* Amendment No. 2, *supra* note 3, at 3.

[20] *See* Amendment No. 2, *supra* note 3, at 2–3. The NYSE, in its supplemental filing, noted that the transaction must be independent of the previously converted percentage order, and meaningful in relation to the maintenance of continuity and depth in the market. The NYSE further stressed that small-sized transactions generally would not justify a consecutive conversion of a percentage order.

[21] *See* NYSE Rule 123A.30 proposed paragraph 7(1), (3).

[22] *See* NYSE Rule 91.10. A double yellow requires a specialist to notify and obtain immediate written confirmation from a member or member organization when the specialist has satisfied an order entrusted to him by the member through a purchase or sale for his own account.

specialist is able to provide a better price to that side while remaining within the ¼ point destabilizing parameter.[23] Finally, in situations in which a percentage order has been converted for quotation purposes and is subsequently superceded by a better quote, the original converted offer is treated as cancelled and it is reverted to its original status as a percentage order.

III. Discussion

The Commission has reviewed carefully the NYSE proposal to determine whether it is consistent with the Act and specifically the requirements set forth in sections 6(b) and 11(b) of the Act. In reviewing the proposal under section 11(b), the Commission was concerned whether the extended order conversion and quotation provisions provide the specialist with "discretion" in violation of section 11(b).[24] Section 11(b) was designed, in part, to address potential conflicts of interest that may arise as a result of the specialist's dual role as agent and principal in executing stock transactions. In particular, Congress intended to prevent specialists from unduly influencing market trends through their knowledge of market interest from the specialist's book and their handling of discretionary agency orders.[25] The Commission has interpreted this section to mean that all orders other than market or limit orders are discretionary and therefore cannot be accepted by a specialist.[26] In its analysis, the Commission has concluded that it is appropriate to treat percentage orders, even under the revised procedures, as equivalent to limit orders. While the NYSE proposal permits specialists to employ their judgment to a greater extent than the present percentage order requirements, the Commission believes that the requirements imposed on the specialist when converting a percentage order for execution or quotation purposes provide sufficiently stringent guidelines to ensure that the specialist only will implement the conversion provisions in a manner consistent with his market making duties and section 11(b). Further, the Commission notes that the concept of a limit order with conditions subsequent is not unique.[27] For example, a stop limit order is a limit order that is unexecutable prior to the satisfaction of a future event (a transaction at or better than the stop price). Similarly, in the stop limit order situation, as with a percentage order, the triggering transaction can be effected by the specialist through a proprietary trade.

The Commission also has reviewed the NYSE proposal in light of the standards set forth under section 6(b)(5) of the Act. This section requires that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices.[28] The Commission notes that the NYSE has structured its proposal, through various limiting and protective provisions, to ensure that the broadened conversion provisions will not increase the possibility of specialist abuse of the market. In particular, the 10,000 share and ¼ point restrictions on the block cross amendment ensure that such a conversion is implemented only to respond to large contra-side interest, and without disrupting price continuity. Moreover, the restriction on contemporaneous or consecutive trades (requiring Floor Governor approval) effectively will prevent the specialist from using this technique to influence the market by splitting his conversions and subsequent executions among a series of trades that, although satisfying separately the ¼ point requirement, as a whole create a disruptive market trend. In this regard, the Commission believes that Floor Governor approval would be appropriate only when extremely volatile market conditions are present.[29]

The Commission also has relied on the proposed provisions prohibiting a specialist from converting an order to interact with an established cross transaction unless the specialist can provide a superior price to one side of the cross. The Commission finds that this provision will prevent specialists from interfering with normal crossing procedures and ensure that the block conversion provisions will be utilized solely for purposes of price improvement.

The Commission also believes that the potential for abuse resulting from "bettering the market" conversions for quote purposes, is alleviated by limiting any conversion of percentage orders to conversions at or within the existing quotation spread. Those parameters effectively should control the use by specialists of these conversion provisions. In addition, the proposal's restriction against consecutive quotation conversions without a "meaningful" "intervening" transaction should reduce substantially any potential manipulative concern.[30] Further, the ⅛ point conversion limitation in connection with the restrictions on contemporaneous or consecutive block conversions, as well as the restrictions on connected block and quote conversions, make it difficult for a specialist to use the conversion mechanism to influence the price of the market.

The Commission also views as important that cancellation provision of the proposed bettering the marketing rule. This provision requires the specialist, without discretion, to cancel a converted order and revert it back to a percentage order if subsequent interest enters the market and establishes a superior quote. Finally, the Commission believes that allowing the specialist to reflect unelected portions of percentage orders in the quote should make the quote more representative of the buy and sell interest present in the market, and may act to draw contra-side interest into the market that otherwise might not develop. This capability should complement effectively the specialist's negative and affirmative obligations in the marketplace.[31] In particular, the specialist is required to refrain from proprietary trading unless it is necessary to maintain a fair and orderly market. To the extent that the conversion provisions make the quote more representative, such conversions should reduce the need for specialist

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[23] Further, unless asked by the member holding the block cross, a specialist may not trade for his own account with either side of the cross where the effect would be to establish a new last sale price and extend the ¼ point destabilizing parameter.

[24] 15 U.S.C. 78k(b). Section 11(b) permits a specialist to accept only market or limit orders.

[25] *See* H. Rep. No. 1383, 73d Cong. 2d Sess. 22, S. Rep. 792, 73d Cong. 2d Sess. 18 (1934).

[26] *See, e.g.*, SEC, Special Study of the Securities Markets, H.R. Doc. No. 95, 88th Cong., 1st Sess., Part 2, 72 (1963) ("Special Study") (noting that "Section 11(b) . . . prohibits, without exception, a specialists's effecting any transaction except upon a market or limit order").

[27] *See, e.g.*, NYSE Rule 13, which defines "limit order" as "[a]n order to buy or sell a stated amount of a security at a specified price, or at a better price, if obtainable after the order is represented in the Trading Crowd."

[28] 15 U.S.C. 78f(b)(5).

[29] *See* January 24 Letter, *supra* note 8, at 7–8. In its letter, the NYSE stressed that approval of consecutive or contemporaneous conversions on destabilizing ticks only would occur in exceptional circumstances. The Exchange emphasized the higher standing of Floor Governors, as opposed to Floor Officials, from whom a specialist would need to secure approval for these trades. Further, the Exchange noted that neither requests nor approvals would be considered routine, and that written records of Floor Governor approvals would be kept. Finally, the Exchange noted that if it determined that written approval guidelines were appropriate, such guidelines would be promulgated.

[30] As a general matter, the Commission expects that such an "independent," "meaningful" transaction would exceed an average-sized transaction for that security.

[31] *See* 17 CFR 240.11b–1(a)(2); NYSE Rule 104. NYSE Rule 104 reads, in pertinent part, "[n]o specialist shall effect on the Exchange purchases or sales of any security in which such specialist is registered, for any account in which he . . . is directly or indirectly interested, unless such dealings are reasonably necessasry to permit such specialist to maintain a fair and orderly market. . . ."

proprietary trading. These provisions will, therefore, further assist the specialist in his duty, consistent with sections 6(b)(5) and 11(b), to maintain a fair and orderly market.[32]

IV. Conclusion

The Commission finds that the proposed rule changes are consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange and, in particular, the requirements of section 6 and the rules and regulations thereunder. Further, the Commission finds that the proposed changes are consistent with section 11(b). Moreover, the Commission is satisfied that the limitations and conditions implemented in connection with the conversion provisions will prevent the specialist from using the conversion provisions to influence the market, while providing him with increased opportunities to provide for efficient executions of large institutional orders and maintain a fair and orderly market.

It is therefore ordered, pursuant to section 19(b)(2) of the Act, that the above mentioned proposed rule change be, and hereby is, approved.

Dated: May 22, 1987.

By the Commission.

Jonathan G. Katz,

Secretary.

[FR Doc. 87-12421 Filed 5-29-87; 8:45 am]

BILLING CODE 8010-01-M

[Rel. No. IC- 15750; File No. 812-6583]

IDS Life Insurance Company and IDS Life Variable Life Separate Account; Application for Exemption

May 22, 1987.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of Application for Exemption under the Investment Company Act of 1940 ("1940 Act").

Applicants: IDS Life Insurance Company ("IDS Life") and IDS Life Variable Life Separate Account ("Variable Account").

Relevant 1940 Act Sections and Rules: Exemption requested *under* Section 6(c) *from* sections 2(a)(32), 12(d)(1), 22(c), 26(a), 27(c)(1), 27(c)(2) and 27(d) of the 1940 Act and Rules 6e-2(a)(2), 6e-2(b)(15), 6e-3(T)(b)(12), 6-3e(T)(b)(13), 6e-3(T)(c)(2) and 22c-1 thereunder.

Summary of Application: Applicants seek an order to the extent necessary or appropriate to permit the offering of flexible premium variable life insurance contracts. Specifically, Applicants seek the relief necessary to permit (1) the extension of the relief granted in a prior order to these Contracts; (2) the definition of the term "Incidental Insurance Benefits" in Rule 6e-3(T)(c)(2) to include the policy's rider for a Waiver of Monthly Deduction for Total Disability; (3) the assessment of certain Contingent Deferred Issue and Administrative Expense Charges; and (4) the use of the same Separate Account and underlying Series Fund by Applicants' Single Premium Variable Life Contract as well as their Flexible Premium Variable Life Contract.

Filing Date: The application was filed on December 31, 1986, and amended on April 8, 1987.

Hearing or Notification of Hearing: If no hearing is ordered, the requested exemption 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 June 15, 1987. Request a hearing in writing giving the nature of your interest, the reason for the request, and the issues you contest. Serve the Applicant 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, in the case of an attorney-at-law, by certificate. Request notifications of the date of a hearing by writing to the Secretary of the SEC.

ADDRESS: Secretary, SEC, 450 5th Street NW., Washington, DC 20549. IDS Life Insurance Company and the Variable Account, 800 IDS Tower, Minneapolis, MN 55474.

FOR FURTHER INFORMATION CONTACT: Lewis B. Reich, Special Counsel (202) 272-2061, or Clifford E. Kirsch, Staff Attorney, (202) 272-3032.

SUPPLEMENTARY INFORMATION: Following is a summary of the application; the complete application is available for a fee from either the SEC's Public Reference Branch in person or the SEC's commercial copier (800) 231-3282 (in Maryland (301) 253-4300).

Applicants' Representations and Arguments

1. The Variable Account is a separate account of IDS Life. Its subaccounts invest their assets in corresponding portfolios of IDS Life Series Fund, Inc. ("the Fund") or in units of Shearson Lehman Brothers Stripped ("Zero Coupon") U.S. Treasury Securities Fund ("the Trust"). IDS Life is planning on issuing certain flexible premium variable life insurance contracts ("Contracts") through the Variable Account. The Variable Account currently offers and sells Single Premium Variable Life Insurance Contracts.

2. IDS Life deducts a sales charge and a charge for premium taxes from each premium payment. The total of these charges is called the Premium Expense Charge. A sales charge of 2.5% of each premium payment will be deducted to compensate IDS Life for expenses relating to the distribution of the Contract, including agents' commissions, advertising, and the printing of the prospectuses and sales literature. In addition, IDS Life charges a contingent deferred sales charge if the Contract is surrendered or lapses. Also, a charge of 2.5% of each premium payment will be deducted to compensate IDS Life for paying state premium taxes imposed by certain states and governmental subdivisions on premiums received by insurance companies.

3. During the first 10 Contract years and during the first 10 years following any requested increase in Specified Amount, IDS Life will make a Surrender Charge if the owner surrenders the Contract or the Contract lapses. The Surrender Charge has two parts—the Contingent Deferred Issue and Administrative Expense Charge and the Contingent Deferred Sales Charge. The Contingent Deferred Issue and Administrative Expense Charge reimburses IDS Life for expenses incurred in issuing the Contract, such as processing the application (primarily underwriting) and setting up computer records. The maximum Contingent Deferred Sales Charge and the maximum Contingent Deferred Issue and Administrative Expense Charge for the Initial Specified Amount or any requested increase in Specified Amount will be determined on the Contract Date or on the effective date of any such requested increase, as the case may be. In general, these maximum charges remain level for the first five years in the relevant 10-year period, and then reduce in equal monthly increments until they become zero at the end of 10 years.

4. IDS Life makes a daily charge against the assets of each subaccount investing in the Trusts. This charge will not be deducted from the assets in the Fixed Account. This charge is intended

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[32] The Commission also believes that the proposal will permit specialist to service more effectively the increasingly institutional market. It is inefficient and uneconomic for a floor broker to remain at a post and "work" an institutional order for a long period of time. By increasing the flexibility of the specialist to handle percentage orders, the rule proposal should enhance the ability of institutions to receive favorable execution of their orders.

to reimburse IDS Life for the transaction charge paid directly by IDS Life to Shearson Lehman on the sale of the Trust units to the Variable Account. IDS Life pays these amounts from its fixed account assets. The amount of the asset charge is equivalent to an effective annual rate of .25 percent of the account value. This amount may be increased in the future but in no event will it exceed an effective annual rate of .50 percent of the account value. The charge will be cost-based (taking into account a loss of interest) with no anticipated element of profit for IDS Life.

Extension of Prior Order

5. Applicants state that in connection with certain Single Premium Variable Life Insurance Contracts ("SPVL Contracts") issued by the Variable Account, IDS Life and the Variable Account sought and obtained certain exemptive relief. An order was issued on July 21, 1986 (Release No. IC–15212) (File No. 812–6312) ("prior order"). Applicant's assert that the exemptions granted were necessitated primarily as a result of the Variable Account's investments in other investment companies that were organized as unit investment trusts ("Trusts").

6. Applicants note that the Trusts provide a "zero coupon" investment vehicle for the SPVL Contracts. The specific exemptive relief granted under the prior orders included relief from section 12(d)(1) of the Act, to the extent necessary to permit the purchase of shares of the Trusts, and from sections 26(a)(2) and 27(c)(2) to permit IDS Life to recover amounts, through asset charges against the Variable Account, paid by IDS Life to the Trust sponsors in connection with the acquisition of Trust units. Applicants incorporate by reference the application requesting such relief.

7. Applicants submit that there may be a question whether the relief granted in the prior order would extend to the Contract, given the differences in Contract design and in the exemptive rules under which the Contract and the SPVL Contracts are regulated. Applicants also are concerned that using the same separate account to support both the Contract and SPVL Contracts may bring into question the continued qualification of the SPVL Contracts under Rule 6e–2. Applicants are therefore seeking an order amending the prior order to (a) provide exemptive relief from paragraph (a)(2) and (b)(15) of Rule 6e–2 to permit both the Contract and the SPVL Contracts to be issued through the same separate account and (b) extend, to the extent necessary, the prior exemptive relief granted from sections 12(d)(1), 26(a) and 27(c)(2), pursuant to section 6(c) under the Act, to the Contract issued by the Variable Account.

8. With regard to the extension of the prior order to the Contract, Applicants assert that although there are differences between the Contract and the SPVL Contracts, none of the differences have a bearing on the appropriateness of the relief granted in the prior order. Applicants represent that the basic investment structure of the Contract is the same as for the SPVL Contract. Applicants state that the same basic types of charges or deductions are made under the Contract and SPVL Contract. Applicants assert that the arguments made in the application for the prior order are equally applicable in the case of the Contract, and are incorporated by reference. Moreover, Applicants represent that the Variable Account and the Contract will be subject to the same representations and limitations as discussed in the prior application.

Definition of Incidental Insurance Benefits

9. Applicants seek relief from Rule 6e–3(T)(c)(2) which defines the term "incidental insurance benefits" to mean insurance benefits that do not vary in amount in accordance with the investment experience of a separate account. Under the Contract, the Owner will have the option to elect coverage under a Waiver of Monthly Deduction Rider for Total Disability (the "Rider"), which provides that in the event of the total disability of the insured, as defined in the Rider, IDS Life will waive the monthly deduction for the cost of insurance, Contract Fee, the cost of any riders, and the death benefit guarantee charge for the next Contract month. The Rider may be deemed not to meet the definition of "incidental insurance benefits" under Rule 6e–3(T)(c)(2) because the monthly cost of insurance charge varies based upon the net amount at risk (Death Benefit less Policy Value) under a Contract, which in turn varies with the investment experience of the Subaccounts (because of the Contract Value component in the net amount at risk calculation). Thus, the amount of the monthly cost of insurance charge that will be waived under the Rider will vary with the investment experience of the Subaccounts.

10. However, in significant respects, the coverage provided by the Rider is a fixed benefit. Under the Rider, IDS Life's obligation to waive the monthly cost of insurance charge, the Contract Fee, the cost of any riders and the death benefit charge for the next Contract month is a fixed obligation, and the benefit will be provided irrespective of the investment experience of the Subaccounts (i.e., the monthly cost of insurance charge, the Contract Fee, the cost of any riders and the death benefit charge for the next Contract month will be waived regardless of how much the net amount at risk varies). For the reasons set forth above, the exemptive relief sought from Rule 6e–3(T)(c)(2) involves "technical and unforeseen matters," and is necessary and appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

Contingent Deferred Issue and Administrative Expense Charge

11. The Contract provides for calculation of a Surrender Charge which includes a Contingent Deferred Sales Charge ("Sales Charge") and a Contingent Deferred Issue and Administrative Expense Charge ("Issue and Administrative Expense Charge"). During the first 10 Contract Years and during the first 10 years following any requested increase in Specified Amount, IDS Life will impose a Surrender Charge if the Owner surrenders the Contract or the Contract lapses.

12. The cost-based Issue and Administrative Expense Charge reimburses IDS Life for administrative costs it incurs in issuing the Contract. The maximum amount of this Charge is equal to $4 time the number of thousands of dollars of Specified Amount.

13. Applicants state that whereas the deduction of the sales charge—either upon a surrender or if the Contract lapses—is expressly permitted by Rule 6(e)–3(T)(b)(i), (b)(13)(iv) and (d)(1)(i), it is not completely clear whether the Issue and Administrative Expense Charge may be deducted upon surrender or lapse of the Contract. Rule 6e–3(T)(b)(13)(iii) specifically allows the deduction of amounts for administrative expenses from the cash value of a flexible premium variable life insurance contract, if certain conditions are fulfilled, all of which are met with respect to the Contract. Nothing in Rule 6e–3(T) specifically prohibits the deduction of such amounts from cash value prior to surrender or lapse.

14. Applicants submit that imposition of the Issue and Administrative Expense Charge in the form of a deferred charge as part of the Surrender Charge is much more favorable to the Contractowner than the deduction of this charge from premiums paid—the conventional way of imposing such charges. First, the

amount of the Contractowner's investment in the Subaccounts is not reduced as it would be if this charge were taken in full in the first Contract Year. Second, the total amount charged to any Contractowner is no greater than it would be if these charges were taken in full in the first Contract Year. Finally, the fact that the entire amount of the charge was not deducted initially will favorably affect the amount of the Death Benefit under Option 2 since cash value will be greater.

15. Applicants represent that the Issue and Administrative Expense Charge is the same amount as would have been imposed under the Contract if the expenses of issuing the Contract had been recovered through a front-end charge. In particular, Applicants represent that the Issue and Administrative Expense Charge does not take into account the time value of money (which would increase the charge to factor in the investment cost to IDS Life of deferring the charge). Applicants represent that the Issue and Administrative Expense Charge does not take into account the likelihood that not all Contractowners will lapse or surrender their Contracts or that some Contractowners may redeem later than others (which would increase the charge for those surrendering or lapsing over what they would have paid had all Contractowners been required to pay the Issue and Administrative Expense Charge at the time the Contract is issued.) As a result, Applicants submit that Contractowners will obtain the advantages described above, which arise from the deferred nature of the charge, without incurring any additional cost. Therefore, Applicant request exemption from section 2(a)(32), 22(c), 26(a)(2), 27(c)(1), 27(c)(2), and 27(d) and Rules 6e-3(T)(b)(12), 6e-3(T)(b)(13) and Rule 22c-1.

Mixed Funding

16. Applicants' original request for exemptive relief for the SPVL Contracts was filed under Rule 6e-2 (Investment Company Act Release No. IC-14798, File No. 812-6113, November 18, 1985). The assets of the Separate Account are currently derived from the sale of single premium variable life insurance contracts which meet the requirements of Rule 6e-2. However, Applicants propose to fund the Separate Account in part from the sale of flexible premium variable life insurance contracts.

17. Applicants state that while funding of the Separate Account in part from the sale of such flexible premium life insurance Contracts would not be permitted under Rule 6e-2(a)(2) and (b)(15) as presently in effect, it would be permitted under the proposed amendments to Rule 6e-2(a)(2) and (b)(15), as proposed in Investment Company Act Release No. IC-14421 (March 15, 1985) and under Rule 6e-3(T)(a)(2) and (b)(15).

18. The interests of single premium and flexible premium variable life Contractholders, IDS Life's interests with respect to the two types of Contracts, and the regulatory frameworks for the two types of Contracts are sufficiently parallel that funding both Contracts through a single spearate account should not prejudice any Contractholder. Furthermore, the increased pooling, diversification, and scale economies in expenses realized from the use of a single separate account should benefit both types of Contractholders. Therefore, the funding of both types of life insurance Contracts with a single separate account should be permitted. Furthermore, the requested relief is consistent with the proposed amendments to Rule 6e-2, and presently would be allowed under Rule 6e-3(T).

19. For the reasons set forth above, Applicants assert that the exemptive relief sought from Rule 6e-2 is necessary and appropriate, in the public interest, and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 87-12423 Filed 5-29-87; 8:45 am]

BILLING CODE 8010-01-M

TENNESSEE VALLEY AUTHORITY

Information Collection Under Review by the Office of Management and Budget (OMB)

AGENCY: Tennessee Valley Authority.

ACTION: Information collection under review by the Office of Management and Budget (OMB).

SUMMARY: The Tennessee Valley Authority (TVA) has sent to OMB the following proposal for the collection of information under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. Chapter 35), as amended by Pub. L. 99-591.

Requests for information, including copies of the information collection proposed and supporting documentation, should be directed to the Agency Clearance Officer whose name, address, and telephone number appear below. Questions or comments should be directed to the Agency Clearance Officer and also to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503; Attention: Desk Officer for Tennessee Valley Authority, 395-7313.

Agency clearance officer: Mark R. Winter, Tennessee Valley Authority, 100 Lupton Building, Chattanooga, TN 37401; (615) 751-2524.

Type of request: Regular submission.

Title of information collection: Questionnaire for Consulting Foresters in the Tennessee Valley Region.

Frequency of use: On occasion.

Type of affected public: Small businesses or organizations.

Small businesses or organizations affected: Yes.

Federal budget functional category code: 452.

Estimated number of annual responses: 200.

Estimated total annual burden hours: 60.

Need for and use of information: This information collection is necessary for an evaluation of TVA's Consulting Foresters Assistance Program by the Association of Consulting Foresters.

John W. Thompson,

Manager of Corporate Services, Senior Agency Official.

[FR Doc. 87-12333 Filed 5-29-87; 8:45 am]

BILLING CODE 8120-01-M

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[Order 87-6-70]

Fitness Determination of Air Cape, Inc., d/b/a Nantucket Airlines; Order To Show Cause

AGENCY: Department of Transportation.

ACTION: Notice of Commuter Air Carrier Fitness, Determination—Order 87-6-70, Order to Show Cause.

SUMMARY: The Department of Transportation is proposing to find that Air Cape, Inc. d/b/a Nantucket Airlines is fit, willing, and able to provide commuter air service under section 419(c)(2) of the Federal Aviation Act.

Responses: All interested persons wishing to respond to the Department of Transportation's tentative fitness determination should file their responses with the Air Carrier Fitness Division, Room 6420, Department of Transportation, 400 7th Street, SW. Washington, DC 20590, and serve them on all persons listed in Attachment A to

the order. Responses shall be filed no later than June 5, 1987.

FOR FURTHER INFORMATION CONTACT: James A. Lawyer, Air Carrier Fitness Division, Department of Transportation, 400 7th Street, SW., Washington, DC 20590, (202) 366–1064.

Dated: May 26, 1987.

Vance Fort,

Deputy Assistant Secretary for Policy and International Affairs.

[FR Doc. 87–12393 Filed 5–29–87; 8:45 am]

BILLING CODE 4910–62–M

[Order 87–5–71]

Fitness Determination of Pearson Aviation Corporation d/b/a Pacair Order To Show Cause

AGENCY: Department of Transportation.

ACTION: Notice of Commuter Air Carrier Fitness, Determination—Order 87–5–71, Order to Show Cause.

SUMMARY: The Department of Transportation is proposing to find Pearson Aviation Corporation d/b/a/ PacAir fit, willing, and able to provide commuter air service under section 419(c)(2) of the Federal Aviation Act.

Responses: All interested persons wishing to respond to the Department of Transportation's tentative fitness determination should file their responses with the Air Carrier Fitness Division, P–56, Department of Transportation, 400 Seventh Street, SW., Room 6420, Washington, DC 20590, and serve them on all persons listed in Attachment A of the order. Responses shall be filed no later than June 5, 1987.

FOR FURTHER INFORMATION CONTACT: Ms. Kathy A. Lusby, Air Carrier Fitness Division (P–56, Room 6420, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590, (202) 366–2337.

Dated: May 26, 1987.

Vance Fort,

Deputy Assistant Secretary for Policy and International Affairs.

[FR Doc. 87–12394 Filed 5–29–87; 8:45 am]

BILLING CODE 4910–62–M

Federal Railroad Administration

[BS–AP–No. 2588]

Southern Railway System; Postponement of Public Hearing

The public hearing scheduled for May 28, 1987, in Macon, Georgia, concerning the captioned block signal application, has been postponed indefinitely.

The postponement is being made at the request of the applicant, the Southern Railway System.

In the application that will be the subject of this hearing, the Southern Railway System has petitioned the Federal Railroad Administration (FRA) for approval of the proposed discontinuance of the traffic control and automatic block signal systems between Edgewood, Georgia and Lee, Georgia. This proceeding is identified as FRA Block Signal Application No. 2588. (See the original hearing notice published April 14, 1987, at 52 FR 12106 and 12107.)

FRA regrets any inconvenience caused by the postponement of this hearing.

Issued in Washington, DC, on May 26, 1987.

J.W. Walsh,

Associate Administrator for Safety.

[FR Doc. 87–12346 Filed 5–29–87; 8:45 am]

BILLING CODE 4910–06–M

DEPARTMENT OF THE TREASURY

Public Information Collection Requirements Submitted to OMB for Review

Dated: May 26, 1987.

The Department of Treaury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Pub. L. 96–511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 2224, 15th and Pennsylvania Avenue, NW., Washington, DC 20220.

Bureau of the Public Debt

OMB Number: New
Form Number: 5263
Type of Review: New Collection
Title: Order for Series EE U.S. Savings Bonds
Description: Form 5263 is needed to indicate registration and number and denomination of Series EE U.S. Savings Bonds to be purchased. The form is also used to document the request for issuance.
Respondents: Individuals or households, State or local governments, Farms, Businesses
Estimated Burden: 74,615 hours
Clearance Officer: Peter Laugesen (202) 376–3902, Bureau of the Public Debt, Room 445, 999 E. Street, NW., Washington, DC 20226
OMB Reviewer: Milo Sunderhauf (202) 395–6880, Office of Management and Budget, Room 3208, New Executive Office Building, Washington, DC 20503

Lois K. Holland,

Department Reports, Management Officer.

[FR Doc. 87–12424 Filed 5–29–87; 8:45 am]

BILLING CODE 4810–25–M

Office of the Secretary

[Supplement to Department Circular—Public Debt Series—No. 14–87]

Treasury Notes, Series Y–1989

The Secretary announced on May 20, 1987, that the interest rate on the notes designated Series Y–1989, described in Department Circular—Public Debt Series—No. 14–87 dated May 14, 1987, will be 8 percent. Interest on the notes will be payable at the rate of 8 percent per annum.

Gerald Murphy,

Fiscal Assistant Secretary.

[FR Doc. 87–12354 Filed 5–29–87; 8:45 am]

BILLING CODE 4810–40–M

UNITED STATES INFORMATION AGENCY

Grants; Initiation of a New Project in Zimbabwe Sponsored by a Special African Programming Initiative; Teacher, Text, Technology (TTT)

The Bureau of Educational and Cultural Affairs of the United States Information Agency plans to award a grant to a U.S. academic institution of higher education for the purpose of assisting in the development of secondary school teachers in Zimbabwe. The grantee will work with the Associate College Center of the University of Zimbabwe in its efforts to develop staff and strengthen its curriculum and textbook-writing capacities.

The program will be a component of the Agency's Teacher-Text-Technology (TTT) Initiative which is an element of the Fulbright Exchange Program. TTT is designed to support the efforts of African countries to upgrade secondary education and related teacher training in English, math, science and other fields.

Proposals will be reviewed consistent with Bureau guidelines. A twelve-month grant will be awarded on or about September 15, 1987. Deadline for receipt of proposals is COB, Friday, July 10, 1987. For details, interested institutions should contact the Agency's TTT Coordinator, Bob Dalsky, E/AEA—Room 234, U.S. Information Agency, 301 Fourth Street, SW., Washington, DC 20547, telephone (202) 485–7355.

Dated: May 27, 1987.

Robert R. Gosende,

Deputy Associate Director, Bureau of Educational and Cultural Affairs.

[FR Doc. 87–12402 Filed 5–29–87; 8:45 am]

BILLING CODE 8230–01–M

Sunshine Act Meetings

Federal Register
Vol. 52, No. 104
Monday, June 1, 1987

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).

COMMODITY FUTURES TRADING COMMISSION

TIME AND DATE: 10:00 a.m., June 9, 1987.

PLACE: 2033 K St., NW., Washington, DC, 5th Floor Hearing Room.

STATUS: Open.

MATTERS TO BE CONSIDERED: Discussion of Off-Exchange Issues.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 254–6314.

Jean A. Webb,
Secretary of the Commission.

[FR Doc. 87–12481 Filed 5–28–87; 2:59 pm]
BILLING CODE 6351–01–M

COMMODITY FUTURES TRADING COMMISSION

TIME AND DATE: 11:00 a.m., June 9, 1987.

PLACE: 2033 K St., NW., Washington, DC, 8th Floor Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Judicial Session.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 254–6314.

Jean A. Webb,
Secretary of the Commission.

[FR Doc. 87–12482 Filed 5–28–87; 2:59 pm]
BILLING CODE 6351–01–M

COMMODITY FUTURES TRADING COMMISSION

TIME AND DATE: 10:00 a.m., June 23, 1987.

PLACE: 2033 K St., NW., Washington, DC, 5th Floor Hearing Room.

STATUS: Open.

MATTERS TO BE CONSIDERED:

Application of the MidAmerica Commodity Exchange for designation as a contract market in Australian Dollar Futures.

Application of the Coffee Sugar Cocoa Exchange for designation as a contract market in Inflation Rate options.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 254–6314.

Jean A. Webb,
Secretary of the Commission.

[FR Doc. 87–12483 Filed 5–28–87; 2:59 pm]
BILLING CODE 6351–01–M

COMMODITY FUTURES TRADING COMMISSION

TIME AND DATE: 11:00 a.m., June 23, 1987.

PLACE: 2033 K St., NW., Washington, DC, 8th Floor Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Enforcement Matters.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb. 254–6314.

Jean A. Webb,
Secretary of the Commission.

[FR Doc. 87–12484 Filed 5–28–87; 2:59 pm]
BILLING CODE 6351–01–M

COMMODITY FUTURES TRADING COMMISSION

TIME AND DATE: 10:00 a.m., June 30, 1987.

PLACE: 2033 K St., NW., Washington, DC, 5th Floor Hearing Room.

STATUS: Open.

MATTERS TO BE CONSIDERED: Part 9, Commission review of Exchange Disciplinary, Access Denial and other Adverse Action, final rules.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 254–6314.

Jean A. Webb,
Secretary of the Commission.

[FR Doc. 87–12485 Filed 5–28–87; 2:59 pm]
BILLING CODE 6351–01–M

COMMODITY FUTURES TRADING COMMISSION

TIME AND DATE: 11:00 a.m., June 30, 1987.

PLACE: 2033 K St., NW., Washington, DC, 8th Floor Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Enforcement Matters.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 254–6314.

Jean A. Webb,
Secretary of the Commission.

[FR Doc. 87–12486 Filed 5–28–87; 2:59 pm]
BILLING CODE 6351–01–M

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

TIME AND DATE: 2:00 PM (Eastern Time) Monday, June 9, 1987.

PLACE: Clarence M. Mitchell, Jr., Conference Room No. 200–C on the 2nd Floor of the Columbia Plaza Office Building, 2401 "E" Street, NW., Washington, DC 20507.

STATUS: Part will be open to the public and part will be closed to the public.

MATTERS TO BE CONSIDERED:

Open

1. Announcement of Notation Vote(s).
2. Report on Commission Operations (Optional).
3. Proposed FY 1988 Qualification Criteria for the Tribal Employment Rights Office Program.
4. Proposed FY 1988 Funding Principles for State and Local Fair Employment Practices Agencies.
5. Proposed Federal Sector Complaint Processing Manual.
6. Proposed Annual Report on the Employment of Minorities, Women and Individuals with Handicaps in the Federal Government for Fiscal Year 1985.
7. Proposed Annual Report on the Coordination of Federal Equal Employment Opportunity Programs for Fiscal Year 1986.

Closed

Litigation Authorization; General Counsel Recommendations.

Note.—Any mater not discussed or concluded may be carried over to a later meeting. (In addition to publishing notices on EEOC Commission meetings in the **Federal Register**, the Commission also provides a recorded announcement a full week in advance on future Commission sessions.)

Please telephone (202) 634–6748 at all times for information on these meetings.

CONTACT PERSON FOR MORE INFORMATION: Cynthia C. Matthews, Executive Officer at (202) 634–6748.

Dated: May 28, 1987.

Cynthia C. Matthews,
Executive Officer, Executive Secretariat.

[FR Doc. 87–12494 Filed 5–28–87 3:39 pm]
BILLING CODE 6750–05–M

SECURITIES AND EXCHANGE COMMISSION

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Pub. L. 94–409, that the Securities and Exchange Commission will hold the following meeting during the week of June 1, 1987:

A closed meeting will be held on Tuesday, June 2, 1987, at 2:30 p.m.

The Commissioners, Counsel to the Commissioners, the Secretary of the Commission, and recording secretaries will attend the closed meeting. Certain staff members who are responsible for the calendared matters may also be present.

The General Counsel of the Commission, or his designee, has cretified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(4), (8), (9)(A) and (10) and 17 CFR 200.402(a)(4), (8), (9)(i) and (10),

permit consideration of the scheduled matters at a closed meeting.

Commissioner Fleischman, as duty officer, voted to consider the items listed for the closed meeting in closed session.

The subject matter of the closed meeting scheduled for Tuesday, June 2, 1987, at 2:30 p.m., will be:

Formal orders of investigation.
Institution of administrative proceedings of an enforcement nature.
Settlement of administrative proceedings of an enforcement nature.
To amend injunctive action.
Institution of injunctive actions.
Settlement of injunctive action.
Regulatory matter regarding financial Opinion.

At times changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: Brent Taylor at (202) 272–2014.

Jonathan G. Katz,

Secretary.

May 27, 1987.

[FR Doc. 87–12459 Filed 5–28–87; 11:51 am]

BILLING CODE 8010–01–M

Corrections

Federal Register
Vol. 52, No. 104
Monday, June 1, 1987

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, 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.

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 700

[OPTS-260002; FRL 3157-2]

Proposed Fees for Processing Premanufacture Notices, Exemption Applications and Notices, and Significant New Use Notices

Correction

In proposed rule document 87-8780 beginning on page 12940 in the issue of Monday, April 20, 1987, make the following corrections:

1. On page 12942, in the third column, in the third complete paragraph, in the 2nd line "section"was misspelled. Also in the 11th line "$400 million" should read "$40 million".

S 700.49 [Corrected]

2.On page 12944, in S 700.49, in the third column, in the fourth line the section reference "S 700.45(d)" should read "S 700.45(b)".Q03

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Advisory Council Meeting

Correction

In notice document 87-11591 beginning on page 19203 in the issue of Thursday, May 21, 1987, make the following correction:

On page 19203, in the second column, in the 24th line, "June 19" should read "June 29".

BILLING CODE 1505-01-D

DEPARTMENT OF THE INTERIOR

Office of the Secretary

43 CFR Part 2

Records and Testimony; Freedom of Information Act

Correction

In proposed rule document 87-10788 beginning on page 17780 in the issue of Tuesday, May 12, 1987, make the following corrections:

§ 2.16 [Corrected]

1. On page 17783, in the third column, in § 2.16(c)(2)(iii), in the fourth line, insert "a" after "and".

§ 2.17 [Corrected]

2. In the same column, in § 2.17(a), in the fourth line, "one" should read "no".

§ 2.20 [Corrected]

3. On page 17785, in § 2.20(f), in the third column, in the 10th line, "217" should read "2.17".

BILLING CODE 1505-01-D

Federal Register

Monday
June 1, 1987

Part II

Department of Labor

Employment and Training Administration
Wage and Hour Division

20 CFR Parts 654 and 655

Labor Certification Process for the Temporary Employment of Aliens in Agriculture and Logging in the United States; Interim Final Rule; Request for Comments

29 CFR Part 501

Enforcement of Contractual Obligations for Temporary Alien Agricultural Workers Admitted Under Section 216 of the Immigration and Nationality Act; Interim Final Rule; Request for Comments

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Parts 654 and 655

Labor Certification Process for the Temporary Employment of Aliens in Agriculture and Logging in the United States

AGENCY: Employment and Training Administration, Labor.

ACTION: Interim final rule; request for comments.

SUMMARY: The Employment and Training Administration (ETA) of the U.S. Department of Labor (DOL) is amending its regulations for the certification of nonimmigrant aliens for temporary employment in agriculture and logging in the United States. These amendments will conform the regulations to the requirements of the Immigration and Nationality Act (INA) as amended by the Immigration Reform and Control Act of 1986 (IRCA). The amendments incorporate the provisions specified by the statute into the present regulatory framework, and make other procedural and technical changes deemed necessary to efficiently carry out the Secretary of Labor's responsibilities under the INA.

DATES:

Effective date: The interim final rule is effective on June 1, 1987. Applications for temporary alien agricultural labor certification filed on or after that date will be processed pursuant to the interim final rule.

Comments: The comment period in this rulemaking is being reopened through July 31, 1987. Comments on the May 5, 1987, proposed rule (52 FR 16770) will be considered as part of this rulemaking. Comments on the interim final rule must be submitted by mail and be received on or before July 31, 1987.

ADDRESS: *Send written comments to:* Assistant Secretary of Labor, Employment and Training Administration, Room N4456, 200 Constitution Avenue, NW., Washington, DC 20210; Attention: Director, U.S. Employment Service.

FOR FURTHER INFORMATION CONTACT: Mr. Thomas M. Bruening, Telephone (202) 535-0163.

SUPPLEMENTARY INFORMATION:

I. History of This Rulemaking

On May 5, 1987, there was published in the **Federal Register** a proposed rule to implement the Department of Labor's responsibilities under the temporary alien agricultural labor certification program, as set out at sections 101(a)(15)(H)(ii)(a), 214(c), and 216 of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986, Pub. L. 99-603 (IRCA), 100 Stat. 3359. 52 FR 16770. Under that program job opportunities are certified for nonimmigrant alien workers ("H-2A" workers) to perform agricultural labor or services of a temporary or seasonal nature in the United States. Written comments on the proposed rule were invited through May 19, 1987.

The H-2A-related amendments to INA made by IRCA apply to petitions and applications filed under INA sections 214(c) and 216 on or after the effective date of June 1, 1987. IRCA section 301(d), 8 U.S.C. 1186 note. Section 301(e) of IRCA requires that "[n]otwithstanding any other provision of law, final regulations to implement . . . [sections 101(a)(15)(H)(ii)(a) and 216 of the Immigration and Nationality Act] shall first be issued, on an interim or other basis, not later than the effective date." 8 U.S.C. 1186 note.

To the extent feasible, given the constraints of time and the statutory mandate to issue final regulations by June 1, 1987, the comments received on the proposed rule have been considered and some changes have been made in this interim final rule. When changes have been made, other than minor technical or typographical changes, they are discussed in this preamble.

While the comments received during the comment period on the proposed rule continue to be considered, the Department of Labor is publishing this final rule on an interim basis. The comment period is being reopened through July 31, 1987, with comments invited on the interim final rule. A final rule will be published at a later date. The preamble to that final rule will discuss the comments received on the proposed rule and the interim final rule, and, where appropriate, the interim final rule will be amended.

II. Statutory and Regulatory Background

Whether to grant or deny an employer's petition to import a nonimmigrant alien to the United States for the purpose of temporary employment is solely the decision of the Attorney General and his designee, the Commissioner of the Immigration and Naturalization Service (INS). The Immigration and Nationality Act (INA) (8 U.S.C. 1101 *et seq.*), as amended by the Immigration Reform and Control Act of 1986 (IRCA) (Pub. L. 99-603), provides that the Attorney General may not approve such a petition from an employer for employment of nonimmigrant H-2A alien workers in agriculture unless the petitioner has applied to the Secretary of Labor (Secretary) for a labor certification showing that: (1) There are not sufficient workers who are able, willing, and qualified and who will be available at the time and place needed to perform the labor or services involved in the petition; and (2) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

The amendments to the INA made by IRCA codify DOL's role in the temporary alien agricultural labor certification process. Prior to 1987, many of the responsibilities of the Department of Labor (DOL) specified in IRCA were carried out under the requirement in the INA at 8 U.S.C. 1184(c) that the Attorney General consult with appropriate agencies of the Government concerning the importation of nonimmigrant workers, and under INS regulations governing the reliance placed by INS on the advice of DOL relative to U.S. worker availability and adverse effect. See 8 CFR 214.2(h)(3)(i) (1986). Pursuant to INS regulations, DOL promulgated regulations at 20 CFR Part 655, Subpart C, for the certification of temporary employment of nonimmigrant aliens in agriculture and logging in the United States. The amendments in this document contain changes to the labor certification process as mandated by IRCA and revise certain current procedures deemed necessary by DOL to carry out its statutory responsibilities. DOL's regulations governing the H-2A program apply to all employer applications submitted on or after June 1, 1987. Applications for temporary alien agricultural labor certification submitted before June 1, 1987, are governed by the H-2 regulations in 20 CFR Part 655, Subpart C (1986). (The INS, through its regulations at 8 CFR Part 214, will continue to be responsible for the final approval of petitions for the admission of nonimmigrant aliens, including H-2A workers.)

III. Contents of Regulations

Following is a section-by-section summary of the primary components of the regulations in this new Subpart B of 20 CFR Part 655. Major differences between the H-2 agricultural regulations and the H-2A interim final regulations are identified and discussed. The interim final H-2A regulations are arranged as follows: Sections 655.0-655.000 describes broadly the concepts behind the temporary alien labor certification programs; Subpart A

continues to provide regulations for occupations other than agriculture and logging; Subpart B covers H–2A agricultural work; and Subpart C continues to cover non–H–2A temporary agricultural work and logging.

A. Sections 655.0–655.000 and 655.91–655.93: Statutory and Regulatory Background

These sections describe the statutory and regulatory standards behind the H–2 and the H–2A regulations; the construction given by DOL to the factors impacting upon the Secretary's responsibilities and determinations; and the delegation of authority for program operation to certain officials. A provision in the H–2A program allows DOL to have some flexibility in permitting exceptions to general procedures in the certification process to recognize unique circumstances and characteristics for some agricultural employer/worker situations. DOL has determined this is needed based on past experiences with such occupations as sheepherding and custom combine occupations and available information which indicates that flexibility will be needed to efficiently handle the applications of employers who may be seeking H–2A certification as the result of IRCA. To avoid unnecessary delay and to provide greater flexibility in making such determinations, the consultation process for establishment of special procedures has been made nonmandatory. Based on the similarity of occupations, the interim final rule has been changed to clarify DOL's intent that the special procedures in place for sheepherding may be applied by DOL to occupations in the range production of other livestock.

B. Section 655.100: General Description of Subpart and Definitions of Terms

In this section, a general description of Subpart B is provided along with definitions for terms used in the subpart. In this interim final rule, the definition of "United States worker" has been changed from the proposed rule to delete the separate reference to special agricultural workers (SAWs) as provided for under sections 210 and 210A of the INA, as amended by IRCA. 8 U.S.C. 1161 and 1162; see H.R. Conf. Rep. No. 99–1000, 99th Cong., 2d Sess. 97 (1986). The remaining language is broad enough to include SAWs as U.S. workers, making a separate reference unnecessary.

Further, consistent with section § 274a.11 of the INS regulations (8 CFR 274a.11), an individual who claims to be eligible, and who intends to apply or has applied, for benefits pursuant to section 245A or 210 of the INA or section 202 of IRCA, and who attests to that fact on INS Form I–9 and provides the documentation of identity required by 8 CFR 274a.11, is a "U.S. worker" for work contract periods ending no later than September 1, 1987. See 52 FR 16226 (May 1, 1987). These workers are given such limited work authorization by INS as part of the legalization, SAW, and Cuban/Haitian entrant adjustment application programs. *Id.*

To reflect DOL's intent, "eligible worker" is defined in the interim final rule as "U.S. worker".

The definitions also include a new definition for "agricultural labor or services of a temporary or seasonal nature," consistent with the INA. As mandated by the INA, "agricultural labor or services" consists of "agricultural labor" as defined in section 3121(g) of the Internal Revenue Code of 1954 (29 U.S.C. 3121(g)); and "agriculture" as defined in section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f)).

The phrase "of a temporary or seasonal nature" is defined consistently with the phrase "on a seasonal or other temporary basis", as defined by DOL in the regulations implementing the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). See 29 CFR 500.20. Given the interconnection between the various programs administered by DOL in the area of agricultural labor and services, and the fact that many agricultural employers and workers will have to deal with both the MSPA and H–2A programs in securing a labor force during an agricultural season, it is appropriate to have a single definition, consistent with a coordinated approach toward compliance and enforcement. This will not be a problem for much of agriculture, which uses workers on a seasonal basis.

These regulations reflect the present administrative interpretation of the word "temporary" under the H–2 provision and are consistent with the common meaning of the word "temporary." One would expect that the same word would have the same meaning within a single sentence—*i.e.*, that "temporary" would have the same meaning in both sections 101(a)(15)(H)(ii) (a) and (b) of the INA. 8 U.S.C. 1101(a)(15)(H)(ii) (a) and (b). There is nothing in either the language of the statute or the legislative history that would lead DOL to question this otherwise self-evident proposition. Therefore, the definition of temporary for H–2A workers is the same as that for H–2 workers: Less than 12 months. It may be that there are unusual circumstances where a "temporary" job might last 12 months or longer. Nevertheless, a blanket assumption that all jobs are "temporary" simply because the alien will not be permitted to occupy a job—any job—for more than three years, for example, appears to DOL to be an interpretation not supported by the statute.

A policy to have a blanket three-year provision, for example, would threaten the integrity of the INA which already has a provision for *immigrant* visas for *permanent* positions. 8 U.S.C. 1153(a)(6). Because the number of these so-called "sixth preference" visas is strictly limited (10 percent of each year's total visa quota), employers would be strongly tempted to call a permanent position temporary in order to fill it with an H–2A worker. As one court has said,

> The INS's present interpretation of [H–2] prevents the likelihood of so-called "temporary" workers from entering this country permanently under the less rigorous standard of [H–2], rather than applying properly as immigrants under the more stringent [sixth] preference classification[.]

Volt Technical Services Corporation v. *Immigration and Naturalization Service*, 648 F. Supp 578, 581 (S.D.N.Y. 1986).

In some situations the employer's need may create a temporary job opportunity in an employment situation which may otherwise have been permanent in nature. Where the employer can show clearly that the need for the H–2A worker's services or labor is of a short, identified length, limited by an identified event located in time, the job opportunity is temporary. *Volt Technical Services Corp.* v. *Immigration and Naturalization Service*, 648 F. Supp. at 580. For example, a temporary job opportunity could be created because the incumbent has fallen ill or is otherwise unavailable for a short, identified period of less than one year, or an extra hand is needed during a busy period.

In view of all these factors, in order to determine whether a particular job opportunity is "temporary" within the meaning of section 101(a)(15)(H)(ii)(a) of the INA, DOL must focus upon the employer's need. If an employer makes a *bona fide* application showing that it needs to fill a job opportunity on a temporary basis, the work is "of a temporary or seasonal nature." It is irrelevant whether the job is for three weeks to harvest berries or for six months to replace a sick worker or for a year to help handle an unusually large agricultural contract. What is relevant to the temporary alien agricultural labor certification determination is the employer's assessment—*evaluated, as*

required by statute, by DOL—of its need for a short-term (as opposed to permanent) employee. The issue to be decided is whether the employer has demonstrated a *temporary need for a worker* in some area of agriculture. The nature of the job itself is irrelevant. What is relevant is whether the employer's need is truly temporary.

This interpretation is supported in part by administrative and judicial interpretations of the H–2 provision. As was stated in the leading case of *In re Artee*, 18 I. & N. Dec. 355 (1982),

> [i]t is not the nature of the duties of the position which must be examined to determine the temporary need. It is the nature of the need for the duties to be performed which determines the temporariness of the position.

Id. at 367. In *Artee*, the INS reversed a long-standing rule that the functional nature of the duties of the job controlled its characterization in favor of determining that eligibility for an H–2 visa was controlled by "the intent of the petitioner and the beneficiary concerning the time that the individual would be employed." *Id.* See also *In re Ord*, 18 I. & N. Dec. 285 (1982).

This position has been affirmed by the courts. Thus, in *Wilson* v. *Smith*, 587 F. Supp. (D.D.C. 1984), the court held that a "housekeeper/child caretaker" was a "temporary" worker because the parents only needed child care until the child was old enough for day care, stating that

> Plaintiffs have made a plausible case for their assertion that their need for live-in help is temporary, based on their daughter's youth . . . . The Wilsons have credibly established that their need will end in the "near, definable future."

Id. at 473 (quoting *Artee*). The court did not focus on whether those engaged in child care occupy a permanent job function, although they arguably do so since child care could be said to last at least until children enter high school. What the court based its ruling on was its determination that the parents only needed the "housekeeper/child caretaker" until their child entered day care.

Similarly, in *Volt Technical Services Corporation* v. *Immigration and Naturalization Service, supra*, the court adopted the *Artee* standard: a temporary job is one where "it is clearly shown that the petitioner's need for the beneficiary's services or labor is of a short, identified length, limited by an identified event located in time." 648 F. Supp. at 580. In doing so, the court recognized that aliens could be hired as engineers—a permanent job description—if they were hired by a temporary help service "to fill a specific contract with a client and the beneficiaries entered the United States with the understanding that their employment was to be of a temporary period." *Id.* at 581.

Finally, in *North American Industries, Inc.* v. *Feldman*, 722 F. 2d 893 (1st Cir. 1983), the court discussed at some length the position of a man who programmed and operated computerized lathes and high-speed gear cutters. The underlying job was permanent. Indeed, the issue in the case was whether the alien, having held the position as an H–2 worker on a temporary basis, could apply to hold it on a permanent basis using a "sixth preference" visa. See 8 U.S.C. 1153(a)(6); and *Volt Technical Services Corporation* v. *Immigration and Naturalization Service*, 648 F. Supp 578, 581 (S.D.N.Y. 1986). As in the other cases cited above, the First Circuit noted that "the INS has conceded that the needs of an employer should determine whether a position offered an alien is temporary or permanent." *Id.* at 900 (citing *Artee*); see also *Hess* v. *Esperdy*, 234 F. Supp. 909 (S.D.N.Y. 1964); 9 *Foreign Affairs Manual* § 41.55, note 17.

DOL understands that focusing on the employer's need may encourage numerous applications by employers to DOL and that it is often very difficult to distinguish between temporary and permanent jobs. Nevertheless, DOL believes a one-year limitation reflects Congress' intent and will be administratively feasible. Based on all the factors, DOL believes that the word "temporary" in 8 U.S.C. 1101(a)(15)(H)(ii)(a) refers to any job opportunity covered by the H–2A regulations where the employer needs a worker for a limited period of time.

One should note, however, that the longer the employer needs a "temporary" worker, the more likely it would seem that the job has in fact become a permanent one. Thus, DOL will take a careful look at repeated temporary alien agricultural labor certification applications for the same job, and will approve applications where the job opportunity would be filled by an H–2A worker for a cumulative period, including past and future certifications (and extensions), of 12 months or more only in extraordinary circumstances.

Of course, with respect to truly "seasonal" employment, it is appropriate and should raise no issue for an employer to apply to DOL each year for temporary alien agricultural labor certifications for job opportunities recurring annually in the same occupation.

C. Section 655.101: Applications

1. General

This section prescribes the general parameters within which an employer seeking H–2A workers must file an application with the appropriate Regional Administrator (RA) of the Employment and Training Administration; the roles of agents and associations in the process; certain minimum general requirements regarding job offers; the general time frame within which the certification process is conducted; amendments and modifications to applications; and provisions governing emergency situations and "first-time" potential H–2A employers.

Employers' agents and joint employer associations may submit "master" applications for temporary alien agricultural labor certification covering virtually identical job opportunities with the certification fee charged for a certification, not an application, however. DOL is exploring the possible development of a new application form for this program.

The interim final rule specifically requires that the application state the total number of workers to be employed in the agricultural labor or service activity, as well as the number of job opportunities for which the employer seeks H–2A workers to make up for a shortage of U.S. workers. This will assist the RA in making determinations on such issues as U.S. worker shortfalls ("new determinations") and availability, emergency certifications, recruitment efforts, and shortages of local U.S. workers.

2. Major Differences From H–2 Agricultural Regulations

a. *Dates.* IRCA provides that applications may not be required to be filed more than 60 days prior to the employer's date of need for workers. These regulations, therefore, provide that the applications be filed with the RA a minimum of 60 calendar days before the first date of need. This permits time for review of the application, time for an employer to submit an amended application (if necessary), and adequate time for the recruitment of U.S. workers, with a certification determination no later than 20 calendar days before the employer's date of need for workers. See 8 U.S.C. 1186(c) (1) and (3)(A). Employers are encouraged, but not required, to file their applications early, nevertheless, since delay in submitting an acceptable application can result in a delay in recruiting and a delay in issuance of the

temporary alien agricultural labor certification.

DOL has determined that the application shall be filed directly with the RA to permit the RA to review the application within the seven calendar days provided by IRCA and to allow adequate time to recruit U.S. workers. Under IRCA, DOL must make the certification determination no later than 20 calendar days before the date of need, provided that the employer has complied with DOL certification criteria, including recruitment of U.S. workers.

b. *Minor amendments.* Minor, technical amendments to certification applications may be requested and made before the certification determination. Current procedures allow for this, but existing regulations do not cover it.

c. *Local office recruitment.* Duplicate applications are to be submitted to the local State employment service (ES) office at the time they are filed with the RA. DOL has determined that the local office must begin recruitment of local workers before the RA accepts for consideration the application in order to maximize local recruitment and permit intrastate and interstate clearance orders to be prepared and ready for interstate submittal when the RA approves an employer's application as acceptable for consideration. The interim final rule adds language to § 655.101(c)(2), restating this requirement.

d. *Fees.* A fee requirement has been adopted for certification of H–2A workers. For each certification, an employer would pay a fee of $100 plus $10 per H–2A job opportunity certified, with a maximum total fee of $1,000 for each employer's certification.

In the case of an application filed by a joint employer association, a separate fee for each employer-member will be required. Thus, each employer-member of the joint employer association would pay $100 plus $10 per H–2A worker certified to that employer up to a $1,000 maximum for each employer-member. The proposed rule would also have required a fee for the joint employer association, but the interim final rule does not do so. Since the association is not benefiting directly from the services of the H–2A workers, it is reasonable not to charge a separate fee for the joint employer association. Associations acting as agents, and not joint or sole employers, pay no fees.

Applications for temporary alien agricultural labor certification must contain an assurance that the fee will be paid within the prescribed time period after the issuance of the temporary alien agricultural labor certification. A bill for the fee will be included with the temporary alien agricultural labor certification determination. Failure to pay the fee in a timely manner is a substantial violation for which certification may be withheld in future years. The interim final rule has changed the timeliness requirement to permit the payment of the fee up to 30 days after the date of the temporary alien agricultural labor certification, rather than seven days as in the proposed rule. This would be in line with billing cycles in the private sector.

DOL is authorized by IRCA to require a fee to recover reasonable costs of processing applications for certification. 8 U.S.C. 1186(a)(2). In establishing the fee, DOL conducted studies of estimated time and costs involved in ETA Regional Office processing of H–2 agricultural applications under the INA prior to amendment by IRCA.

For the purposes of this study, processing included regional office review of applications for compliance with legal and regulatory requirements, preparation of notices to applicants giving the results of the review, and activities related to arriving at and rendering a certification determination near the employer's date of need. This study did not include, however, the costs of processing by the State employment service agencies, post-certification activities and post-denial activities at all levels, ETA national office activities, DOL Office of the Solicitor activities, and DOL Office of Administrative Law Judges activities. DOL believes that the fee structure is fair and reasonable.

Fees are not charged for extensions or shortfall determinations. 8 CFR 655.106 (c)(3) and (h). Fees are charged for first-time user and emergency temporary alien agricultural labor certifications. 8 CFR 655.101 (c)(5) and (f)(2)).

Since the fee is a new addition to the temporary alien agricultural labor certification program, DOL is inviting specific comments on the level of the fee and on the fee-charging mechanisms, and is inviting recommendations for reasonable alternatives.

D. Section 655.102: Contents of Job Offers

1. General

This section presents DOL's policy of requiring equivalent benefits for U.S. and alien workers, and lists the minimum benefits, wages and working conditions which must be offered when an H–2A certification is requested.

2. Major Differences From H–2 Agricultural Regulations

a. *Housing.* Employers are given the option to secure rental or public accommodation housing, or other substantially similar class of habitation, for their workers. Such housing must meet appropriate health and safety standards. See 8 U.S.C. 1186(c)(4).

b. *Range housing.* Different housing standards shall apply to all workers engaged in the range production of livestock. See 8 U.S.C. 1186(c)(4).

c. *Workers' compensation.* The employer must provide the RA with specific information on State workers' compensation or comparable insurance coverage. See 8 U.S.C. 1186 (b)(3).

d. *Qualifications.* Bona fide occupational qualifications specified by an employer will be reviewed in the context of their normal use by non–H–2A employers in the same or comparable occupations and crops. See 8 U.S.C. 1186(c)(3)(A).

e. *Positive recruitment.* Positive recruitment has been included as a requirement to these regulations. INA section 216(b)(4) requires employers under the H–2A program to make positive recruitment efforts within a multistate area of traditional or expected labor supply where the Secretary finds that there are a significant number of able, willing, and qualified U.S. workers who, if recruited, would be willing to make themselves available for work at the time and place needed. 8 U.S.C. 1186(b)(4). The regulations delegate specific positive recruitment determinations to the ETA Regional Administrators (RAs). Positive recruitment is performed contemporaneously with recruitment through the interstate clearance system. *Id.* There are provisions relating to positive recruitment at 20 CFR 655.102(d), 655.103 (d) and (f), 655.105(a), and 655.106(b)(1)(v).

At § 655.102(d), the employer is required to submit with the job offer a positive recruitment plan. This will ensure compliance with IRCA's positive recruitment provisions. It will facilitate coordination between the employer and the RA; the RA will be made aware of the employer's planned efforts, and can advise the employer of any modifications which will have to be made to the plan.

At § 655.103(d), the employer is required to assure that the positive recruitment will be performed along with recruitment through the interstate clearance system.

Section 655.103(f) requires the employer to assure that it will engage in

positive recruitment of U.S. workers to an extent (with respect to both location and effort) no less than that of non-H–2A agricultural employers of comparable or smaller size in the area of intended employment. This includes efforts to recruit through farm labor contractors. It is reasonable and appropriate to consider, among other things, the recruitment efforts made by other agricultural employers located in the area of intended employment, who are relying solely on the availability of U.S. workers, and the efforts made by the employer to obtain H–2A workers. See H.R. Rept. No. 99–682(I), 99th Cong., 2d Sess. 80–81 (July 16, 1986). It is likely that there will be a significant number of able, willing, and qualified U.S. workers in areas where such local non-H–2A agricultural employers recruit. Of course, the employer would not be required to go to such areas to positively recruit where it can reasonably demonstrate that the U.S. agricultural workers have already been recruited to work elsewhere or are otherwise unavailable. In addition, the regulation avoids an unnecessary burden on small employers by requiring employers only to meet the recruitment efforts of non-H–2A agricultural employers of comparable or smaller size in the area of intended employment.

Section 655.105(a) sets forth positive recruitment requirements which may possibly be required after the employer's application is accepted for consideration. Thus, as part of the notice which the RA sends to the employer, the RA may require the employer to conduct positive recruitment in other areas of expected labor supply. However, the RA must first obtain current information from a State employment service (ES) agency that there are a significant number of able, willing, and qualified U.S. workers who, if recruited, would likely be willing to make themselves available for work at the time and place needed. The interim final rule clarifies the proposed rule, in permitting the RA to take into account sources of current information in addition to the State ES agency. Further, the RA must take into account recent recruiting efforts in those areas and attempt to avoid requiring employers to engage in futile recruitment in out-of-state areas where there are a significant number of local employers attempting to recruit workers with similar occupational qualifications An employer is permitted to terminate all positive recruitment on the date the H–2A workers depart for the employer's place of work. The interim final rule has been clarified by explicitly requiring the employer to conduct positive recruitment for U.S. workers during the period from the date of application until the H–2A workers leave for the place of employment at a degree and of the same kind as the potential H–2A employer made to obtain the H–2A workers.

In § 655.106(b)(1)(v), the RA is required to take into account, in determining whether to grant a application for temporary alien agricultural labor certification, whether the employer has satisfactorily complied with the positive recruitment requirements of the regulations.

3. Other Changes

a. *Meals.* The interim final rule differs from the proposed rule by permitting employers without centralized cooking and eating facilities the option of providing the workers with three daily meals option of providing cooking facilities.

b. *Transportation.* The interim final rule clarifies the language in the the proposed rule by stating explicitly that the employer is not required to pay more than the most reasonable and economical common carrier cost for the worker's transportation to the place of employment; and that advancing transportation is required only when local non-H–2A agricultural employers "in the occupation" do so. Further, consistent with DOL's intent, the interim final rule provides that transportation between required housing and the worksite is required for workers who are eligible for housing (*i.e.,* those workers who are not reasonably able to return to their residence within the same day).

The interim final rule has been clarified with respect to transportation (for this discussion, this includes subsistence) from the place of employment at the completion of the work contract period. The phrase "without intervening employment" has been clarified to read "disregarding intervening employment".

This provision means that the employer must offer to pay for (or provide) the worker's transportation home, or wherever the worker began the series of jobs culminating at the current place of employment. If the worker has obtained a subsequent job, but the subsequent employer has not offered to pay for (in advance or by reimbursement) the worker's transportation from the current place of employment to the other employer's place of employment, the current employer must offer to pay for (or provide) such transportation expenses. However, where the subsequent employer has offered to pay for (or provide), in advance or by reimbursement, the worker's transportation from the current place of employment to the subsequent employer's place of employment, the current employer is not required to pay for (or provide) such transportation.

H–2A workers may be authorized to go on from "criteria" employment (*i.e.,* job opportunities certified by DOL pursuant to this program) to other criteria employment. Therefore, in the case of an H–2A worker, each employer (a so-called "criteria" employer) will be offering to pay for (or provide) the H–2A worker's transportation to and from the place of employment (see § 655.102(b)(5)(i)), provided that the worker completes his/her work obligations under the work contract. This effectively places the requirement on the H–2A worker's final criteria employer to pay for (or provide) the H–2A worker's transportation "home".

U.S. workers, however, may go on from "criteria" employment (*i.e.,* where they have H–2A co-workers in the same agricultural activity) to either criteria or non-criteria employment. The following thus applies to U.S. Worker employment:

(1) If the U.S. worker's subsequent employer is a criteria employer, the subsequent employer must offer to pay for (or provide) the U.S. worker's transportation from the current place of employment to the subsequent place of employment and the current employer is not required to pay for (or provide) such transportation. The transportation "home" requirement is assumed by the next criteria employer.

(2) If the U.S. worker's subsequent employer is a non-criteria employer and that subsequent employer offers to pay for (or provide) the U.S. worker's transportation from the current place of employment to the subsequent place of employment, the current employer is not required to pay for (or provide) such transportation. The transportation "home" requirement in 20 CFR Part 655, Subpart B, is not assumed by the non-criteria employer, and unless that subsequent employer offers to pay for (or provide) transportation "home" or to further employment, it is the worker's responsibility to obtain such transportation from some other source. Workers are informed in writing in job orders concerning offers of transportation.

(3) If the U.S. worker's subsequent employer is a non-criteria employer and that subsequent employer does not offer to pay for (or provide) the U.S. worker's transportation from the current place of employment to the subsequent place of

employment, the current employer is required to pay for (or provide) such transportation. As above, the transportation "home" requirement in 20 CFR Part 655, Subpart B, is not assumed by the non-criteria employer, and unless that subsequent employer offers to pay for (or provide) transportation "home" or to further employment, it is the worker's responsibility to obtain such transportation from some other source. Workers are informed in writing in job orders concerning offers of transportation.

(4) If the U.S. worker has no subsequent employer, the current employer must offer to pay for (or provide) the worker's transportation home, or wherever the worker began the series of jobs culminating at the current place of employment.

c. *Abandonment of employment; termination for cause.* The interim final rule adds a clarification to the proposed rule to state clearly that a worker terminated for cause or who has abandoned the employment is not entitled to the guarantee of work for three-fourths of the work contract period.

d. *Examination of records.* The interim final rule clarifies the proposed rule, by requiring that the worker's representative who may examine the employer's earnings and hours records must be "designated" by the worker. This is designed to protect the worker's privacy, and to protect the employer from making disclosures to unauthorized persons.

e. *Contract impossibility.* The interim final rule clarifies the proposed rule by providing that the employer must offer transportation "home" to the worker, and that reimbursement to the worker for the worker's transportation and subsistence expenses coming to the place of employment must be offered, notwithstanding whether the contract termination for impossibility occurred prior to completion of 50 percent of the originally offerred work contract period (see § 655.102 (b)(5)(i) and (b)(12)).

E. Section 655.103: Assurances

This section lists assurances which an employer must make with an H–2A application. Changes from H–2 requirements are a reduced paperwork burden, a retaliation prohibition, an agreement to engage in positive recruitment at least to the same extent as non-H–2A employers in the same or comparable occupations and crops, and an agreement to pay the certification fee. Consistent with the eligibility of H–2A and U.S. workers for legal assistance (IRCA § 305), the interim final rule adds another act for which retaliation is prohibited: consultation with an employee of a legal assistance program or an attorney.

F. Section 655.104: Determinations Based on Acceptability of H–2A Applications

1. General

This section describes the actions that are to be taken by the local office and by the RA when an H–2A application is received. Procedures are prescribed for the RA to follow when a filed application is not accepted for consideration, and what an employer may do to seek further review if an application is not accepted for consideration. See 8 U.S.C. 1186(c)(2).

2. Major Differences From H–2 Agricultural Regulations

a. *Deficiencies.* The RA is expected to notify the employer of any deficiencies in the application within seven calendar days and provide five calendar days for amendment and resubmittal. See 8 U.S.C. 1186(c)(2).

b. *Review.* In addition to the present option open to such employers to seek expedited review before an administrative law judge, the employer is given an opportunity to request a *de novo* hearing when an application is not accepted for consideration. See 8 U.S.C. 1186 (c)(2)(B) and (e)(1).

c. *Delayed notices.* If the RA's notice that the application is not acceptable for consideration is not made within seven calendar days, the recruitment of U.S. workers will be accomplished on an expedited basis within the time available until 20 calendar days before the date of need. DOL has determined that it would not be reasonable to delay an employer's certification to a date later than 20 calendar days before the date of need due to delays which are not attributable to the employer.

G. Section 655.105: Recruitment Period

This section describes the recruitment activity that must be conducted after an application is accepted for consideration. The only significant change from the H–2 agricultural regulations is the positive recruitment required of employers, described above. See 8 U.S.C. 1186(b)(4).

The interim final rule requires, at § 655.105(a), that the notice of the application's acceptance for consideration be sent by means normally assuring next-day delivery.

H. Section 655.106: Determinations Based on U.S. Worker Availability

1. General

This section describes the process that occurs after an application has been accepted for consideration and the requirements for recruitment of U.S. workers have been completed. Factors the RA must take into account when arriving at a certification determination are presented, as are obligations that continue for an employer after the temporary alien agricultural labor certification has been granted. Matters related to requests for new determinations because of U.S. worker shortfall and extensions of certification periods also are addressed.

2. Major Differences From H–2 Agricultural Regulations

a. *Referrals of U.S. workers.* Referrals of U.S. workers to employers and the subsequent determination of the availability of such workers must be based on the referral of workers who have been made aware of the terms and conditions of and qualifications for the job, and who have indicated, by accepting referral to the job, that they meet the qualifications required and are able, willing, and eligible to take such a job.

b. *New grounds for denial.* The RA may not certify if the employer has substantially violated a material term or condition of a labor certification within the past two years (see also § 655.110); not complied with workers' compensation requirements; or not complied with positive recruitment requirements. See 8 U.S.C. 1186(b) (2), (3), and (4).

c. *Labor disputes.* The RA will subtract from affirmative certification decisions the numbers of job opportunities open because of a strike or other labor dispute involving a work stoppage, or because of a lockout. This reflects current DOL operating procedure, but is not in current regulations. See 8 U.S.C 1186(b)(1). The interim final rule clarifies the proposed rule by indicating that the RA will consider information from sources in addition to the State ES agency regarding strikes and lockouts.

d. *Fifty-percent rule.* Generally, the employer must hire qualified U.S. workers who apply for employment before fifty-percent of the work contract period has expired. The employer is not required to terminate H–2A workers when this happens, but the INA provides that the employer may do so without application of the "¾ guarantee" to the H–2A worker. The

proposed rule differed from the H–2 agricultural labor certification regulations in order to comply with IRCA. 8 U.S.C. 1186(c)(3)(i). The interim final rule differs from the proposed rule by requiring that an employer be excused from the "¾ guarantee" only if the RA "certifies" that an H–2A worker has been displaced due to the hiring of a U.S. worker under the "fifty-percent rule." RA certification is called for in the INA, but did not appear in the proposed rule.

3. Other changes

a. *Shortfalls.* Procedures for requesting a new certification determination because of U.S. worker shortfall, quits, or terminations are presented (§ 655.106(h)). While these procedures are required because of IRCA, they represent an extension of current DOL policies in the application and interpretation of the present regulations. See 8 U.S.C. 1186 (c)(3)(A)(ii) and (e)(2). The interim final rule clarifies the proposed rule provision, and provides specifically for expeditious handling of requests for new determinations. Deleted from the interim final rule is the provision counting as available some workers who had voluntarily quit a job opportunity with the employer. Added to the interim final rule is the requirement that the RA's shortfall determination be sent by means normally assuring next-day delivery.

b. *Extensions.* The proposed rule has been modified in this interim final rule to provide that for short-term (*i.e.*, two weeks or less) extensions of temporary alien agricultural labor certifications, the employer need apply only to INS. For longer extensions, DOL would review employer documentation and make the decision. An employer could not come to DOL for an extension after receipt of an extension from INS; a new application and labor market test would be required in such instances.

c. *Transfers.* The interim final rule rearranges sentences in § 655.106(c)(2)(i), to indicate more clearly that joint employer associations may transfer workers among members, as long as central records are kept.

d. *Withholding U.S. workers.* INA prohibits persons from withholding U.S. workers under certain circumstances. 8 U.S.C. 1186(c)(3)(vii). The interim final rule modifies the proposed rule's implementation of the statute, by providing for backup interviews by the ETA regional office, if the local office's investigation under this provision did not include such interviews. See 8 CFR 655.106(g)(2), *infra.* Suspension of the 50-percent rule pursuant to this provision will not take place "until" (rather than "unless" as in the proposed rule) such interviews take place. See § 655.106(g)(4), *infra.*

e. *Modifications.* The interim final rule provides that where the job offer does not contain the minimum benefits, wages, and working conditions required by § 655.102(b), the RA, with the concurrence of the Director, U.S. Employment Service, may require modifications. This ensures that the workers will be protected, while allowing for consistency in determinations.

I. Section 655.107: Adverse Effect Wage Rates (AEWRs)

1. Introduction

DOL, through its own knowledge, informed experience, and judgment, has found for many years that the presence of alien workers in agriculture depresses the wages of similarly employed U.S. workers. In order to ensure that the wages of similarly employed U.S. workers are not adversely affected, DOL is continuing in these H–2A regulations its past policy and practice of requiring covered agricultural employers to offer and pay their U.S. and H–2A workers no less than the applicable hourly adverse effect wage rate (AEWR), as determined by the Director, U.S. Employment Service (USES).

Further, the H–2A regulations, as did the H–2 regulations, provide that employers applying for temporary alien agricultural labor certifications must agree to comply with all employment-related laws. If the employment is covered by a wage standard applicable under any federal or State minimum wage law, the employer must comply with that law. See, *e.g.*, 29 U.S.C. 206(a); and 20 CFR 653.501 (d)(4) and (e)(1) (1986). If the prevailing wage for the occupation in the labor market of intended employment is higher, the employer must offer and pay that wage. Thus, a worker in employment under the H–2A program must be paid at the highest of the applicable wage rates, whether that highest rate is the AEWR, the prevailing wage, or the Federal or State statutory minimum wage. See *Limoneira Co.* v. *Wirtz*, 327 F. 2d 499 (9th Cir. 1964), *aff'g*, 225 F. Supp. 961 (S.D. Cal. 1963); see also *Elton Orchards, Inc.* v. *Brennan*, 508 F. 2d 493 (1st Cir. 1974); and *Flecha* v. *Quiros*, 567 F. 2d 1154, 1156 (1st Cir. 1977). These decisions acknowledge DOL's discretion in the area of AEWRs and form a basis for construing DOL's H–2A regulations.

Although continuing its basic past policy of requiring the payment of the AEWR, prevailing wage, or statutory minimum wage, whichever is highest, DOL is revising its procedures for calculating and establishing AEWRs in these H–2A regulations. First, DOL is publishing AEWRs for all States (except Alaska), as opposed to the current procedures of publishing AEWRs only for those States (currently 14) for which DOL has determined on a State-by-State basis that adverse impact has resulted from the employment of alien labor. Second, DOL is changing the method of calculating AEWRs, by basing these AEWRs on the level of actual average hourly agricultural wages for each State.

2. Purpose of AEWRs

The AEWR is the minimum wage rate that agricultural employers seeking nonimmigrant alien workers must offer to and pay their U.S. and alien workers, if prevailing wages are below the AEWR. The AEWR is a wage floor, and the existence of an AEWR does not prevent the worker from seeking a higher wage or the employer from paying a higher wage.

The purpose of an AEWR, as described by the U.S. Court of Appeals for the Fifth Circuit, is "to neutralize any 'adverse effect' resultant from the influx of temporary foreign workers." It is a "method of avoiding wage deflation." *Williams* v. *Usery*, 531 F. 2d 305, 306 (5th Cir. 1976), *cert. denied*, 429 U.S. 1000; see *Florida Sugar Cane League, Inc.* v. *Usery*, 531 F. 2d 299 (5th Cir. 1976); see also *Production Farm Management* v. *Brock*, 767 F. 2d 1368 (9th Cir. 1985); *Limoneira Co.* v. *Wirtz*, 225 F. Supp. 961 (S.D. Cal. 1963), *aff'd*, 327 F. 2d 499 (9th Cir. 1964); *Dona Ana County Farm and Livestock Bureau* v. *Goldberg*, 200 F. Supp. 210 (D.D.C. 1961); and 20 CFR 655.0 (1986). The purpose of an AEWR is to ensure that the wages of similarly employed U.S. workers will not be adversely affected by the importation of alien workers.

The IRCA amendments to the INA do not change the role and effect of DOL's policies to protect the wages of similarly employed U.S. agricultural workers from the adverse effect which may result from the employment of alien workers. Under the H–2A program, as under the H–2 program before it,

> [t]he common purpose [of the program is] . . . to assure [employers] an adequate labor force on the one hand and to protect the jobs of citizens on the other. Any statutory scheme with these two purposes must inevitably strike a balance between the two goals. Clearly, citizen-workers would best be protected and assured high wages if no aliens were allowed to enter. Conversely, elimination of all restrictions upon entry would most effectively provide employers with an ample labor force.

Rogers v. *Larsen*, 563 F. 2d 617, 626 (3rd Cir. 1977); *Flecha* v. *Quiros*, 567 F. 2d 1154 (1st Cir. 1977). As stated by the U.S. Court of Appeals for the First Circuit, the purpose of the INA and temporary foreign worker regulations are "to provide a manageable scheme . . . that is fair to both sides." *Flecha* v. *Quiros*, 567 F. 2d at 1156.

> We start with a given, that it has always been a Congressional policy to prefer domestic workers in all fields. However, it is also necessary to consider would-be employers, although in case of conflict, wide leeway favoring domestic workers is given the U.S. Secretary [of Labor]. *Elton Orchards, Inc.* v. *Brennan*, 1 Cir., 1974, 508 F. 2d 493. . . .

Id., 567 F. 2d at 1155. Thus, the methodology for computing an AEWR must recognize the need to balance the goals of supplying an adequate labor force to employers and protecting the jobs of U.S. workers.

3. History of AEWRs

For a number of decades, DOL has computed and published AEWRs for the temporary employment of nonimmigrant alien workers for agricultural employment under various admission programs. *See* H. N. DELLON, "Foreign Agricultural Workers and the Prevention of Adverse Effect", 17 *Labor Law Journal* 739 (1966). Mr. Dellon's article notes that as far back as 1953, employers seeking to import foreign nationals to work in various crop activities (in that case, under the Bracero Program) were required to pay not less than a wage established by DOL. Eventually, AEWRs began to be set periodically on a Statewide basis. See *Dona Ana County Farm & Livestock Bureau, Inc.* v. *Goldberg*, 200 F. Supp. 210 (D.D.C. 1961).

As time passed, establishment of AEWRs became more formalized, and AEWRs were computed and set for the H–2 agricultural worker program as well, after public notice and comment. See, *e.g.*, 29 FR 19101, 19102 (December 30, 1964); 32 FR 4569, 4571 (March 28, 1967); and 35 FR 12394, 12395 (August 4, 1970).

Beginning in 1968, these AEWRs were computed by adjusting the previous year's Statewide AEWR by the same percentage as the percentage change in the Statewide annual average wage rates for field and livestock workers, as surveyed by the United States Department of Agriculture (USDA); and were set through rulemaking amending the H–2 agricultural worker regulations. See 41 FR 25018 (June 22, 1976); and 43 FR 10306, 10310 (March 10, 1978); see also 20 CFR 602.10b(a)(1) (1977).

The regulations for the H–2 agricultural worker program were consolidated and substantially revised in 1978, after an extended comment period and six public hearings (May and June 1977). 20 CFR Part 655, Subpart C, 43 FR 10306 (March 10, 1978). As part of that rulemaking, DOL's methodology for computing AEWRs, as well as alternative methodologies for computing AEWRs were discussed and considered. 43 FR at 10310–10311. The methodology was set out in the regulations for the H–2 agricultural worker program. 20 CFR 655.207, 43 FR at 10317.

DOL continued to study the AEWR after the 1977–78 rulemaking. An Advance Notice of Proposed Rulemaking was published in 1979, and six additional public hearings were held. 44 FR 59890 (October 16, 1979). Various alternative methodologies were presented for public comment; the public responded to the alternatives and additional methodologies were suggested as part of the rulemaking record. A proposed rule (with a four-month comment period) was published in 1980, and a final rule was published in 1981. 46 FR 4568 (January 16, 1981); 45 FR 29854 (May 6, 1980); and 45 FR 15914 (March 11, 1980). The final rule would have established a single, nationwide, AEWR at the level of the previous year's national annual average hourly wage for piece-rate-paid hired agricultural workers, as computed by USDA surveys. However, as part of a general review of agency regulations, and to consider fully the impact of the new methodology, it was withdrawn prior to its effective date. 46 FR 32437 (June 23, 1981); and 46 FR 19110 (March 27, 1981).

In 1981 USDA substantially reduced its number of surveys and ceased compiling annual average field and livestock worker wage rates, as well as the survey data which would have been used in the rule withdrawn in 1981. Various interim methodologies were utilized until USDA reestablished its surveys and DOL reestablished the 1968–1981 methodology. These were accompanied by further rulemaking, and opportunity for and consideration of public comments. See, *eg.*, 51 FR 20516 (June 5, 1986); 51 FR 15915 (April 29, 1986); 51 FR 12872 (April 16, 1986); 50 FR 47636 (November 19, 1985); 49 FR 31784 (August 8, 1984); 49 FR 30208 (July 27, 1984); 48 FR 40168 (September 2, 1983); 48 FR 33684 (July 22, 1983); 48 FR 232 (January 4, 1983); 47 FR 52198 (November 19, 1982); and 47 FR 37980 (August 27, 1982).

4. Discretion in Setting AEWRs

DOL has "broad discretion" to set AEWRs in accordance with "any of a number of reasonable formulas. . . ." *Florida Sugar Cane League, Inc.* v. *Usery*, 531 F. 2d 299, 303–304 (5th Cir. 1976); *Florida Fruit & Vegetable Association, Inc.* v. *Donovan*, 583 F. Supp. 268 (S.D. Fla. 1984), *aff'd sub nom, Florida Fruit & Vegetable Association, Inc.* v. *Brock*, 771 F. 2d 1455 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 1524 (1986); *Shoreham Cooperative Apple Producers' Association, Inc.* v. *Donovan*,764 F. 2d 135 (2d Cir. 1985); *Virginia Agricultural Growers' Association, Inc.* v. *Donovan*, 774 F. 2d 90 (4th Cir. 1985); *accord, Rowland* v. *Marshall*, 650 F. 2d 28 (4th Cir. 1981) (*per curiam*); *Williams* v. *Usery*, 531 F. 2d 305, 306 (5th Cir. 1976), *cert. denied*, 429 U.S. 1000; *Flecha* v. *Quiros*, 567 F. 2d 1154 (1st Cir. 1977); *Limoneira Co.* v. *Wirtz*, 225 F. Supp. 961 (S.D. Cal. 1963), *aff'd*, 327 F. 2d 499 (9th Cir. 1964); and *Dona Ana County Farm & Livestock Bureau, Inc.* v. *Goldberg*, 200 F. Supp. 210 (D.D.C. 1961); see also *Production Farm Management* v. *Brock*, 767 F. 2d 1368 (9th Cir. 1985).

This is an area in which DOL has "great discretion to reach a number of different results rather than an area of pure statutory interpretation as to which there is in theory only a single answer". See *Building & Construction Trades' Department, AFL–CIO* v. *Donovan*, 712 F. 2d 611, 619 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1069 (1984). DOL, therefore, is promulgating the regulation described below for setting AEWRs under the H–2A program.

Congress has recognized as early as 1961 that the Secretary had the authority to set special rates where alien workers were involved. H.R. Rep. No. 274 (on H.R. 2010), 87th Cong., 1st Sess. 9 (1961). Similar language appeared in the Senate debate on H.R. 2010, which was enacted as Pub. L. 87–345.

However, the INA as amended by IRCA raises to a statutory level the previous regulatory standard preventing the importation of temporary foreign agricultural workers (now H–2A) from adversely affecting the wages of similarly employed U.S. workers. However, no particular methodology for implementing it is fixed by statute. Indeed, the legislative history indicates that Congress had examined DOL's H–2 agricultural worker regulations in great detail, but did not enact any particular AEWR methodology.

While the AEWR methodology in the H–2A rule differs from the methodology used to set AEWRs under the H–2 agricultural worker program, it is within DOL's discretion to make such a change. As the U.S. Court of Appeals for the D.C. Circuit has stated, "prior administrative practice carries much less weight when reviewing an action taken in the area of

discretion, when little more than a clear statement is needed, than when reviewing an action in the field of interpretation, where it is thought that the agency's own contemporaneous interpretation of one of its enabling statutes is reliable evidence of what Congress intended." *Building & Construction Trades' Department, AFL–CIO* v. *Donovan*, 712 F. 2d at 619. In any event, even if the establishment of a new AEWR methodology were to be found an act of interpretation rather than an act of discretion, this rulemaking would constitute DOL's contemporaneous interpretation of a recent statute, *i.e.*, the Immigration Reform and Control Act of 1986 (IRCA).

5. New AEWR Methodology

a. *General.* DOL is setting the AEWRs in each year for the H–2A program at a level equal to the previous year's annual regional average hourly wage rates for field and livestock workers (combined), as computed by USDA quarterly wage surveys. This is the data series by which AEWRs under the H–2 agricultural worker program currently are indexed. USDA publishes the data for the 48 contiguous States and Hawaii by nineteen agricultural regions, which consist of one or more States.

Based on information provided by representatives of employers and workers, DOL has concluded that the universe of employers who may seek H–2A workers could expand considerably as the result of IRCA. Therefore, DOL has also determined to compute and publish on an annual basis AEWRs for all the States included in the USDA survey of wage rates for field and livestock workers (combined), *i.e.*, the forty-eight contiguous States and Hawaii. In addition, a separate rate for Florida sugarcane has been discontinued.

This AEWR methodology is adopted as a result of DOL's consideration of the INA as amended by IRCA, and with full knowledge and consideration of the administrative record developed in earlier rulemaking activities regarding AEWRs, as published in the **Federal Register.** See "3. *History of AEWRs*", above.

b. *Reasons for Establishing a Different Methodology.* DOL has carefully reviewed its current AEWR methodology in light of the probable expansion of the H–2A program under IRCA to new growers in new crops and new States. In examining the application of the present methodology to new States, certain anomalies have become apparent. Specifically, there would be wide variations between States in terms of the relationship of the AEWR to average hourly earnings of field and livestock workers in those States, ranging from five percent lower in Oregon to ninety-one percent higher in Alabama. These variations cannot be explained readily in economic terms, such as impact of the use of illegal aliens, degree of mechanization, *etc.* For example, in Minnesota, where there is little hand-harvesting of crops, the AEWR would be eighty-six percent higher than the average hourly wage rate showing up in USDA data; in California, with extensive hand-harvesting and use of illegals, the AEWR would be only five percent higher.

Thus, while the current methodology has been successfully defended where the program has been used, in a limited number of States, DOL sees a need to implement a superior methodology which will better achieve program objectives under the expected program expansion under IRCA.

c. *Rationale for New Methodology.* Based on its own knowledge, expertise, informed experience, and judgment, DOL has determined that the USDA survey is the best available "barometer" for measuring actual farm wages on a nationwide basis. Given the probability that the H–2A program will be more expansive in States where H–2 agricultural workers now are imported, and will expand to other States where H–2 agricultural workers had not recently been sought, this methodology would permit DOL to establish AEWRs which are equal to regional average wages in traditional and new "user" States.

The new methodology is a basic extension of the DOL practice of over two decades of establishing AEWRs at or above average hourly wages in agriculture. DOL believes that Congress endorsed this basic concept in its passage of IRCA.

In passing IRCA, Congress incorporated into statutory law the longstanding regulatory requirement that the employment of temporary nonimmigrant alien labor "not adversely affect the wages . . . of workers in the United States similarly employed." 8 U.S.C. 1101(a)(15)(H)(ii)(a); see 8 CFR 214.2(h)(3)(i) (1987). By incorporating such a provision in the statute, it is clear that Congress was intimately conversant with the DOL implementation of the previous regulatory requirements and aware of the DOL system of AEWRs.

Prior to selecting the methodology for setting AEWRs, DOL considered various alternative options. These ranged from: (1) The setting of AEWRs at the level of prevailing wages in the local area and occupations and then indexing those prevailing wages over time by the average hourly earnings in agriculture; to (2) the setting of such AEWRs only for prevailing wages below average agricultural wages and only in those instances where a high penetration of H–2A workers already had occurred, with no effective indexing over time.

Given implicit Congressional approval of the longstanding DOL AEWR concept, DOL has determined that the most effective way of establishing simple, durable AEWRs over time, without encountering the anomalies under the present methodology, is to set AEWRs under the H–2A program equal to the regional average wages in traditional and new "user" States. This methodology provides an adequate wage floor for protecting similarly employed U.S. workers and automatically provides the indexing needed to prevent adverse wage impacts over time, as the AEWRs will increase as average hourly wages increase. Further, the methodology is not unlike that adopted, but withdrawn for futher study, in the 1979–81 rulemaking, albeit using a more applicable USDA data series and setting AEWRs on the more reflective regional, rather than national basis. See "3. History of AEWRs", above; see also 46 FR 4568 (January 16, 1981); *cf.*, 46 FR 32437 (June 23, 1981).

It is not expected that the H–2A AEWRs will result in a reduction of earnings of U.S. workers employed in the crops and occupations where there have been H–2 agricultural certifications. DOL believes that, because of labor market conditions and already established prevailing wage rates, the earnings of workers in the traditional user States will generally continue at or close to the levels in the previous year. DOL will strictly enforce the requirement that H–2A employers pay their U.S. and H–2A workers no less than the greater of the AEWR or the local prevailing wage for each agricultural activity, as established in the previous year. In the fourteen States where H–2 certifications have been granted in recent years, DOL expects that these earnings will approximate those under the previous year's AEWRs.

DOL acknowledges that the establishment of an AEWR methodology is a complex issue. DOL therefore invites specific comments on the methodology and is inviting recommendations for reasonable alternatives that both provide adequate protections for U.S. workers and avoid introducing excess rigidities in agricultural labor markets.

d. *Publishing AEWRs for Forty-nine States.* The expansion of AEWR coverage to all States included in the USDA survey, *i.e.,* the forty-eight contiguous States and Hawaii, is being adopted for various reasons. As indicated above, it is expected that the H–2A program will expand to most States under IRCA. A basic congressional premise for temporary foreign worker programs under IRCA and previous legislation is that the unregulated use of aliens in agriculture would have an adverse impact on the wages of U.S. workers, absent protection. This premise is supported by the basic economic laws of supply and demand, as recognized by the court in *Production Farm Management* v. *Donovan,* 767 F. 2d 1368 (9th Cir. 1985). This has been confirmed by DOL's longstanding actual experience and administrative actions (see discussion of agricultural wage regulation going back to 1950's, cited in "3. *History of AEWRs*", above).

Further, DOL has recognized adverse effect in agriculture, beyond the current fourteen States in the past. For example, in 1970 AEWRs were published for forty-eight contiguous States (see 20 CFR 602.10b(a)(1) (1970)). In addition, DOL has consistently calculated AEWRs for all States, under the current methodology, even though it has not always published them.

Establishing and publishing AEWRs for all States covered by the USDA survey benefits both employers and workers. It aids the former in planning for actual operating costs, without the uncertainty of how long the regulatory process will take adding a new State to the list of AEWR States. Similarly, it provides immediate protection to workers, rather than waiting until a regulatory change is effected. Finally, it provides ease of administration and cost savings to the government, by avoiding the cumbersome and time-consuming process of amending the regulation for each new State.

Since AEWRs are being published for all States (except Alaska, for which USDA data are not available), this rulemaking subsumes the proposed rules published in the **Federal Register** on December 10, 1985, and April 6, 1986, where DOL announced its intention of adding Montana, Idaho, and Oregon to the list of States for which AEWRs were published annually under the H–2 program, and those rulemaking actions are now completed. See 51 FR 28599 (August 8, 1986); 51 FR 11942 (April 8, 1986); 51 FR 7084 (February 28, 1986); 50 FR 50311 (December 10, 1985). Of course, the rulemaking records, including all comments received, on those proposed rules have been added to the rulemaking record and taken into consideration in this rulemaking.

The interim final rule has clarified the language from the proposed rule, to state explicitly that USDA figures on a regional basis (some regions are single-state) will be used to set AEWRs, and to permit an Alaska AEWR, should USDA provide data on that State.

e. *1987 H–2A AEWRs.* Pursuant to the requirements of 20 CFR 655.107(a), the 1987 AEWRS for the H–2A program, computed according to the new methodology, are published in the table below.

TABLE: ADVERSE EFFECT WAGE RATES (AEWRS) COMPUTED UNDER H–2A METHODOLOGY *

State	1987 AEWR
Alabama	$3.73
Arizona	4.43
Arkansas	4.05
California	5.17
Colorado	5.19
Connecticut	4.17
Delaware	4.17
Florida	4.66
Georgia	3.73
Hawaii	6.43
Idaho	4.15
Illinois	4.38
Indiana	4.38
Iowa	4.10
Kansas	4.61
Kentucky	3.79
Louisiana	4.05
Maine	4.17
Maryland	4.17
Massachusetts	4.17
Michigan	3.91
Minnesota	3.91
Mississippi	4.05
Missouri	4.10
Montana	4.15
Nebraska	4.61
Nevada	5.19
New Hampshire	4.17
New Jersey	4.17
New Mexico	4.43
New York	4.17
North Carolina	4.02
North Dakota	4.61
Ohio	4.38
Oklahoma	4.49
Oregon	4.52
Pennsylvania	4.17
Rhode Island	4.17
South Carolina	3.73
South Dakota	4.61
Tennessee	3.79
Texas	4.49
Utah	5.19
Vermont	4.17
Virginia	4.02
Washington	4.52
West Virginia	3.79
Wisconsin	3.91
Wyoming	4.15

* These are AEWRs for the H–2A program. AEWRs for the H–2 agricultural program (20 CFR Part 655, Subpart C), were published at 52 FR 15399 (April 28, 1987).

J. *Section 655.108: Temporary Alien Agricultural Labor Certification Applications Involving Fraud or Willful Misrepresentation.*

This section describes actions required when matters involving fraud or willful misrepresentation involving an H–2A certification are surfaced.

K. *Section 655.110: Employer Penalties for Noncompliance With Terms and Conditions of Temporary Alien Agricultural Labor Certifications.*

This section describes sanctions that may be levied against an employer for a substantial violation of a condition of labor certification. The sanctions are required by the INA, as amended by IRCA, and those provisions of the INA are incorporated into the regulations. See 8 U.S.C. 1186(b)(2). A definition for a "substantial" violation is provided.

A special procedure which enables the RA to take corrective action when a less than substantial violation exists is also provided. DOL has determined this is necessary in order to administratively correct situations where U.S. worker recruitment and retention may be impacted negatively, but total denial of certification is excessively severe, and, therefore, not appropriate. The interim final rule clarifies the proposed rule by specifically describing administrative or *de novo* review of failures by employers to comply with the corrective action.

The term "employer's representative" has been changed to "employer's agent" in the interim final rule, since the latter is a defined term, and clearly states DOL's intent.

L. *Section 655.111: Petition for Higher Meal Charges.*

This section having to do with petitions for higher meal charges is practically identical to the corresponding section in the current regulations.

M. *Section 655.112: Administrative Review and De Novo Hearing Before an Administrative Law Judge.*

This section describes the process involved when an employer wishes to pursue an administrative law judge review or *de novo* hearing of a denial of

a labor certification or rejection of an application. The process for the admininistrative law judge review is the same as the current regulations provide, and the *de novo* hearing procedures incorporate those in the DOL *Rules of Practice for Administrative Hearings Before the Office of Administrative Law Judges* at 29 CFR Part 18; however, precise, short time frames are established for setting the date for a hearing and for the administrative law judge to render a decision.

N. *Section 655.113: Job Service Complaint System; Enforcement of Work Contracts.*

This section describes how complaints regarding the work contracts will be handled by the State employment service agencies. Under section 216(g)(2) of the INA, the Secretary

> is authorized to take such actions, including imposing appropriate penalties and seeking appropriate injunctive relief and specific performance of contractual obligations, as may be necessary to assure employer compliance with terms and conditions of employment under this section.

8 U.S.C. 1186(g)(2).

If workers file complaints with the local employment service office under the Job Service Complaint System (see 20 CFR Part 658, Subpart E) regarding alleged employer noncompliance with contractual obligations, such complaints shall be referred by the local office to the DOL Employment Standards Administration for appropriate handling and resolution. The Employment Standards Administration is promulgating, contemporaneously with these regulations, a separate set of regulations for handling such matters.

Complaints and enforcement relating to the work contract will be handled by the Employment Standards Administration. Enforcement relating to the pre-employment activities, such as recruitment of U.S. workers, and issues which relate to the employer's future eligibility to apply for H–2A workers, will be handled by ETA.

O. *Changes to Other Regulations.*

Other minor, procedural changes are made to the regulations on housing for agricultural workers at 20 CFR Part 654, Subpart E; and to the regulations at 20 CFR Part 655, Subpart C, for the temporary alien agricultural labor certification process for H–2 logging employment (and for applications filed before June 1, 1987, for H–2 agricultural employment).

The interim final rule on housing standards differs from the proposed rule by giving the employer five days to bring the housing into compliance should defects be found during inspection. To accommodate the five days, the employer must assure initially that the housing is ready for occupancy 30 days before occupancy, rather than 25 days, as in the proposed rule.

Regulatory Impact

The interim final rule affects only those employers using nonimmigrant alien workers ("H–2A visaholders") in temporary agricultural jobs in the U.S. It does not have the financial or other impact to make it a major rule, and therefore, the preparation of a regulatory impact analysis is not necessary. See Executive Order No. 12291, 3 CFR 1981 Comp., p. 127, 5 U.S.C. 601 note.

At the time the proposed rule was published, the Department of Labor notified the Chief Counsel for Advocacy, Small Business Administration, and made the certification pursuant to the Regulatory Flexibility Act at 5 U.S.C. 605(b), that the rule does not have a significant economic impact on a substantial number of small entities. No significant economic impact is imposed by the proposed regulation above the costs contained in the current temporary alien agricultural labor certification program.

In preparing the interim final rule, the Department of Labor consulted with the Immigration and Naturalization Service of the Department of Justice, and with the Department of Agriculture. This rule was submitted to the Attorney General for approval, pursuant to section 301(e) of the Immigration Reform and Control Act of 1986. 8 U.S.C. 1186 note. This interim final rule received such approval.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*), the paperwork requirements that are included in this interim final rule have been submitted to the Office of Management and Budget for approval.

Catalog of Federal Domestic Assistance Number

This program is listed in the *Catalog of Federal Domestic Assistance* as Number 17.202, "Certification of Foreign Workers for Agricultural and Logging Employment."

List of Subjects

20 CFR Part 654

Agriculture, Employment, Employment and Training Administration, Government procurement, Housing standards, Labor, Migrant labor, Unemployment.

20 CFR Part 655

Administrative practice and procedure, Agriculture, Aliens, Employment, Forest and forest products, Guam, Labor, Migrant labor, Wages.

Final Rule

Accordingly, Parts 654 and 655 of Chapter V of Title 20, Code of Federal Regulations, are amended as follows:

PART 654—SPECIAL RESPONSIBILITIES OF THE EMPLOYMENT SERVICE SYSTEM

Subpart E—Housing for Agricultural Workers

1. In 20 CFR Part 654, Subpart E, the separate authority citation for Subpart E is revised to read as follows:

Authority: 29 U.S.C. 49k; 8 U.S.C. 1186(c)(4); 41 Op.A.G. 406 (1959).

2. In 20 CFR Part 654, § 654.403 is revised to read as follows:

§ 654.403 Conditional access to the intrastate or interstate clearance system.

(a) *Filing requests for conditional access—(1) "Noncriteria" employers.* Except as provided in paragraph (a)(2) of this section, an employer whose housing does not meet applicable standards may file with the local Job Service office serving the area in which its housing is located, a written request that its job orders be conditionally allowed into the intrastate or interstate clearance system, provided that the employer's request assures that its housing will be in full compliance with the requirements of the applicable housing standards at least 30 calendar days (giving the specific date) before the housing is to be occupied.

(2) *"Criteria" employers.* If the request for conditional access described in paragraph (a)(1) of this section is from an employer filing a job order pursuant to an application for temporary alien agricultural labor certification for H–2A alien agricultural workers or H–2 alien workers under Subpart B or Subpart C, respectively, of Part 655 of this chapter, the request shall be filed with the RA as an attachment to the application for temporary alien agricultural labor certification.

(3) *Assurance.* The employer's request pursuant to paragraphs (a)(1) or (a)(2) of this section shall contain an assurance that the housing will be in full compliance with the applicable housing standards at least 30 calendar days (stating the specific date) before the housing is to be occupied.

(b) *Processing requests—(1) State agency processing.* Upon receipt of a

written request for conditional access to the intrastate or interstate clearance system under paragraph (a)(1) of this section, the local Job Service office shall send the request to the State office, which, in turn, shall forward it to the Regional Administrator, Employment and Training Administration, (RA).

(2) *Regional office processing and determination.* Upon receipt of a request for conditional access pursuant to paragraph (a)(2) or paragraph (b)(1) of this section, the RA shall review the matter and, as appropriate, shall either grant or deny the request.

(c) *Authorization.* The authorization for conditional access to the intrastate or interstate clearance system shall be in writing, and shall state that although the housing does not comply with the applicable standards, the employer's job order may be placed into intrastate or interstate clearance until a specified date. The RA shall send the authorization to the employer and shall send copies to the appropriate State agency and local Job Service office. The employer shall submit and the local Job Service shall attach copies of the authorization to each of the employer's job orders which is placed into intrastate or interstate clearance.

(d) *Notice of denial.* If the RA denies the request for conditional access to the intrastate or interstate clearance system, the RA shall provide written notice to the employer, the appropriate State agency, and the local Job Service office, stating the reasons for the denial.

(e) *Inspection.* The local Job Service office serving the area containing the housing of any employer granted conditional access to the intrastate or interstate clearance system shall assure that the housing is inspected no later than the date by which the employer has promised to have its housing in compliance with the requirements of this subpart. An employer, however, may request an earlier preliminary inspection. If, on the date set forth in the authorization, the housing is not in full compliance with the applicable housing standards as assured in the request for conditional access, the local Job Service office shall afford the employer five calendar days to bring the housing into full compliance. After the five-calendar-day period, if the housing is not in full compliance with the applicable housing standards as assured in the request for conditional access, the local Job Service office immediately:

(i) Shall notify the RA;

(ii) Shall remove the employer's job orders from intrastate and interstate clearance; and

(iii) Shall, if workers have been recruited against these orders, in cooperation with the employment service agencies in other States, make every reasonable attempt to locate and notify the appropriate crew leaders or workers, and to find alternative and comparable employment for the workers.

PART 655—LABOR CERTIFICATION PROCESS FOR THE TEMPORARY EMPLOYMENT OF ALIENS IN THE UNITED STATES

3. In 20 CFR Part 655, the authority citation is revised to read as set forth below and the authority citations for all the subparts and following all the sections in Part 655 are removed:

Authority: 8 U.S.C. 1101(a)(15)(H) and 1184(c); 29 U.S.C. 49 *et seq.*; §§ 655.0, 655.00, and 655.000 also issued under 8 U.S.C. 1186 and 8 CFR 214.2(h)(3)(i); Subpart A and Subpart C also issued under 8 CFR 214.2(h)(3)(i); Subpart B also issued under 8 U.S.C. 1186.

§ 655.0 [Amended]

4. In 20 CFR Part 655, § 655.0 is amended:

a. By removing paragraphs (b) and (c);

b. By redesignating paragraphs (d) and (e) as paragraphs (b) and (c) respectively; and

c. By removing from paragraph (a) the words "are required by the Attorney General, acting through the Immigration and Naturalization Service (INS) of the Department of Justice, to assist the Attorney General to carry out the policy of the Immigration and Nationality Act, as implemented by the INS regulation at 8 CFR 214.2(h)(3)(i)," and adding, in their place, the words "are required to carry out the policies of the Immigration and Nationality Act (INA),".

§ 655.00 [Amended]

5. In 20 CFR Part 655, § 655.00 is amended by removing the words "The Administrator" and adding, in their place, the words "The Director".

§ 655.000 [Amended]

6. In 20 CFR Part 655, §§ 655.000 is amended by removing the period at the end of the first sentence in paragraph (a) and adding in its place the words ", except with respect to agricultural employment covered by 8 U.S.C. 1101 (a)(15)(H)(ii)(a) and Subpart B of this Part."

§ 655.1 [Amended]

7. In 20 CFR Part 655, § 655.1 is amended by removing paragraph (b) and by redesignating § 655.1(a) as § 655.1.

8. In 20 CFR Part 655, Subpart B is revised to read as follows:

Subpart B—Labor Certification Process for Temporary Agricultural Employment in the United States (H–2A Workers)

Sec.

§ 655.90 Scope and purpose of Subpart B.

(a) *General.* This subpart sets out the procedures established by the Secretary of Labor to acquire information sufficient to make factual determinations of: (1) Whether there are sufficient able, willing, and qualified U.S. workers available to perform the temporary and seasonal agricultural employment for which an employer desires to import nonimmigrant foreign workers (H–2A workers); and (2) whether the employment of H–2A workers will adversely effect the wages and working conditions of workers in the U.S. similarly employed. Under the authority of the INA, the Secretary of Labor has promulgated the regulations in this subpart. This subpart sets forth the requirements and procedures applicable to requests for certification by employers seeking the services of temporary foreign workers in agriculture. This subpart provides the Secretary's methodology for the two-fold determination of availability of domestic workers and of any adverse effect which would be occasioned by the use of foreign workers, for particular temporary and seasonal agricultural jobs in the United States.

(b) *The statutory standard.* (1) A petitioner for H–2A workers must apply

to the Secretary of Labor for a certification that, as stated in the INA:

(A) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and

(B) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

(2) Section 216(b) of the INA further requires that the Secretary may not issue a certification if the conditions regarding U.S. worker availability and adverse effect are not met, and may not issue a certification if, as stated in the INA:

(1) There is a strike or lockout in the course of a labor dispute which, under the regulations, precludes such certification.

(2)(A) The employer during the previous two-year period employed H–2A workers and the Secretary has determined, after notice and opportunity for a hearing, that the employer at any time during that period substantially violated a material term or condition of the labor certification with respect to the employment of domestic or non-immigrant workers.

(B) No employer may be denied certification under subparagraph (A) for more than three years for any violation described in such subparagraph.

(3) The employer has not provided the Secretary with satisfactory assurances that if the employment for which the certification is sought is not covered by State workers' compensation law, the employer will provide, at no cost to the worker, insurance covering injury and disease arising out of and in the course of the worker's employment which will provide benefits at least equal to those provided under the State workers' compensation law for comparable employment.

(4) The Secretary determines that the employer has not made positive recruitment efforts within a multistate region of traditional or expected labor supply where the Secretary finds that there are a significant number of qualified United States workers who, if recruited, would be willing to make themselves available for work at the time and place needed. Positive recruitment under this paragraph is in addition to, and shall be conducted within the same time period as, the circulation through the interstate employment service system of the employer's job offer. The obligation to engage in positive recruitment . . . shall terminate on the date the H–2A workers depart for the employer's place of employment.

(3) Regarding the labor certification determination itself, section 216(c)(3) of the INA, as quoted in the following, specifically directs the Secretary to make the certification if:

(i) the employer has complied with the criteria for certification (including criteria for the recruitment of eligible individuals as prescribed by the Secretary), and

(ii) the employer does not actually have, or has not been provided with referrals of, qualified individuals who have indicated their availability to perform such labor or services on the terms and conditions of a job offer which meets the requirements of the Secretary.

(c) *The Secretary's determinations.* Before any factual determination can be made concerning the availability of U.S. workers to perform particular job opportunities, two steps must be taken. First, the minimum level of wages, terms, benefits, and conditions for the particular job opportunities below which similarly employed U.S. workers would be adversely affected must be established. (The regulations in this subpart establish such minimum levels for wages, terms, benefits, and conditions of employment). Second, the wages, terms, benefits, and conditions offered and afforded to the aliens must be compared to the established minimum levels. If it is concluded that adverse effect would result, the ultimate determination of availability within the meaning of the INA cannot be made since U.S. workers cannot be expected to accept employment under conditions below the established minimum levels. *Florida Sugar Cane League, Inc.* v. *Usery,* 531 F. 2d 299 (5th Cir. 1976). Once a determination of no adverse effect has been made, the availability of U.S. workers can be tested only if U.S. workers are actively recruited through the offer of wages, terms, benefits, and conditions at least at the minimum level or the level offered to the aliens, whichever is higher. The regulations in this subpart set forth requirements for recruiting U.S. workers in accordance with this principle.

(d) *Construction.* This subpart shall be construed to effectuate the purpose of the INA that U.S. workers rather than aliens be employed wherever possible. *Elton Orchards, Inc.* v. *Brennan,* 508 F. 2d 493, 500 (1st Cir. 1974); *Flecha* v. *Quiros,* 567 F.2d 1154, 1156 (1st Cir. 1977). Where temporary alien workers are admitted, the terms and conditions of their employment must not result in a lowering of the wages, terms, and conditions of domestic workers similarly employed. *Williams* v. *Usery,* 531 F. 2d 305, 306 (5th Cir. 1976), *cert. denied,* 429 U.S. 1000, and the job benefits extended to any U.S. workers shall be at least those extended to the alien workers.

§ 655.92 Authority of the Regional Administrator.

Under this subpart, the accepting for consideration and the making of temporary alien agricultural labor certification determinations are ordinarily performed by the Regional Administrator (RA) of an Employment and Training Administration region, who, in turn, may delegate this responsibility to a designated staff member. The Director of the United States Employment Service, however, may direct that certain types of applications or certain applications shall be handled by, and the determinations made by USES in Washington, DC. In those cases, the RA will informally advise the employer or agent of the name of the official who will make determinations with respect to the application.

§ 655.93 Special circumstances.

(a) *Systematic process.* The regulations under this subpart are designed to provide a systematic process for handling applications from the kinds of employers who have historically utilized nonimmigrant alien workers in agriculture, usually in relation to the production or harvesting of a particular agricultural crop for market, and which normally share such characteristics as:

(1) A fixed-site farm, ranch, or similar establishment;

(2) A need for workers to come to their establishment from other areas to perform services or labor in and around their establishment;

(3) Labor needs which will normally be controlled by environmental conditions, particularly weather and sunshine; and

(4) A reasonably regular workday or workweek.

(b) *Establishment of special procedures.* In order to provide for a limited degree of flexibility in carrying out the Secretary's responsibilities under the INA, while not deviating from the statutory requirements to determine U.S. worker availability and make a determination as to adverse effect, the Director has the authority to establish special procedures for processing H–2A applications when employers can demonstrate upon written application to and consultation with the Director that special procedures are necessary. In a like manner, for work in occupations characterized by other than a reasonably regular workday or workweek, such as the range production of sheep or other livestock, the Director has the authority to establish monthly, weekly, or bi-weekly adverse effect wage rates for those occupations, for a Statewide or other geographical area, other than the rates established pursuant to § 655.107 of this part, provided that the Director uses a methodology to establish such adverse effect wage rates which is consistent

with the methodology in § 655.107(a). Prior to making determinations under this paragraph (b), the Director may consult with employer representatives, appropriate RAs, and worker representatives.

(c) *Construction.* This subpart shall be construed to permit the Director to continue and, where the Director deems appropriate, to revise the special procedures previously in effect for the handling of applications for sheepherders in the Western States (and to adapt such procedures to occupations in the range production of other livestock) and for custom combine crews.

§ 655.100 Overview of this subpart and definition of terms.

(a) *Overview*—(1) *Filing applications.* This subpart provides guidance to an employer who desires to apply for temporary alien agricultural labor certification for the employment of H–2A workers to perform agricultural employment of a temporary or seasonal nature. The regulations in this subpart provide that such employer shall file an H–2A application, including a job offer, on forms prescribed by the Employment and Training Administration (ETA), which describes the material terms and conditions of employment to be offered and afforded to U.S. workers and H–2A workers, with the Regional Administrator (RA) having jurisdiction over the geographical area in which the work will be performed. The entire application shall be filed with the RA no less than 60 calendar days before the first date of need for workers, and a copy of the job offer shall be submitted at the same time to the local office of the State employment service agency which serves the area of intended employment. Under the regulations, the RA will promptly review the application and notify the applicant in writing if there are deficiencies which render the application not acceptable for consideration, and afford the applicant a five-calendar-day period for resubmittal of an amended application or an appeal of the RA's refusal to approve the application as acceptable for consideration. Employers are encouraged to file their applications in advance of the 60-calendar-day period mentioned above in this paragraph (a)(1). Sufficient time should be allowed for delays that might arise due to the need for amendments in order to make the application acceptable for consideration.

(2) *Amendment of applications.* This subpart provides for the amendment of applications, at any time prior to the RA's certification determination, to increase the number of workers requested in the initial application; without requiring, under certain circumstances, an additional recruitment period for U.S. workers.

(3) *Untimely applications.* If an H–2A application does not satisfy the specified time requirements, this subpart provides for the RA's advice to the employer in writing that the certification cannot be granted because there is not sufficient time to test the availability of U.S. workers; and provides for the employer's right to an administrative review or a *de novo* hearing before an administrative law judge. Emergency situations are provided for, wherein the RA may waive the specified time periods.

(4) *Recruitment of U.S. workers; determinations*—(i) *Recruitment.* This subpart provides that, where the application is accepted for consideration and meets the regulatory standards, the State agency and the employer begin to recruit U.S. workers. If the employer has complied with the criteria for certification, including recruitment of U.S. workers, by 20 calendar days before the date of need specified in the application (except as provided in certain cases), the RA makes a determination to grant or deny, in whole or in part, the application for certification.

(ii) *Granted applications.* This subpart provides that the application for temporary alien agricultural labor certification is granted if the RA finds that the employer has not offered foreign workers higher wages or better working conditions (or has imposed less restrictions on foreign workers) than those offered and afforded to U.S. workers; that sufficient U.S. workers who are able, willing, and qualified will not be available at the time and place needed to perform the work for which H–2A workers are being requested; and that the employment of such aliens will not adversely affect the wages and working conditions of similarly employed U.S. workers.

(iii) *Fees*—(A) *Amount.* This subpart provides that each employer (except joint employer associations) of H–2A workers shall pay to the RA fees for each temporary alien agricultural labor certification received. The fee for each employer receiving a temporary alien agricultural labor certification is $100 plus $10 for each job opportunity for H–2A workers certified, provided that the fee to an employer for each temporary alien agricultural labor certification received shall be no greater than $1,000. In the case of a joint employer association receiving a temporary alien agricultural labor certification, each employer-member receiving a temporary alien agricultural labor certification shall pay a fee of $100 plus $10 for each job opportunity for H–2A workers certified, provided that the fee to an employer for each temporary alien agricultural labor certification received shall be no greater than $1,000. The joint employer association will not be charged a separate fee.

(B) *Timeliness of payment.* The fee must be received by the RA no later than 30 calendar days after the granting a each temporary alien agricultural labor certification. Fees received any later are untimely. Failure to pay fees in a timely manner is a substantial violation which may result in the denial of future temporary alien agricultural labor certifications.

(iv) *Denied applications.* This subpart provides that if the application for temporary alien agricultural labor certification is denied, in whole or in part, the employer may seek review of the denial, or a *de novo* hearing, by an administrative law judge as provided in this subpart.

(b) *Definitions of terms used in this subpart.* For the purposes of this subpart:

"Accept for consideration" means, with respect to an application for temporary alien agricultural labor certification, the action by the RA to notify the employer that a filed temporary alien agricultural labor certification application meets the adverse effect criteria necessary for processing. An application accepted for consideration ultimately will be approved or denied in a temporary alien agricultural labor certification determination.

"Administrative law judge" means a person within the Department of Labor Office of Administrative Law Judges appointed pursuant to 5 U.S.C. 3105; or a panel of such persons designated by the Chief Administrative Law Judge from the Board of Alien Labor Certification Appeals established by Part 656 of this chapter, but which shall hear and decide appeals as set forth in § 655.112 of this part. "Chief Administrative Law Judge" means the chief official of the Department of Labor Office of Administrative Law Judges or the Chief Administrative Law Judge's designee.

"Adverse effect wage rate (AEWR)" means the wage rate which the Director has determined must be offered and paid, as a minimum, to every H–2A worker and every U.S. worker for a particular occupation and/or area in which an employer employs or seeks to employ an H–2A worker so that the

wages of similarly employed U.S. workers will not be adversely affected.

"Agent" means a legal entity or person, such as an association of agricultural employers, or an attorney for an association, which (1) is authorized to act on behalf of the employer for temporary alien agricultural labor certification purposes, and (2) is not itself an employer, or a joint employer, as defined in this paragraph (b).

"Director" means the chief official of the United States Employment Service (USES) or the Director's designee.

"DOL" means the United States Department of Labor.

"Eligible worker" means a "U.S. worker", as defined in this section.

"Employer" means a person, firm, corporation or other association or organization which suffers or permits a person to work and (1) which has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ workers at a place within the United States and (2) which has an employer relationship with respect to employees under this subpart as indicated by the fact that it may hire, pay, fire, supervise or otherwise control the work of any such employee. An association of employers shall be considered the sole employer if it has the indicia of an employer set forth in this definition. Such an association, however, shall be considered as a joint employer with an employer member if it shares with the employer member one or more of the definitional indicia.

"Employment Service (ES)" and "Employment Service (ES) System" mean, collectively, the USES, the State agencies, the local offices, and the ETA regional offices.

"Employment Standards Administration" means the agency within the Department of Labor (DOL), which includes the Wage and Hour Division, and which is charged with the carrying out of certain functions of the Secretary under the INA.

"Employment and Training Administration (ETA)" means the agency within the Department of Labor (DOL) which includes the United States Employment Service (USES).

"Federal holiday" means a legal public holiday as defined at 5 U.S.C. 6103.

"H–2A worker" means any nonimmigrant alien admitted to the United States for agricultural labor or services of a temporary or seasonal nature under section 101(a)(15)(H)(ii)(a) of the INA (8 U.S.C. 1101(a)(15)(H)(ii)(a)).

"Immigration and Naturalization Service (INS)" means the component of the U.S. Department of Justice which makes the determination under the INA on whether or not to grant visa petitions to employers seeking H–2A workers to perform temporary agricultural work in the United States.

"INA" means the Immigration and Nationality Act, as amended (8 U.S.C. 1101 *et seq.*).

"Job offer" means the offer made by an employer or potential employer of H–2A workers to both U.S. and H–2A workers describing all the material terms and conditions of employment, including those relating to wages, working conditions, and other benefits.

"Job opportunity" means a job opening for temporary, full-time employment at a place in the United States to which U.S. workers can be referred.

"Local office" means the State agency's office which serves a particular geographic area within a State.

"Positive recruitment" means the active participation of an employer or its authorized hiring agent in locating and interviewing applicants in other potential labor supply areas and in the area where the employer's establishment is located in an effort to fill specific job openings with U.S. workers.

"Regional Administrator, Employment and Training Administration (RA)" means the chief ETA official of a DOL regional offfice or the RA's designee.

"Secretary" means the Secretary of Labor or the Secretary's designee.

"Solicitor of Labor" means the Solicitor, United States Department of Labor, and includes employees of the Office of the Solicitor of Labor designated by the Solicitor to perform functions of the Solicitor under this subpart.

"State agency" means the State employment service agency designated under § 4 of the Wagner-Peyser Act to cooperate with the USES in the operation of the ES System.

"Temporary alien agricultural labor certification" means the certification made by the Secretary of Labor with respect to an employer seeking to file with INS a visa petition to import an alien as an H–2A worker, pursuant to sections 101(a)(15)(H)(ii)(a), 214(a) and (c), and 216 of the INA that (1) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the agricultural labor or services involved in the petition, and (2) the employment of the alien in such agricultural labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed (8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184 (a) and (c), and 1186).

"Temporary alien agricultural labor certification determination" means the written determination made by the RA to approve or deny, in whole or in part, an application for temporary alien agricultural labor certification.

"United States Employment Service (USES)" means the agency of the U.S. Department of Labor, established under the Wagner-Peyser Act, which is charged with administering the national system of public employment offices and carrying out certain functions of the Secretary under the INA.

"United States (U.S.) worker" means any worker who, whether a U.S. national, a U.S. citizen, or an alien, is legally permitted to work in the job opportunity within the United States (as defined at § 101(a)(38) of the INA (8 U.S.C. 1101(a)(38)).

"Wages" means all forms of cash remuneration to a worker by an employer in payment for personal services.

(c) *Definition of "agricultural labor or services of a temporary or seasonal nature".* For the purposes of this subpart, "agricultural labor or services of a temporary or seasonal nature" means the following:

(1) *"Agricultural labor or services".* Pursuant to section 101(a)(15)(H)(ii)(a) of the INA (8 U.S.C. 1101(a)(15)(H)(ii)(a)), "agricultural labor or services" is defined for the purposes of this subpart as either "agricultural labor" as defined and applied in section 3121(g) of the Internal Revenue Code of 1954 (26 U.S.C. 3121(g)) or "agriculture" as defined and applied in section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f)). An occupation included in either statutory definition shall be "agricultural labor or services", notwithstanding the exclusion of that occupation from the other statutory definition. For informational purposes, the statutory provisions are quoted below:

(i) *"Agricultural labor".* Section 3121(g) of the Internal Revenue Code of 1954 (26 U.S.C. 3121(g)), quoted as follows, defines the term "agricultural labor" to include all service performed:

(1) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and furbearing animals and wildlife;

(2) Services performed in the employ of the owner or tenant or other operator of a farm, in connection with the operation, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm;

(3) In connection with the production or harvesting of any commodity defined as an agricultural commodity in section 15(g) of the Agricultural Marketing Act, as amended (12 U.S.C. 1141j), or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes;

(4) (A) In the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity; but only if such operator produced more than one-half of the commodity with respect to which such service is performed;

(B) In the employ of a group of operators of farms (other than a cooperative organization) in the performance of service described in subparagraph (A), but only if such operators produced all of the commodity with respect to which such service is performed. For purposes of this subparagraph, any unincorporated group of operators shall be deemed a cooperative organization if the number of operators comprising such group is more than 20 at any time during the calendar quarter in which such service is performed;

(C) The provisions of subparagraphs (A) and (B) shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; or

(5) On a farm operated for profit if such service is not in the course of the employer's trade or business or is domestic service in a private home of the employer.

As used in this subsection, the term "farm" includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.

(ii) *"Agriculture"* Section 203(f) of Title 29, United States Code, (section 3(f) of the Fair Labor Standards Act of 1938, as codified), quoted as follows, defines "agriculture" to include:

(f) * * * farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities as defined as agricultural commodities in section 1141j(g) of Title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(iii) *"Agricultural commodity".* Section 1141j(g) of Title 12, United States Code, (section 15(g) of the Agricultural Marketing Act, as amended), quoted as follows, defines "agricultural commodity" to include:

(g) * * * in addition to other agricultural commodities, crude gum (oleoresin) from a living tree, and the following products as processed by the original producer of the crude gum (oleoresin) from which derived: Gum spirits of turpentine, and gum rosin, as defined in section 92 of Title 7.

(iv) *"Gum rosin".* Section 92 of Title 7, United States Code, quoted as follows, defines "gum spirits of turpentine" and "gum rosin" as—

(c) "Gum spirits of turpentine" means spirits of turpentine made from gum (oleoresin) from a living tree.

* * * * *

(h) "Gum rosin" means rosin remaining after the distillation of gum spirits of turpentine.

(2) *"Of a temporary or seasonal nature"*—(i) *"On a seasonal or other temporary basis".* For the purposes of this subpart, "of a temporary or seasonal nature" means "on a seasonal or other temporary basis", as defined in the Employment Standards Administration's Wage and Hour Division's regulation at 29 CFR 500.20 under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA).

(ii) *MSPA definition.* For informational purposes, the definition of "on a seasonal or other temporary basis", as set forth at 29 CFR 500.20, is provided below:

"On a seasonal or other temporary basis" means:

* * * * *

Labor is performed on a seasonal basis, where, ordinarily, the employment pertains to or is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year. A worker who moves from one seasonal activity to another, while employed in agriculture or performing agricultural labor, is employed on a seasonal basis even though he may continue to be employed during a major portion of the year.

* * * * *

A worker is employed on "other temporary basis" where he is employed for a limited time only or his performance is contemplated for a particular piece of work, usually of short duration. Generally, employment, which is contemplated to continue indefinitely, is not temporary.

* * * * *

"On a seasonal or other temporary basis" does not include the employment of any foreman or other supervisory employee who is employed by a specific agricultural employer or agricultural association essentially on a year round basis.

* * * * *

"On a seasonal or other temporary basis" does not include the employment of any worker who is living at his permanent place of residence, when that worker is employed by a specific agricultural employer or agricultural association on essentially a year round basis to perform a variety of tasks for his employer and is not primarily employed to do field work.

(iii) *"Temporary".* For the purposes of this subpart, the definition of "temporary" in paragraph (c)(2)(ii) of this section refers to any job opportunity covered by this subpart where the employer needs a worker for a position, either temporary or permanent, for a limited period of time, which shall be for less than one year, unless the original temporary alien agricultural labor certification is extended based on unforeseen circumstances, pursuant to § 655.106(c)(3) of this part.

§ 655.101 Temporary alien agricultural labor certification applications.

(a) *General*—(1) *Filing of application.* An employer who anticipates a shortage of U.S. workers needed to perform agricultural labor or services of a temporary or seasonal nature may apply to the RA in whose region the area of intended employment is located, for a temporary alien agricultural labor certification for temporary foreign workers (H–2A workers). A signed application for temporary alien agricultural worker certification shall be filed by the employer, or by an agent of the employer, with the RA. At the same time, a duplicate application shall be submitted to the local office serving the area of intended employment.

(2) *Applications filed by agents.* If the temporary alien agricultural labor certification application is filed by an agent on behalf of an employer, the agent may sign the application if the application is accompanied by a signed statement from the employer which authorizes the agent to act on the employer's behalf. The employer may authorize the agent to accept for interview workers being referred to the job and to make hiring commitments on behalf of the employer. The statement shall specify that the employer assumes full responsibility for the accuracy of the application, for all representations made by the agent on the employer's behalf,

and for compliance with all regulatory and other legal requirements.

(3) *Applications filed by associations.* If an association of agricultural producers which uses agricultural labor or services files the application, the association shall identify whether it is: (i) The sole employer; (ii) a joint employer with its employer-member employers; or (iii) the agent of its employer-members. The association shall submit documentation sufficient to enable the RA to verify the employer or agency status of the association; and shall identify by name and address each member which will be an employer of H–2A workers.

(b) *Application form.* Each H–2A application shall be on a form or forms prescribed by ETA. The application shall state the total number of workers the employer anticipates employing in the agricultural labor or service activity during the covered period of employment. The application shall include:

(1) A copy of the job offer which will be used by each employer for the recruitment of U.S. and H–2A workers. The job offer shall state the number of workers needed by the employer, based upon the employer's anticipation of a shortage of U.S. workers needed to perform the agricultural labor or services, and the specific estimated date on which the workers are needed. The job offer shall comply with the requirements of §§ 655.102 and 653.501 of this chapter, and shall be signed by the employer or the employer's agent on behalf of the employer; and

(2) An agreement to abide by the assurances required by § 655.103 of this part.

(c) *Timeliness.* Applications for temporary alien agricultural labor certification are not required to be filed more than 60 calendar days before the first day of need. The employer shall be notified by the RA in writing within seven calendar days of filing the application if the application is not approved as acceptable for consideration. The RA's temporary alien agricultural labor certification determination on the approved application shall be made no later than 20 calendar days before the date of need if the employer has complied with the criteria for certification. To allow for the availability of U.S. workers to be tested, the following process applies:

(1) *Application filing date.* The entire H–2A application, including the job offer, shall be filed with the RA, in duplicate, no less than 60 calendar days before the first date on which the employer estimates that the workers are needed. Applications may be filed in person; may be mailed to the RA (Attention: H–2A Certifying Officer) by certified mail, return receipt requested; or delivered by guaranteed commercial delivery which will ensure delivery to the RA and provide the employer with a documented acknowledgment of receipt of the application by the RA. Any application received 60 calendar days before the date of need will have met the minimum timeliness of filing requirement as long as the application is eventually approved by the RA as being acceptable for processing.

(2) *Review of application; recruitment; certification determination period.* Section 655.104 of this part requires the RA to promptly review the application, and to notify the applicant in writing within seven calendar days of any deficiencies which render the application not acceptable for consideration and to afford an opportunity for resubmittal of an amended application. The employer shall have five calendar days in which to file an amended application. Section 655.106 of this part requires the RA to grant or deny the temporary alien agricultural labor certification application no later than 20 calendar days before the date on which the workers are needed, provided that the employer has complied with the criteria for certification, including recruitment of eligible individuals. Such recruitment, for the employer, the State agencies, and DOL to attempt to locate U.S. workers locally and through the circulation of intrastate and interstate agricultural clearance job orders acceptable under § 653.501 of this chapter and under this subpart, shall begin on the date that an acceptable application is filed, except that the local office shall begin to recruit workers locally beginning on the date it first receives the application. The time needed to obtain an application acceptable for consideration (including the job offer) after the five-calendar-day period allowed for an amended application will postpone day-for-day the certification determination beyond the 20 calendar days before the date of need, provided that the RA notifies the applicant of any deficiencies within seven calendar days after receipt of the application. Delays in obtaining an application acceptable for consideration which are directly attributable to the RA will not postpone the certification determination beyond the 20 calendar days before the date of need. When an employer resubmits to the RA (with a copy to the local office) an application with modifications required by the RA, and the RA approves the modified application as meeting necessary adverse effect standards, the modified application will not be rejected solely because it now does not meet the 60-calendar-day filing requirement. If an application is approved as being acceptable for processing without need for any amendment within the seven-calendar-day review period after initial filing, recruitment of U.S. workers will be considered to have begun on the date the application was received by the RA; and the RA shall make the temporary alien agricultural labor certification determination required by § 655.106 of this part no later than 20 calendar days before the date of need provided that other regulatory conditions are met.

(3) *Early filing.* Employers are encouraged, but not required, to file their applications in advance of the 60-calendar-day minimum period specified in paragraph (c)(1) of this section, to afford more time for review and discussion of the applications and to consider amendments, should they be necessary. This is particularly true for employers submitting H–2A applications for the first time who may not be familiar with the Secretary's requirements for an acceptable application or U.S. worker recruitment. Such employers particularly are encouraged to consult with DOL and local office staff for guidance and assistance well in advance of the minimum 60-calendar-day filing period.

(4) *Local recruitment; preparation of clearance orders.* At the same time the employer files the H–2A application with the RA, a copy of the application shall be submitted to the local office which will use the job offer portion—of the application to prepare a local job order and begin to recruit U.S. workers in the area of intended employment. The local office also shall begin preparing an agricultural clearance order, but such order will not be used to recruit workers in other geographical areas until the employer's H–2A application is accepted for consideration and the clearance order is approved by the RA and the local office is so notified by the RA.

(5) *First-time employers of H–2A workers.* With respect only to those applications filed on or before May 31, 1989, and notwithstanding the time requirements in paragraphs (c)(1) through (c)(4) of this section, under the following circumstances the RA shall make the certification determination required by § 655.106 of this part no later than 10 calendar days before the date of need:

(i) The employer would be a first-time employer of H–2A workers (and, prior to June 1, 1987, did not use or apply for certification to use H–2 agricultural

workers under the INA as then in effect) and has not previously applied for a temporary alien agricultural labor certification to use H–2A workers;

(ii) The RA, the employer, and the ES System have had a reasonable opportunity to test the availability of U.S. workers under the conditions of a job offer which has been determined to be acceptable by the RA in accordance with the provisions of §§ 655.102 and 655.103 of this part at least 30 calendar days before the date of need; and

(iii) The RA has determined that the employer has otherwise made good faith efforts to comply with the requirements of this subpart.

(d) *Amendments to application to increase number of workers.* Applications may be amended at any time, prior to an RA certification determination, to increase the number of workers requested in the initial application by not more than 20 percent (50 percent for employers of less than ten workers) without requiring an additional recruitment period for U.S. workers. Requests for increases above the percent prescribed, without additional recruitment, may be approved only when the need for additional workers could not have been foreseen, and that crops or commodities will be in jeopardy prior to the expiration of an additional recruitment period.

(e) *Minor amendments to applications.* Minor technical amendments may be requested by the employer and made to the application and job offer prior to the certification determination if the RA determines they are justified and will have no significant effect upon the RA's ability to make the labor certification determination required by § 655.106 of this part. Amendments described at paragraph (d) of this section are not "minor technical amendments".

(f) *Untimely applications*—(1) *Notices of denial.* If an H–2A application, or any part thereof, does not satisfy the time requirements specified in paragraph (c) of this section, and if the exception in paragraph (d) of this section does not apply, the RA may then advise the employer in writing that the certification cannot be granted because, pursuant to paragraph (c) of this section, there is not sufficient time to test the availability of U.S. workers. The notice of denial shall inform the employer of its right to an administrative review or *de novo* hearing before an administrative law judge.

(2) *Emergency situations.* Notwithstanding paragraph (f)(1) of this section, in emergency situations the RA may waive the time period specified in this section on behalf of employers who have not made use of temporary alien agricultural workers (H–2 or H–2A) for the prior year's agricultural season or for any employer which has other good and substantial cause (which may include unforeseen changes in market conditions), provided that the RA has an opportunity to obtain sufficient labor market information on an expedited basis to make the labor certification determination required by § 216 of the INA (8 U.S.C. 1186). In making this determination, the RA will accept information offered by and may consult with representatives of the U.S. Department of Agriculture.

(g) *Length of job opportunity.* The employer shall set forth on the application sufficient information concerning the job opportunity to demonstrate to the RA that the need for the worker is "of a temporary or seasonal nature", as defined at § 655.100(c)(2) of this part. Job opportunities of 12 months or more are presumed to be permanent in nature. Therefore, the RA shall not grant a temporary alien agricultural labor certification where the job opportunity has been or would be filled by an H–2A worker for a cumulative period, including temporary alien agricultural labor certifications and extensions, of 12 months or more, except in extraordinary circumstances.

§ 655.102 Contents of job offers.

(a) *Preferential treatment of aliens prohibited.* The employer's job offer to U.S. workers shall offer the U.S. workers no less than the same benefits, wages, and working conditions which the employer is offering, intends to offer, or will provide to H–2A workers. Conversely, no job offer may impose on U.S. workers any restrictions or obligations which will not be imposed on the employer's H–2A workers. This does not relieve the employer from providing to H–2A workers at least the same level of minimum benefits, wages, and working conditions which must be offered to U.S. workers consistent with this section.

(b) *Minimum benefits, wages, and working conditions.* Except when higher benefits, wages or working conditions are required by the provisions of paragraph (a) of this section, DOL has determined that in order to protect similarly employed U.S. workers from adverse effect with respect to benefits, wages, and working conditions, every job offer which must accompany an H–2A application always shall include each of the following minimum benefit, wage, and working condition provisions:

(1) *Housing.* The employer shall provide to those workers who are not reasonably able to return to their residence within the same day housing, without charge to the worker, which may be, at the employer's option, rental or public accommodation type housing.

(i) *Standards for employer-provided housing.* Housing provided by the employer shall meet the full set of DOL Occupational Safety and Health Administration standards set forth at 29 CFR 1910.142, or the full set of standards at §§ 654.404–654.417 of this chapter, whichever are applicable, except as provided for under paragraph (b)(1)(iii) of this section. Requests by employers, whose housing does not meet the applicable standards, for conditional access to the intrastate or interstate clearance system, shall be processed under the procedures set forth at § 654.403 of this chapter.

(ii) *Standards for range housing.* Housing for workers principally engaged in the range production of livestock shall meet standards of the DOL Occupational Safety and Health Administration for such housing. In the absence of such standards, range housing for sheepherders and other workers engaged in the range production of livestock shall meet guidelines issued by ETA.

(iii) *Standards for other habitation.* Rental, public accomodation, or other substantially similar class of habitation must meet local standards for such housing. In the absence of applicable local standards, State standards shall apply. In the absence of applicable local or State standards, Occupational Safety and Health Administration standards at 29 CFR 1910.142 shall apply. Any charges for rental housing shall be paid directly by the employer to the owner or operator of the housing. When such housing is to be supplied by an employer, the employer shall document to the satisfaction of the RA that the housing complies with the local, State, or federal housing standards applicable under this paragraph (b)(1)(iii).

(iv) *Charges for public housing.* If public housing provided for migrant agricultural workers under the auspices of a local, county, or State government is secured by an employer, and use of the public housing unit normally requires charges from migrant workers, such charges shall be paid by the employer directly to the appropriate individual or entity affiliated with the housing's management.

(v) *Deposit charges.* Charges in the form of deposits for bedding or other similar incidentals related to housing shall not be levied upon workers by

employers who provide housing for their workers. However, employers may require workers to reimburse them for damage caused to housing by the individual workers found to have been responsible for damage which is not the result of normal wear and tear related to habitation.

(vi) *Family housing.* When it is the prevailing practice in the area of intended employment and the occupation to provide family housing, family housing shall be provided to workers with families who request it.

(2) *Workers' compensation.* The employer shall provide, at no cost to the worker, insurance, under a State workers' compensation law or otherwise, covering injury and disease arising out of and in the course of the worker's employment which will provide benefits at least equal to those provided under the State workers' compensation law, if any, for comparable employment. The employer shall furnish the name of the insurance carrier and the insurance policy number, or, if appropriate, proof of State law coverage, to the RA prior to the issuance of a labor certification.

(3) *Employer-provided items.* Except as provided below, the employer shall provide, without charge including deposit charge, to the worker all tools, supplies, and equipment required to perform the duties assigned; the employer may charge the worker for reasonable costs related to the worker's refusal or negligent failure to return any property furnished by the employer or due to such worker's willful damage or destruction of such property. Where it is a common practice in the particular area, crop activity and occupation for workers to provide tools and equipment, with or without the employer reimbursing the workers for the cost of providing them, such an arrangement is permissible if approved in advance by the RA.

(4) *Meals.* Where the employer has centralized cooking and eating facilities designed to feed workers, the employer shall provide each worker with three meals a day. When such facilities are not available, the employer either shall provide each worker with three meals a day or shall furnish free and convenient cooking and kitchen facilities to the workers which will enable the workers to prepare their own meals. Where the employer provides the meals, the job offer shall state the charge, if any, to the worker for such meals. Until a new amount is set pursuant to this paragraph (b)(4), the charge shall not be more than $5.26 per day unless the RA has approved a higher charge pursuant to § 655.111 of this part. Each year the charge allowed by this paragraph (b)(4) will be changed by the same percentage as the 12-month percent change in the Consumer Price Index for All Urban Consumers for Food between December of the year just concluded and December of the year prior to that. The annual adjustments shall be effective on the date of their publication by the Director as a notice in the **Federal Register.**

(5) *Transportation; daily subsistence—(i) Transportation to place of employment.* The employer shall advance transportation and subsistence costs (or otherwise provide them) to workers when it is the prevailing practice of non-H–2A agricultural employers in the occupation in the area to do so, or when such benefits are extended to H–2A workers. The amount of the transportation payment shall be no less (and shall not be required to be more) than the most economical and reasonable similar common carrier transportation charges for the distances involved. If the employer has not previously advanced such transportation and subsistence costs to the worker or otherwise provided such transportation or subsistence directly to the worker by other means and if the worker completes 50 percent of the work contract period, the employer shall pay the worker for costs incurred by the worker for transportation and daily subsistence from the place from which the worker has come to work for the employer to the place of employment. The amount of the daily subsistence payment shall be at least as much as the employer will charge the worker for providing the worker with three meals a day during employment. If no charges will be made for meals and free and convenient cooking and kitchen facilities will be provided, the amount of the subsistence payment shall be no less than the amount permitted under paragraph (b)(4) of this section.

(ii) *Transportation from place of employment.* If the worker completes the work contract period, the employer shall provide or pay for the worker's transportation and daily subsistence from the place of employment to the place from which the worker, disregarding intervening employment, came to work for the employer, or, if the worker has contracted with a subsequent employer who has not agreed in that contract to provide or pay for the worker's transportation and daily subsistence expenses from the employer's worksite to such subsequent employer's worksite, the employer shall provide or pay for such expenses; except that, if the worker has contracted for employment with a subsequent employer who, in that contract, has agreed to pay for the worker's transportation and daily subsistence expenses from the employer's worksite to such subsequent employer's worksite, the employer is not required to provide or pay for such expenses.

(iii) *Transportation between living quarters and worksite.* The employer shall provide transportation between the worker's living quarters (*i.e.*, housing provided by the employer pursuant to paragraph (b)(1) of this section) and the employer's worksite without cost to the worker, and such transportation will be in accordance with applicable laws and regulations. This paragraph (b)(5)(iii) is applicable to the transportation of workers eligible for housing, pursuant to paragraph (b)(1) of this section.

(6) *Three-fourths guarantee*—(i) *Offer to worker.* The employer shall guarantee to offer the worker employment for at least three-fourths of the workdays of the total periods during which the work contract and all extensions thereof are in effect, beginning with the first workday after the arrival of the worker at the place of employment and ending on the expiration date specified in the work contract or in its extensions, if any. If the employer affords the U.S. or H–2A worker during the total work contract period less employment than that required under this paragraph (b)(6), the employer shall pay such worker the amount which the worker would have earned had the worker, in fact, worked for the guaranteed number of days. For purposes of this paragraph (b)(6), a workday shall mean the number of hours in a workday as stated in the job order and shall exclude the worker's Sabbath and federal holidays. An employer shall not be considered to have met the work guarantee if the employer has merely offered work on three-fourths of the workdays if each workday did not consist of a full number of hours of work time specified in the job order. The work shall be offered for at least three-fourths of the workdays (that is, 3/4 x (number of days) x (specified hours)). Therefore, if, for example, the contract contains 20 eight-hour workdays, the worker shall be offered employment for 120 hours during the 20 workdays. A worker may be offered more than the specified hours of work on a single workday. For purposes of meeting the guarantee, however, the worker shall not be required to work for more than the number hours specified in the job order for a workday, or on the worker's Sabbath or Federal holidays.

(ii) *Guarantee for piece-rate-paid worker.* If the worker will be paid on a piece rate basis, the employer shall use

the worker's average hourly piece rate earnings or the AEWR, whichever is higher, to calculate the amount due under the guarantee.

(iii) *Failure to work.* Any hours which the worker fails to work, up to a maximum of the number of hours specified in the job order for a workday, when the worker has been offered an opportunity to do so pursuant to paragraph (b)(6)(i) of this section and all hours of work actually performed (including voluntary work over 8 hours in a workday or on the worker's Sabbath or federal holidays) may be counted by the employer in calculating whether the period of guaranteed employment has been met.

(iv) *Displaced H–2A worker.* The employer shall not be liable for payment under this paragraph (b)(6) with respect to an H–2A worker whom the RA certifies is displaced because of the employer's compliance with § 655.103(e) of this part.

(7) *Records.* (i) The employer shall keep accurate and adequate records with respect to the workers' earnings including field tally records, supporting summary payroll records and records showing the nature and amount of the work performed; the number of hours of work offered each day by the employer (broken out by hours offered both in accordance with and over and above the three-fourths guarantee at paragraph (b)(6) of this section); the hours actually worked each day by the worker; the time the worker began and ended each workday; the rate of pay (both piece rate and hourly, if applicable); the worker's earnings per pay period; the worker's home address; and the amount of and reasons for any and all deductions made from the worker's wages;

(ii) If the number of hours worked by the worker is less than the number offered in accordance with the three-fourths guarantee at paragraph (b)(6) of this section, the records shall state the reason or reasons therefore.

(iii) Upon reasonable notice, the employer shall make available the records, including field tally records and supporting summary payroll records for inspection and copying by representatives of the Secretary of Labor, and by the worker and representatives designated by the worker; and

(iv) The employer shall retain the records for not less than three years after the completion of the work contract.

(8) *Hours and earnings statements.* The employer shall furnish to the worker on or before each payday in one or more written statements the following information:

(i) The worker's total earnings for the pay period;

(ii) The worker's hourly rate and/or piece rate of pay;

(iii) The hours of employment which have been offered to the worker (broken out by offers in accordance with and over and above the guarantee);

(iv) The hours actually worked by the worker;

(v) An itemization of all deductions made from the worker's wages; and

(vi) If piece rates are used, the units produced daily.

(9) *Rates of pay.* (i) If the worker will be paid by the hour, the employer shall pay the worker at least the adverse effect wage rate in effect at the time the work is performed, the prevailing hourly wage rate, or the legal federal or State minimum wage rate, whichever is highest, for every hour or portion thereof worked during a pay period; or

(ii)(A) If the worker will be paid on a piece rate basis and the piece rate does not result at the end of the pay period in average hourly piece rate earnings during the pay period at least equal to the amount the worker would have earned had the worker been paid at the appropriate hourly rate, the worker's pay shall be supplemented at that time so that the worker's earnings are at least as much as the worker would have earned during the pay period if the worker had been paid at the appropriate hourly wage rate for each hour worked; and the piece rate shall be no less than the piece rate prevailing for the activity in the area of intended employment; and

(B) If the employer who pays by the piece rate requires one or more minimum productivity standards of workers as a condition of job retention,

(*1*) Such standards shall be specified in the job offer and be no more than those required by the employer in 1977, unless the RA approves a higher minimum; or

(*2*) If the employer first applied for H–2 agricultural or H–2A temporary alien agricultural labor certification after 1977, such standards shall be no more than those normally required (at the time of the first application) by other employers for the activity in the area of intended employment, unless the RA approves a higher minimum.

(10) *Frequency of pay.* The employer shall state the frequency with which the worker will be paid (in accordance with the prevailing practice in the area of intended employment, or at least twice monthly whichever is more frequent).

(11) *Abandonment of employment; or termination for cause.* If the worker voluntarily abandons employment before the end of the contract period, or is terminated for cause, and the employer notifies the local office of such abandonment or termination, the employer will not be responsible for providing or paying for the subsequent transportation and subsistence expenses of any worker for whom the employer would have otherwise been required to pay such expenses under paragraph (b)(5)(ii) of this section, and that worker is not entitled to the "three-fourths guarantee" (see paragraph (b)(6) of this section).

(12) *Contract impossibility.* If, before the expiration date specified in the work contract, the services of the worker are no longer required for reasons beyond the control of the employer due to fire, hurricane, or other Act of God which makes the fulfillment of the contract impossible the employer may terminate the work contract. In the event of such termination of a contract, the employer shall fulfill the three-fourths guarantee at paragraph (b)(6) of this section for the time that has elapsed from the start of the work contract to its termination. In such cases the employer will make efforts to transfer the worker to other comparable employment acceptable to the worker. If such transfer is not effected, the employer shall:

(i) Offer to return the worker, at the employer's expense, to the place from which the worker disregarding intervening employment came to work for the employer,

(ii) Reimburse the worker the full amount of any deductions made from the worker's pay by the employer for transportation and subsistence expenses to the place of employment, and

(iii) Notwithstanding whether the employment has been terminated prior to completion of 50 percent of the work contract period originally offered by the employer, pay the worker for costs incurred by the worker for transportation and daily subsistence from the place from which the worker, without intervening employment, has come to work for the employer to the place of employment. Daily subsistence shall be computed as set forth in paragraph (b)(5)(i) of this section. The amount of the transportation payment shall be no less (and shall not be required to be more) than the most economical and reasonable similar common carrier transportation charges for the distances involved.

(13) *Deductions.* The employer shall make those deductions from the worker's paycheck which are required by law. The job offer shall specify all deductions not required by law which the employer will make from the

worker's paycheck. All deductions shall be reasonable. The employer may deduct the cost of the worker's transportation and daily subsistence expenses to the place of employment which were borne directly by the employer. In such cases, the job offer shall state that the worker will be reimbursed the full amount of such deductions upon the worker's completion of 50 percent of the worker's contract period. However, an employer subject to the Fair Labor Standards Act (FLSA) may not make deductions which will result in payments to workers of less than the federal minimum wage permitted by the FLSA as determined by the Secretary at 29 CFR Part 531.

(14) *Copy of work contract.* The employer shall provide to the worker, no later than on the day the work commences, a copy of the work contract between the employer and the worker. The work contract shall contain all of the provisions required by paragraphs (a) and (b) of this section. In the absence of a separate, written work contract entered into between the employer and the worker, the required terms of the job order and application for temporary alien agricultural labor certification shall be the work contract.

(c) *Appropriateness of required qualifications.* Bona fide occupational qualifications specified by an employer in a job offer shall be consistent with the normal and accepted qualifications required by non-H–2A employers in the same or comparable occupations and crops, and shall be reviewed by the RA for their appropriateness. The RA may require the employer to submit documentation to substantiate the appropriateness of the qualification specified in the job offer; and shall consider information offered by and may consult with representatives of the U.S. Department of Agriculture.

(d) *Positive recruitment plan.* The employer shall submit in writing, as a part of the application, the employer's plan for conducting independent, positive recruitment of U.S. workers as required by §§ 655.103 and 655.105(a) of this part. Such a plan shall include a description of recruitment efforts (if any) made prior to the actual submittal of the application. The plan shall describe how the employer will engage in positive recruitment of U.S. workers to an extent (with respect to both effort and location(s)) no less than that of non-H–2A agricultural employers of comparable or smaller size in the area of employment. When it is the prevailing practice in the area of employment and for the occupation for non-H–2A agricultural employers to secure U.S. workers through farm labor contractors and to compensate farm labor contractors with an override for their services, the employer shall describe how it will make the same level of effort as non-H–2A agricultural employers and provide an override which is no less than that being provided by non-H–2A agricultural employers.

§ 655.103 Assurances.

As part of the temporary alien agricultural labor certification application, the employer shall include in the job offer a statement agreeing to abide by the conditions of this subpart. By so doing, the employer makes each of the following assurances:

(a) *Labor disputes.* The specific job opportunity for which the employer is requesting H–2A certification is not vacant because the former occupant is on strike or being locked out in the course of a labor dispute.

(b) *Employment-related laws.* During the period for which the temporary alien agricultural labor certification is granted, the employer shall comply with applicable federal, State, and local employment-related laws and regulations, including employment-related health and safety laws.

(c) *Rejections and terminations of U.S. workers.* No U.S. worker will be rejected for or terminated from employment for other than a lawful job-related reason, and notification of all rejections or terminations shall be made to the local office.

(d) *Recruitment of U.S. workers.* The employer shall independently engage in positive recruitment until the foreign workers have departed for the employer's place of employment and shall cooperate with the ES System in the active recruitment of U.S. workers by:

(1) Assisting the ES System to prepare local, intrastate, and interstate job orders using the information supplied on the employer's job offer;

(2) Placing advertisements (in a language other than English, where the RA determines appropriate) for the job opportunities in newspapers of general circulation and/or on the radio, as required by the RA:

(i) Each such advertisement shall describe the nature and anticipated duration of the job opportunity; offer at least the adverse effect wage rate; give the ¾ guarantee; state that work tools, supplies and equipment will be provided by the employer; state that housing will also be provided, and that transportation and subsistence expenses to the worksite will be provided or paid by the employer upon completion of 50% of the work contract, or earlier, if appropriate; and

(ii) Each such advertisement shall direct interested workers to apply for the job opportunity at a local employment service office in their area;

(3) Cooperating with the ES System and independently contacting farm labor contractors, migrant workers and other potential workers in other areas of the State and/or Nation by letter and/or telephone; and

(4) Cooperating with the ES System in contacting schools, business and labor organizations, fraternal and veterans' organizations, and nonprofit organizations and public agencies such as sponsors of programs under the Job Training Partnership Act throughout the area of intended employment and in other potential labor supply areas in order to enlist them in helping to find U.S. workers.

(e) *Fifty-percent rule.* From the time the foreign workers depart for the employer's place of employment, the employer, except as provided for by § 655.106(e)(1) of this part, shall provide employment to any qualified, eligible U.S. worker who applies to the employer until 50% of the period of the work contract, under which the foreign worker who is in the job was hired, has elapsed. In addition, the employer shall offer to provide housing and the other benefits, wages, and working conditions required by § 655.102 of this part to any such U.S. worker and shall not treat less favorably than H–2A workers any U.S. worker referred or transferred pursuant to this assurance.

(f) *Other recruitment.* The employer shall perform the other specific recruitment and reporting activities specified in the notice from the RA required by § 655.105(a) of this part, and shall engage in positive recruitment of U.S. workers to an extent (with respect to both effort and location) no less than that of non-H–2A agricultural employers of comparable or smaller size in the area of employment. When it is the prevailing practice in the area of employment and for the occupation for non-H–2A agricultural employers to secure U.S. workers through farm labor contractors and to compensate farm labor contractors with an override for their services, the employer shall make the same level of effort as non-H–2A agricultural employers and shall provide an override which is no less than that being provided by non-H–2A agricultural employers. Where the employer has centralized cooking and eating facilities designed to feed workers, the employer shall not be required to provide meals through an

override. The employer shall not be required to provide for housing through an override.

(g) *Retaliation prohibited.* The employer shall not intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against, and shall not cause any person to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against, any person who has with just cause:

(1) Filed a complaint under or related to § 216 of the INA (8 U.S.C. 1186), or this subpart or any other DOL regulation promulgated pursuant to § 216 of the INA;

(2) Instituted or caused to be instituted any proceeding under or related to § 216 of the INA, or this subpart or any other DOL regulation promulgated pursuant to § 216 of the INA (8 U.S.C. 1186);

(3) Testified or is about to testify in any proceeding under or related to § 216 of the INA (8 U.S.C. 1186), or this subpart or any other DOL regulation promulgated pursuant to § 216 of the INA;

(4) Consulted with an employee of a legal assistance program or an attorney on matters related to § 216 of the INA (8 U.S.C. 1186), or this subpart or any other DOL regulation promulgated pursuant to § 216 of the INA; or

(5) Exercised or asserted on behalf of himself/herself or others any right or protection afforded by § 216 of the INA (8 U.S.C. 1186), or this subpart or any other DOL regulation promulgated pursuant to § 216 of the INA.

(h) *Fees.* The application shall include the assurance that fees will be paid in a timely manner, as follows:

(1) *Amount.* The fee for each employer receiving a temporary alien agricultural labor certification is $100 plus $10 for each job opportunity for H–2A workers certified, provided that the fee for an employer for each temporary alien agricultural labor certification received shall be no greater than $1,000. In the case of a joint employer association receiving a temporary alien agricultural labor certification, the fee for each employer-member receiving a temporary alien agricultural labor certification shall be $100 plus $10 for each job opportunity for H–2A workers certified, provided that the fee for an employer for each temporary alien agricultural labor certification received shall be no greater than $1,000. The joint employer association will not be charged a separate fee. Fees shall be paid by a check or money order made payable to "Department of Labor", and are nonrefundable. In the case of employers of H–2A workers which are members of a joint employer association applying on their behalf, the aggregate fees for all employers of H–2A workers under the application may be paid by one check or money order.

(2) *Timeliness.* Fees received by the RA within 30 calendar days after the date of the temporary alien agricultural labor certification determination are timely.

§ 655.104 Determinations based on acceptability of H–2A applications.

(a) *Local office activities.* The local office, using the job offer portion of the H–2A application, shall promptly prepare a local job order and shall begin to recruit U.S. workers in the area of intended employment. The RA should notify the State or local office by telephone no later than seven calendar days after the application was received by the RA if the application has been accepted for consideration. Upon receiving such notice or seven calendar days after the application is received by the local office, whichever is earlier, the local office shall promptly prepare an agricultural clearance order which will permit the recruitment of U.S. workers by the Employment Service System on an intrastate and interstate basis.

(b) *Regional office activities.* The RA, upon receipt of the H–2A application, shall promptly review the application to determine whether it is acceptable for consideration under the timeliness and adverse effect criteria of §§ 655.101–655.103 of this part. If the RA determines that the application does not meet the requirements of §§ 655.101–655.103, the RA shall not accept the application for consideration on the grounds that the availability of U.S. workers cannot be adequately tested because the benefits, wages and working conditions do not meet the adverse effect criteria; however, if the RA determines that the application is not timely in accordance with § 655.101 of this part and that neither the first-year employer provisions of § 655.101(c)(5) nor the emergency provisions of § 655.101(f) apply, the RA may determine not to accept the application for consideration because there is not sufficient time to test the availability of U.S. workers.

(c) *Rejected applications.* If the application is not accepted for consideration, the RA shall notify the applicant in writing (by means normally assuring next-day delivery) within seven calendar days of the date the application was received by the RA with a copy to the local office. The notice shall:

(1) State all the reasons the application is not accepted for consideration, citing the relevant regulatory standards;

(2) Offer the applicant an opportunity for the resubmission within five calendar days of a modified application, stating the modifications needed in order for the RA to accept the application for consideration;

(3) Offer the applicant an opportunity to request an expedited administrative review or a *de novo* administrative hearing before an administrative law judge of the nonacceptance; the notice shall state that in order to obtain such a review or hearing, the employer, within seven calendar days of the date of the notice, shall telegraph a written request to the Chief Administrative Law Judge of the Department of Labor (giving the address) and to telegraph a copy to the RA; the notice shall also state that the employer may submit any legal arguments which the employer believes will rebut the basis of the RA's action; and

(4) State that if the employer does not request an expedited administrative-judicial review or a *de novo* hearing before an administrative law judge within the seven calendar days no further consideration of the employer's application for temporary alien agricultural labor certification will be made by any DOL official.

(d) *Appeal procedures.* If the employer timely requests an expedited administrative review or *de novo* hearing before an administrative law judge pursuant to paragraph (c)(3) of this section, the procedures at § 655.112 of this part shall be followed.

(e) *Required modifications.* If the application is not accepted for consideration by the RA, but the RA's written notification to the applicant is not timely as required by § 655.101 of this part, the certification determination will not be extended beyond 20 calendar days before the date of need. The notice will specify that the RA's temporary alien agricultural labor certification determination will be made no later than 20 calendar days before the date of need, provided that the applicant submits the modifications to the application which are required by the RA within five calendar days and in a manner specified by the RA which will enable the test of U.S. worker availability to be made as required by § 655.101 of this part within the time available for such purposes.

§ 655.105 Recruitment period.

(a) *Notice of acceptance of application for consideration; required recruitment.* If the RA determines that the H–2A application meets the

requirements of §§ 655.101–655.103 of this part, the RA shall promptly notify the employer (by means normally assuring next-day delivery) in writing with copies to the State agency. The notice shall inform the employer and the State agency of the specific efforts which will be expected from them during the following weeks to carry out the assurances contained in § 655.103 with respect to the recruitment of U.S. workers. The notice shall require that the job order be laced into intrastate clearance and into interstate clearance to such States as the RA shall determine to be potential sources of U.S. workers. The notice may require the employer to engage in positive recruitment efforts within a multi-State region of traditional or expected labor supply where the RA finds, based on current information provided by a State agency and such information as may be offered and provided by other sources, that there are a significant number of able and qualified U.S. workers who, if recruited, would likely be willing to make themselves available for work at the time and place needed. In making such a finding, the RA shall take into account other recent recruiting efforts in those areas and will attempt to avoid requiring employers to futilely recruit in areas where there are a significant number of local employers recruiting for U.S. workers for the same types of occupations. Positive recruitment is in addition to, and shall be conducted within the same time period as, the circulation through the interstate clearance system of an agricultural clearance order. The obligation to engage in such positive recruitment shall terminate on the date H–2A workers depart for the employer's place of work. In determining what positive recruitment shall be required, the RA will ascertain the normal recruitment practices of non-H–2A agricultural employers in the area and the kind and degree of recruitment efforts which the potential H–2A employer made to obtain H–2A workers. The RA shall ensure that the effort, including the location(s) of the positive recruitment required of the potential H–2A employer, during the period after filing the application and before the date the H–2A workers depart their prior location to come to the place of employment, shall be no less than: (1) The recruitment efforts of non-H–2A agricultural employers of comparable or smaller size in the area of employment; and (2) the kind and degree of recruitment efforts which the potential H–2A employer made to obtain H–2A workers.

(b) *Recruitment of U.S. workers.* After an application for temporary alien agricultural labor certification is accepted for processing pursuant to paragraph (a) of this section, the RA, under the direction of the ETA national office and with the assistance of other RAs with respect to areas outside the region, shall provide overall direction to the employer and the State agency with respect to the recruitment of U.S. workers.

(c) *Modifications.* At any time during the recruitment effort, the RA, with the Director's concurrence, may require modifications to a job offer when the RA determines that the job offer does not contain all the provisions relating to minimum benefits, wages, and working conditions, required by § 655.102(b) of this part. If any such modifications are required after an application has been accepted for consideration by the RA, the modifications must be made; however, the certification determination shall not be delayed beyond the 20 calendar days prior to the date of need as a result of such modification.

(d) *Final determination.* By 20 calendar days before the date of need specified in the application, except as provided for under §§ 655.101(c)(2) and 655.104(e) of this part for untimely modified applications, the RA, when making a determination of the availability of U.S. workers, shall also make a determination as to whether the employer has satisfied the recruitment assurances in § 655.103 of this part. If the RA concludes that the employer has not satisfied the requirements for recruitment of U.S. workers, the RA shall deny the temporary alien agricultural labor certification, and shall immediately notify the employer in writing with a copy to the State agency and local office. The notice shall contain the statements specified in § 655.104(d) of this part.

(e) *Appeal procedure.* With respect to determinations by the RA pursuant to this section, if the employer timely requests an expedited administrative review or a *de novo* hearing before an administrative law judge, the procedures in § 655.112 of this part shall be followed.

§ 655.106 Referral of U.S. workers; determinations based on U.S. worker availability and adverse effect; activities after receipt of the temporary alien agricultural labor certification.

(a) *Referral of able, willing, and qualified eligible U.S. workers.* With respect to the referral of U.S. workers to job openings listed on a job order accompanying an application for temporary alien agricultural labor certification, no U.S. worker-applicant shall be referred unless such U.S. worker has been made aware of the terms and conditions of and qualifications for the job, and has indicated, by accepting referral to the job, that she or he meets the qualifications required and is able, willing, and eligible to take such a job.

(b) (1) *Determinations.* If the RA, in accordance with § 655.105 of this part, has determined that the employer has complied with the recruitment assurances and the adverse effect criteria of § 655.102 of this part, by the date specified pursuant to § 655.101(c)(2) of this part for untimely modified applications or 20 calendar days before the date of need specified in the application, whichever is applicable, the RA shall grant the temporary alien agricultural labor certification request for enough H–2A workers to fill the employer's job opportunities for which U.S. workers are not available. In making the temporary alien agricultural labor certification determination, the RA shall consider as available any U.S. worker who has made a firm commitment to work for the employer, including those workers committed by other authorized persons such as farm labor contractors and family heads. Such a firm commitment shall be considered to have been made not only by workers who have signed work contracts with the employer, but also by those whom the RA determines are likely to sign a work contract. The RA shall count as available any U.S. worker who has applied to the employer (or on whose behalf an application has been made), but who was rejected by the employer for other than lawful job-related reasons or who has not been provided with a lawful job-related reason for rejection by the employer, as determined by the RA. The RA shall not grant a temporary alien agricultural labor certification request for any H–2A workers if the RA determines that:

(i) Enough able, willing, and qualified U.S. workers have been identified as being available to fill all the employer's job opportunities;

(ii) The employer, since the time the application was accepted for consideration under § 655.104 of this part, has adversely affected U.S. workers by offering to, or agreeing to provide to, H–2A workers better wages, working conditions or benefits (or by offering to, or agreeing to impose on alien workers less obligations and restrictions) than those offered to U.S. workers;

(iii) The employer during the previous two-year period employed H–2A

workers and the RA has determined, after notice and opportunity for a hearing, that the employer at any time during that period substantially violated a material term or condition of a temporary alien agricultural labor certification with respect to the employment of U.S. or H–2A workers;

(iv) The employer has not complied with the workers' compensation requirements at § 655.102(b)(2) of this part; or

(v) The employer has not satisfactorily complied with the positive recruitment requirements specified by this subpart.

Further, the RA, in making the temporary alien agricultural labor certification determination, will subtract from any temporary alien agricultural labor certification the specific verified number of job opportunities involved which are vacant because of a strike or other labor dispute involving a work stoppage, or a lockout, in the occupation at the place of employment (and for which H–2A workers have been requested). Upon receipt by the RA of such labor dispute information from any source, the RA shall verify the existence of the strike, labor dispute, or lockout and the vacancies directly attributable through the receipt by the RA of a written report from the State agency written following an investigation by the State agency (made under the oversight of the RA) of the situation and after the RA has consulted with the Director prior to making such a determination.

(2) *Fees.* A temporary alien agricultural labor certification determination granting an application shall include a bill for the required fees. Each employer (except joint employer associations) of H–2A workers under the application for temporary alien agricultural labor certification shall pay in a timely manner a nonrefundable fee upon issuance of the temporary alien agricultural labor certification granting the application (in whole or in part), as follows:

(i) *Amount.* The fee for each employer receiving a temporary alien agricultural labor certification is $100 plus $10 for each job opportunity for H–2A workers certified, provided that the fee to an employer for each temporary alien agricultural labor certification received shall be no greater than $1,000. In the case of a joint employer association receiving a temporary alien agricultural labor certification, each employer-member receiving a temporary alien agricultural labor certification shall pay a fee of $100 plus $10 for each job opportunity for H–2A workers certified, provided that the fee to an employer for each temporary alien agricultural labor certification received shall be no greater than $1,000. The joint employer association will not be charged a separate fee. The fees shall be paid by check or money order made payable to "Department of Labor". In the case of employers of H–2A workers which are members of a joint employer association applying on their behalf, the aggregate fees for all employers of H–2A workers under the application may be paid by one check or money order.

(ii) *Timeliness.* Fees received by the RA no more than 30 calendar days after the date of the temporary alien agricultural labor certification determination are timely.

(c) *Changes to temporary alien agricultural labor certifications; temporary alien agricultural labor certifications involving employer associations*—(1) *Changes.* Temporary alien agricultural labor certifications are subject to the conditions and assurances made during the application process. Any changes in the level of benefits, wages, and working conditions an employer may wish to make at any time during the work contract period must be approved by the RA after written application by the employer, even if such changes have been agreed to by an employee. Temporary alien agricultural labor certifications shall be for the specific period of time specified in the employer's job offer, which shall be less than twelve months; shall be limited to the employer's specific job opportunities; and may not be transferred from one employer to another, except as provided for by paragraph (c)(2) of this section.

(2) *Associations*—(i) *Applications.* If an association is requesting a temporary alien agricultural labor certification as a joint employer, the temporary alien agricultural labor certification granted under this section shall be made jointly to the association and to its employer members. Except as provided in paragraph (c)(2)(iii) of this section, such workers may be transferred among its producer members to perform work for which the temporary alien agricultural labor certification was granted, provided the association controls the assignment of such workers and maintains a record of such assignments. All temporary alien agricultural labor certifications to associations may be used for the certified job opportunities of any of its members. If an association is requesting a temporary alien agricultural labor certification as a sole employer, the temporary alien agricultural labor certification granted pursuant to this section shall be made to the association only.

(ii) *Referrals and transfers.* For the purposes of complying with the "fifty-percent rule" at § 655.103(e) of this part, any association shall be allowed to refer or transfer workers among its members (except as provided in paragraph (c)(2)(iii) of this section), and an association acting as an agent for its members shall not be considered a joint employer merely because of such referral or transfer.

(iii) *Ineligible employer-members.* Workers shall not be transferred or referred to an association's member, if that member is ineligible to obtain any or any additional workers, pursuant to § 655.110 of this part.

(3) *Extension of temporary alien agricultural labor certification*–(i) *Short-term extension.* An employer who seeks an extension of two weeks or less of the temporary alien agricultural labor certification shall apply for such extension to INS. If INS grants such an extension, the temporary alien agricultural labor certification shall be deemed extended for such period as is approved by INS. No extension granted under this paragraph (c)(3)(i) shall be for a period longer than the original work contract period of the temporary alien agricultural labor certification.

(ii) *Long-term extension.* For extensions beyond the period which may be granted by INS pursuant to paragraph (c)(3)(i) of this section, an employer, after 50 percent of the work contract period has elapsed, may apply to the RA for an extension of the period of the temporary alien agricultural labor certification, for reasons related to weather conditions or other external factors beyond the control of the employer (which may include unforeseen changes in market conditions), provided that the employer's need for an extension is supported in writing by the employer, with documentation showing that the extension is needed and could not have been reasonably foreseen by the employer. The RA shall grant or deny the request for extension of the temporary alien agricultural labor certification based on available information, and shall notify the employer of the decision on the request in writing. The RA shall not grant an extension where the total work contract period, including past temporary alien labor certifications for the job opportunity and extensions, would be 12 months or more, except in extraordinary circumstances. The RA shall not grant an extension where the temporary alien agricultural labor certification has already been extended by INS pursuant to paragraph (c)(3)(i) of this section.

(d) *Denials of applications.* If the RA does not grant the temporary alien agricultural labor certification (in whole or in part) the RA shall notify the employer by means reasonably calculated to assure next-day delivery. The notification shall contain all the statements required in § 655.104(c) of this part. If a timely request is made for an administrative-judicial review or a *de novo* hearing by an administrative law judge, the procedures of § 655.112 of this part shall be followed.

(e) *Approvals of applications*—(1) *Continued recruitment of U.S. workers.* After a temporary alien agricultural labor certification has been granted, the employer shall continue its efforts to recruit U.S. workers, until the H–2A workers have departed for the employer's place of employment, and shall notify the local office, in writing, of the exact date on which the H–2A workers depart for the employer's place of employment. The employer, however, shall keep an active job order on file until the "50-percent rule" assurance at § 655.103(e) of this part is met, except as provided for by paragraph (f) of this section.

(2) *Referrals by ES System.* The ES System shall continue to refer to the employer U.S. workers who apply as long as there is an active job order on file.

(f) *Exceptions*—(1) *"Fifty-percent rule" inapplicable to small employers.* The assurance requirement at § 655.103(e) of this part does not apply to any employer who:

(i) Did not, during any calendar quarter during the preceeding calendar year, use more than 500 "man-days" of agricultural labor, as defined in section 3(u) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(u)), and so certifies to the RA in the H–2A application; and

(ii) Is not a member of an association which has applied for a temporary alien agricultural labor certification under this subpart for its members; and

(iii) Has not otherwise "associated" with other employers who are applying for H–2A workers under this subpart, and so certifies to the RA.

(2) *Displaced H–2A workers.* An employer shall not be liable for payment under § 655.102(b)(6) of this part with respect to an H–2A worker whom the RA certifies is displaced due to compliance with § 655.103(e) of this part.

(g) *Withholding of U.S. workers prohibited*—(1) *Complaints.* Any employer who has reason to believe that a person or entity has willfully and knowingly withheld U.S. workers prior to the arrival at the job site of H–2A workers in order to force the hiring of U.S. workers under § 655.103(e) of this part may submit a written complaint to the local office. The complaint shall clearly identify the person or entity whom the employer believes has withheld the U.S. workers, and shall specify sufficient facts to support the allegation (*e.g.*, dates, places, numbers and names of U.S. workers) which will permit an investigation to be conducted by the local office.

(2) *Investigations.* The local office shall inform the RA by telephone that a complaint under the provisions of paragraph (g) has been filed and shall immediately investigate the complaint. Such investigation shall include interviews with the employer who has submitted the complaint, the person or entity named as responsible for withholding the U.S. workers, and the individual U.S. workers whose availability has purportedly been withheld. In the event the local office fails to conduct such interviews, the RA shall do so.

(3) *Reports of findings.* Within five working days after receipt of the complaint, the local office shall prepare a report of its findings, and shall submit such report (including recommendations) and the original copy of the employer's complaint to the RA.

(4) *Written findings.* The RA shall immediately review the employer's complaint and the report of findings submitted by the local office, and shall conduct any additional investigation the RA deems appropriate. No later than 36 working hours after receipt of the employer's complaint and the local office's report, the RA shall issue written findings to the local office and the employer. Where the RA determines that the employer's complaint is valid and justified, the RA shall immediately suspend the application of § 655.103(e) of this part to the employer. Such suspension of § 655.103(e) of this part under these circumstances shall not take place, however, until the interviews required by paragraph (g)(2) of this section have been conducted. The RA's determination under the provisions of this paragraph (g)(4) shall be the final decision of the Secretary, and no further review by any DOL official shall be given to it.

(h) *Requests for new temporary alien agricultural labor certification determinations based on nonavailability of able, willing, and qualified U.S. workers*— (1) *Standards for requests.* If a temporary alien agricultural labor certification application has been denied (in whole or in part) based on the RA's determination of the availability of able, willing, and qualified U.S. workers, and, on or after 20 calendar days before the date of need specified in the temporary alien agricultural labor certification determination, such U.S. workers identified as being able, willing, qualified, and available are, in fact, not able, willing, qualified, or available at the time and place needed, the employer may request a new temporary alien agricultural labor certification determination from the RA. The RA shall expeditiously, but in no case later than 72 hours after the time a request is received, make a determination on the request.

(2) *Filing requests.* The employer's request for a new determination shall be made directly to the RA. The request may be made to the RA by telephone, but shall be confirmed by the employer in writing as required by paragraphs (h)(2)(i) or (ii) of this section.

(i) *Workers not able, willing, qualified, or eligible.* If the employer asserts that any worker who has been referred by the ES System or by any other person or entity is not an eligible worker or is not able, willing, or qualified for the job opportunity for which the employer has requested H–2A workers, the burden of proof is on the employer to establish that the individual referred is not able, willing, qualified, or eligible because of lawful job-related reasons. The employer's burden of proof shall be met by the employer's submission to the RA, within 72 hours of the RA's receipt of the request for a new determination, of a signed statement of the employer's assertions, which shall identify each rejected worker by name and shall state each lawful job-related reason for rejecting that worker.

(ii) *U.S. workers not available.* If the employer telephonically requests the new determination, asserting solely that U.S. workers are not available, the employer shall submit to the RA a signed statement confirming such assertion. If such signed statement is not received by the RA within 72 hours of the RA's receipt of the telephonic request for a new determination, the RA may make the determination based solely on the information provided telephonically and the information (if any) from the local office.

(3) *Regional office review— (i) Expeditious review.* The RA expeditiously shall review the request for a new determination. The RA may request a signed statement from the local office in support of the employer's assertion of U.S. worker nonavailability or referred U.S. workers not being able, willing, or qualified because of lawful job-related reasons.

(ii) *New determination.* If the RA determines that the employer's assertion

of nonavailability is accurate and that no able, willing, or qualified U.S. worker has been refused or is being refused employment for other than lawful job-related reasons, the RA shall, within 72 hours after receipt of the employer's request, render a new determination. Prior to making a new determination, the RA promptly shall ascertain (which may be through the ES System or other sources of information on U.S. worker availability) whether able, willing, and qualified replacement U.S. workers are available or can be reasonably expected to be present at the employer's establishment within 72 hours from the date the employer's request was received.

(iii) *Notification of new determination.* If the RA cannot identify sufficient able, willing, and qualified U.S. workers who are or who are likely to be available, the RA shall grant the employer's new determination request (in whole or in part) based on available information as to replacement U.S. worker availability. The RA's notification to the employer on the new determination shall be in writing (by means normally assuring next-day delivery), and the RA's determination under the provisions of this paragraph (h)(3) shall be the final decision of the Secretary, and no further review shall be given to an employer's request for a new H–2A determination by any DOL official. However, this does not preclude an employer from submitting subsequent requests for new determinations, if warranted, based on subsequent facts concerning purported nonavailability of U.S. workers or referred workers not being eligible workers or not able, willing, or qualified because of lawful job-related reasons.

§ 655.107 Adverse effect wage rates (AEWRs).

(a) *Computation and publication of AEWRs.* Except as otherwise provided in this section, the AEWRs for all agricultural employment (except for those occupations deemed inappropriate under the special circumstances provisions of § 655.93 of this part) for which temporary alien agricultural labor certification is being sought shall be equal to the annual weighted average hourly wage rate for field and livestock workers (combined) for the region as published annually by the U.S. Department of Agriculture (USDA) based on the USDA quarterly wage survey. The Director shall publish, at least once in each calendar year, on a date or dates to be determined by the Director, AEWRs for each State (for which USDA publishes regional data), calculated pursuant to this paragraph (a) as a notice or notices in the **Federal Register.**

(b) *Higher prevailing wage rates.* If, as the result of a State agency prevailing wage survey determination, the prevailing wage rate in an area and agricultural activity (as determined by the State agency survey and verified by the Director) is found to be higher that the AEWR computed pursuant to paragraph (a) of this section, the higher prevailing wage rate shall be offered and paid to all workers by employers seeking temporary alien agricultural labor certification for that agricultural activity and area.

(c) *Federal minimum wage rate.* In no event shall an AEWR computed pursuant to this section be lower than the hourly wage rate published in 29 U.S.C. 206(a)(1) and currently in effect.

§ 655.108 H–2A applications involving fraud or willful misrepresentation.

(a) *Referral for investigation.* If possible fraud or willful misrepresentation involving a temporary alien agricultural labor certification application is discovered prior to a final temporary alien agricultural labor certification determination or if it is learned that the employer or agent (with respect to an application) is the subject of a criminal indictment or information filed in a court, the RA shall refer the matter to the INS and DOL Office of the Inspector General for investigation. The RA shall continue to process the application and may issue a temporary alien agricultural labor certification.

(b) *Continued processing.* If a court finds an employer or agent not guilty of fraud or willful misrepresentation, or if the Department of Justice decides not to prosecute an employer or agent, the RA shall not deny the temporary alien agricultural labor certification application on the grounds of fraud or willful misrepresentation. The application, of course, may be denied for other reasons pursuant to this subpart.

(c) *Terminated processing.* If a court or the INS determines that there was fraud or willful misrepresentation involving a temporary alien agricultural labor certification application, the application is thereafter invalid, consideration of the application shall be terminated and the RA shall return the application to the employer or agent with the reasons therefor stated in writing.

§ 655.110 Employer penalties for noncompliance with terms and conditions of temporary alien agricultural labor certifications.

(a) *Investigation of violations.* If, during the period of two years after a temporary alien agricultural labor certification has been granted (in whole or in part), the RA has reason to believe that an employer violated a material term or condition of the temporary alien agricultural labor certification, the RA shall, except as provided in paragraph (b) of this section, investigate the matter. If, after the investigation, the RA determines that a substantial violation has occurred, the RA, after consultation with the Director, shall notify the employer that a temporary alien agricultural certification request will not be granted for the next period of time in a calendar year during which the employer would normally be expected to request a temporary alien agricultural labor certification, and any application subsequently submitted by the employer for that time period will not be accepted by the RA. If multiple or repeated substantial violations are involved, the RA's notice to the employer shall specify that the prospective denial of the temporary alien agricultural labor certification will apply not only to the next anticipated period for which a temporary alien agricultural labor certification would normally be requested, but also to any periods within the coming two or three years; two years for two violations, or repetitions of the same violations, and three years for three or more violations, or repetitions thereof. The RA's notice shall be in writing, shall state the reasons for the determinations, and shall offer the employer an opportunity to request an expedited administrative review or a *de novo* hearing before an administrative law judge of the determination within seven calendar days of the date of the notice. If the employer requests an expedited administrative review or a *de novo* hearing before an administrative law judge, the procedures in § 655.112 of this part shall be followed.

(b) *Employment Standards Administration investigations.* The RA may make the determination described in paragraph (a) of this section based on information and recommendations provided by the Employment Standards Administration, after an Employment Standards Administration investigation has been conducted in accordance with the Employment Standards Administration procedures, that an employer has not complied with the terms and conditions of employment prescribed as a condition for a temporary alien agricultural labor certification. In such instances, the RA need not conduct any investigation of his/her own, and the subsequent notification to the employer and other

procedures contained in paragraph (a) of this section will apply. Penalties invoked by the Employment Standards Administration for violations of temporary alien agricultural labor certification terms and conditions shall be treated and handled separately from sanctions available to the RA, and an employer's obligations for compliance with the Employment Standards Administration's enforcement penalties shall not absolve an employer from sanctions applied by ETA under this section (except as noted in paragraph (a) of this section).

(c) *Less than substantial violations—(1) Requirement of special procedures.* If, after investigation as provided for under paragraph (a) of this section, or an Employment Standards Administration notification as provided under paragraph (b) of this section, the RA determines that a less than substantial violation has occurred, but the RA has reason to believe that past actions on the part of the employer may have had and may continue to have a chilling or otherwise negative effect on the recruitment, employment, and retention of U.S. workers, the RA may require the employer to conform to special procedures before and after the temporary alien labor certification determination (including special on-site positive recruitment and streamlined interviewing and referral techniques) designed to enhance U.S. worker recruitment and retention in the next year as a condition for receiving a temporary alien agricultural labor certification. Such requirements shall be reasonable, and shall not require the employer to offer better wages, working conditions and benefits than those specified in § 655.102 of this part, and shall be no more than deemed necessary to assure employer compliance with the test of U.S. worker availability and adverse effect criteria of this subpart. The RA shall notify the employer in writing of the special procedures which will be required in the coming year. The notification shall state the reasons for the imposition of the requirements, state that the employer's agreement to accept the conditions will constitute inclusion of them as bona fide conditions and terms of a temporary alien agricultural labor certification, and shall offer the employer an opportunity to request an administrative review or a *de novo* hearing before an administrative law judge. If an administrative review or *de novo* hearing is requested, the procedures prescribed in § 655.112 of this part shall apply.

(2) *Failure to comply with special procedures.* If the RA determines that the employer has failed to comply with special procedures required pursuant to paragraph (c)(1) of this section, the RA shall send a written notice to the employer, stating that the employer's otherwise affirmative temporary alien agricultural labor certification determination will be reduced by twenty-five percent of the total number of H–2A aliens requested (which cannot be more than those requested in the previous year) for a period of one year. Notice of such a reduction in the number of workers requested shall be conveyed to the employer by the RA in the RA's written temporary alien agricultural labor certification determination required by § 655.101 of this part (with the concurrence of the Director). The notice shall offer the employer an opportunity to request an administrative review or a *de novo* hearing before an administrative law judge. If an administrative review or *de novo* hearing is requested, the procedures prescribed in § 655.112 of this part shall apply, provided that if the administrative law judge affirms the RA's determination that the employer has failed to comply with special procedures required by paragraph (c)(1) of this section, the reduction in the number of workers requested shall be twenty-five percent of the total number of H–2A aliens requested (which cannot be more than those requested in the previous year) for a period of one year.

(d) *Penalties involving members of associations.* If, after investigation as provided for under paragraph (a) of this section, or notification from the Employment Standards Administration under paragraph (b) of this section, the RA determines that a substantial violation has occurred, and if an individual producer member of a joint employer association is determined to have committed the violation, the denial of temporary alien agricultural labor certification penalty prescribed in paragraph (a) shall apply only to that member of the association unless the RA determines that the association or other association member participated in, had knowledge of, or had reason to know of the violation, in which case the penalty shall be invoked against the association or other association member as well.

(e) *Penalties involving associations acting as joint employers.* If, after investigation as provided for under paragraph (a) of this section, or notification from the Employment Standards Administration under paragraph (b) of this section, the RA determines that a substantial violation has occurred, and if an association acting as a joint employer with its members is determined to have committed the violation, the denial of temporary alien agricultural labor certification penalty prescribed in paragraph (a) of this section shall apply only to the association, and shall not be applied to any individual producer member of the association unless the RA determines that the member participated in, had knowledge of, or reason to know of the violation, in which case the penalty shall be invoked against the association member as well.

(f) *Penalties involving associations acting as sole employers.* If, after investigation as provided for under paragraph (a) of this section, or notification from the Employment Standards Administration under paragraph (b) of this section, the RA determines that a substantial violation has occurred, and if an association acting as a sole employer is determined to have committed the violation, no individual producer member of the association shall be permitted to employ certified H–2A workers in the crop and occupation for which the H–2A workers had been previously certified for the sole employer association unless the producer member applies for temporary alien agricultural labor certification under the provisions of this subpart in the capacity of an individual employer/applicant or as a member of a joint employer association, and is granted temporary alien agricultural labor certification by the RA.

(g) *Types of violations*—(1) *Substantial violation.* For the purposes of this subpart, a substantial violation is one or more actions of commission or omission on the part of the employer or the employer's agent, with respect to which the RA determines:

(i)(A) That the action(s) is/are significantly injurious to the wages, benefits, or working conditions of 10 percent or more of an employer's U.S. and/or H–2A workforce; and that:

(*1*) With respect to the action(s), the employer has failed to comply with one or more penalties imposed by the Employment Standards Administration for violation(s) of contractual obligations found by that agency (if applicable), or with one or more decisions or orders of the Secretary or a court pursuant to § 216 of the INA (8 U.S.C. 1186), this subpart, or 29 CFR Part 501 (Employment Standards Administration enforcement of contractual obligations); or

(*2*) The employer has engaged in a pattern or practice of actions which are significantly injurious to the wages, benefits, or working conditions of 10

percent o more of an employer's U.S. and/or H–2A workforce;

(B) That the action(s) involve(s) impeding an investigation of an employer pursuant to § 216 of the INA (8 U.S.C. 1186), this subpart, or 29 CFR Part 501 (Employment Standards Administration enforcement of contractual obligations);

(C) That the employer has not paid the necessary fee in a timely manner;

(D) That the employer is not currently eligible to apply for a temporary alien agricultural labor certification pursuant to § 655.210 of this part (failure of an employer to comply with the terms of a temporary alien agricultural labor certification in which the application was filed under Subpart C of this part prior to June 1, 1987); or

(E) That there was fraud involving the application for temporary alien agricultural labor certification of that the employer made a material misrepresentation of fact during the application process; and

(ii) That there are no extenuating circumstances involved with the action(s) described in paragraph (g)(1)(i) of this section (as determined by the RA).

(2) *Less than substantial violation.* For the purposes of this subpart, a less than substantial violation is an action of commission or omission on the part of the employer or the employer's agent which violates a requirement of this subpart, but is not a substantial violation.

§ 655.111 Petition for higher meal charges.

(a) *Filing petitions.* Until a new amount is set pursuant to this paragraph (a), the RA may permit an employer to charge workers up to $6.58 for providing them with three meals per day, if the employer justifies the charge and submits to the RA the documentation required by paragraph (b) of this section. In the event the employer's petition for a higher meal charge is denied in whole or in part, the employer may appeal such denial. Such appeals shall be filed with the Chief Administrative Law Judge. Administrative law judges shall hear such appeals according to the procedures in 29 CFR Part 18, except that the appeal shall not be considered as a complaint to which an answer is required. The decision of the administrative law judge shall be the final decision of the Secretary. Each year the maximum charge allowed by this paragraph (a) will be changed by the same percentage as the twelve-month percent change for the Consumer Price Index for all Urban Consumers for Food between December of the year just concluded and December of the year prior to that. The annual adjustments shall be effective on the date of their publication by the Director as a notice in the **Federal Register.** However, an employer may not impose such a charge on a worker prior to the effective date contained in the RA's written confirmation of the amount to be charged.

(b) *Required documentation.* Documentation submitted shall include the cost of goods and services directly related to the preparation and serving of meals, the number of workers fed, the number of meals served and the number of days meals were provided. The cost of the following items may be included: Food; kitchen supplies other than food, such as lunch bags and soap; labor costs which have a direct relation to food service operations, such as wages of cooks and restaurant supervisors; fuel, water, electricity, and other utilities used for the food service operation; and other costs directly related to the food service operation. Charges for transportation, depreciation, overhead and similar charges may not be included. Receipts and other cost records for a representative pay period shall be available for inspection by the RA for a period of one year.

§ 655.112 Administrative review and de novo hearing before an administrative law judge.

(a) *Administrative review*—(1) *Consideration.* Whenever an employer has requested an administrative review before an administrative law judge of a decision not to accept for consideration a temporary alien agricultural labor certification application, of the denial of a temporary alien agricultural labor certification, or of a penalty under § 655.110 of this part, the RA shall send a certified copy of the ETA case file to the Chief Administrative Law Judge by means normally assuring next-day delivery. The Chief Administrative Law Judge shall immediately assign an administrative law judge (which may be a panel of such persons designated by the Chief Administrative Law Judge from the Board of Alien Labor Certification Appeals established by Part 656 of this chapter, but which shall hear and decide the appeal as set forth in this section) to review the record for legal sufficiency. The administrative law judge shall not remand the case and shall not receive additional evidence.

(2) *Decision.* Within five working days after receipt of the case file the administrative law judge shall, on the basis of the written record and after due consideration of any written submissions submitted from the parties involved or *amici curiae,* either affirm, reverse, or modify the RA's denial by written decision. The decision of the administrative law judge shall specify the reasons for the action taken and shall be immediately provided to the employer, RA, the Director, and INS by telegram or hand delivery. The administrative law judge's decision shall be the final decision of the Secretary and no further review shall be given to the temporary alien agricultural labor certification application or the temporary alien agricultural labor certification determination by any DOL official.

(b) *De novo hearing*—(1) *Request for hearing; conduct of hearing.* Whenever an employer has requested a *de novo* hearing before an administrative law judge of a decision not to accept for consideration a temporary alien agricultural labor certification application, of the denial of a temporary alien agricultural labor certification, or of a penalty under § 655.110 of this part, the RA shall send a certified copy of the case file to the Chief Administrative Law Judge by means normally assuring next-day delivery. The Chief Administrative Law Judge shall immediately assign an administrative law judge (which may be a panel of such persons designated by the Chief Administrative Law Judge from the Board of Alien Labor Certification Appeals established by Part 656 of this chapter, but which shall hear and decide the appeal as set forth in this section) to conduct the *de novo* hearing. The procedures contained in 29 CFR Part 18 shall apply to such hearings, except that:

(i) The appeal shall not be considered to be a complaint to which an answer is required,

(ii) The administrative law judge shall ensure that, at the request of the employer, the hearing is scheduled to take place within five working days after the administrative law judge's receipt of the case file, and

(iii) The administrative law judge's decision shall be rendered within ten working days after the hearing.

(2) *Decision.* After a *de novo* hearing, the administrative law judge shall either affirm, reverse, or modify the RA's determination, and the administrative law judge's decision shall be provided immediately to the employer, RA, Director, and INS by telegram or hand delivery. The administrative law judge's decision shall be the final decision of the Secretary, and no further review shall be given to the temporary alien agricultural labor certification application or the temporary alien

agricultural labor certification determination by any DOL official.

§ 655.113 Job Service Complaint System; enforcement of work contracts.

Complaints arising under this subpart may be filed through the Job Service Complaint System, as described in 20 CFR Part 658, Subpart E. Complaints which involve worker contracts shall be referred by the local office to the Employment Standards Administration for appropriate handling and resolution. See 29 CFR Part 501. As part of this process, the Employment Standards Administration may report the results of its investigation to ETA for consideration of employer penalties under § 655.110 of this part or such other action as may be appropriate.

9. In 20 CFR Part 655, Subpart C is amended by revising the subpart heading to read as follows:

Subpart C—Labor Certification Process for Logging Employment and Non-H-2A Agricultural Employment

§ 655.200 [Amended]

10. In 20 CFR Part 655, § 655.200 is amended by redesignating paragraphs (a) and (b) as paragraphs (b) and (c) respectively, and by adding a new paragraph (a), to read as follows:

§ 655.200 General description of this subpart and definition of terms.

(a) This subpart applies to applications for temporary alien agricultural labor certification filed before June 1, 1987, and to applications for temporary alien labor certification for logging employment.

* * * * *

Signed at Washington, DC., this 26th day of May 1987.

William E. Brock,

Secretary of Labor.

[FR Doc. 87-12322 Filed 5-29-87; 8:45 am]

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DEPARTMENT OF LABOR

Wage and Hour Division, Employment Standards Administration

29 CFR Part 501

Enforcement of Contractual Obligations for Temporary Alien Agricultural Workers Admitted Under Section 216 of the Immigration and Nationality Act

AGENCY: Wage and Hour Division, Employment Standards Administration, Labor.

ACTION: Interim final rule; request for comments.

SUMMARY: The Employment Standards Administration (ESA) of the U.S. Department of Labor (DOL) is promulgating interim final regulations applicable to employers of nonimmigrant aliens for temporary employment in agriculture in the United States. This program is commonly known as the "H-2A" program. These interim final regulations conform to the requirements of section 216 of the Immigration and Nationality Act (INA) as amended by the Immigration Reform and Control Act of 1986 (IRCA). These regulations incorporate some provisions promulgated by the Employment and Training Administration (ETA) of DOL in carrying out responsibilities of that agency under the "H-2A" program. These regulations relate specifically to enforcement of the contractual obligations of an employer of H-2A workers to the workers, including U.S. and H-2A workers and other workers engaged in corresponding employment employed by the employer.

Dates:

Effective date: The interim final rule is effective on June 1, 1987. Applications for temporary alien labor certification filed on and after that date will be subject to the interim final rule.

Comments: The comment period in this rulemaking is being reopened through July 31, 1987. Comments on the May 5, 1987 proposed rule (52 FR 16795) will continue to be considered as part of this rulemaking. Comments on the interim final rule must be submitted by mail and received on or before July 31, 1987.

ADDRESS: Send written comments to: Paula V. Smith, Administrator, Wage and Hour Division, Employment Standards Administration, Room S-3502, 200 Constitution Avenue, NW., Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Herbert J. Cohen, Deputy Administrator, Telephone (202) 523-8305.

SUPPLEMENTARY INFORMATION:

I. History of this Rulemaking.

On May 5, 1987, there were published in the **Federal Register** proposed rules to implement the Department of Labor's responsibilities under the temporary alien agricultural labor certification program, as set out at sections 101(a)(15)(H)(ii)(a), 214(c), and 216 of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986, Pub. L. 99-603 (IRCA), 100 Stat. 3359. The Employment Standards Administration responsibilities relative to an employer's contractual obligations to workers were published at 52 FR 16795. Written comments on the proposed rule were invited through May 19, 1987.

Section 301(e) of IRCA requires that "(n)otwithstanding any other provision of law, final regulations to implement . . . (sections 101(a)(15)(H)(ii)(a) and 216 of the Immigration and Nationality Act) shall first be issued, on an interim or other basis, not later than the effective date." 8 U.S.C. 1186 note.

Given the constraints of time and the statutory mandate to issue final regulations by June 1, 1987, the comments received on the proposed rule have been considered and some changes have been made in this interim final rule. When changes have been made, other than minor technical or typographical changes, they are discussed in this preamble.

While the comments received during the comment period on the proposed rule continue to be considered, the Department of Labor is publishing this final rule on an interim basis. The comment period is being reopened through July 31, 1987, with comments invited on the interim final rule. A final rule will be published at a later date.

II. Background

Whether to grant or deny an employer's petition to import a nonimmigrant alien to the United States for the purpose of temporary employment is solely the decision of the Attorney General and his designee, the Commissioner of the Immigration and Naturalization Service (INS). The Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), provides that the Attorney General may not approve such a petition from an employer for employment of a nonimmigrant H-2A alien worker, in agriculture unless the petitioner has applied to the Secretary of Labor (the Secretary) for a labor certification showing that: (1) there are not sufficient workers who are able, willing, and qualified and who will be available at the time and place needed to perform the labor or service involved in the petition; and (2) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

The amendments to the INA made by IRCA codify DOL's role in the temporary agricultural labor certification process. Prior to 1987, many of the responsibilities of the Department of Labor (DOL) specified in IRCA were carried out under the requirement in the INA at 8 U.S.C. 1184(c) that the Attorney

General consult with appropriate agencies of the Government concerning the importation of nonimmigrant workers; also, under INS regulations governing the reliance placed by INS on the advice of DOL relative to U.S. worker availability and adverse effect. Pursuant to INS regulations, the Employment and Training Administration, DOL promulgated regulations at 20 CFR Part 655, Subpart C, for the certification of temporary employment of nonimmigrant aliens in agriculture and logging in the United States.

It is clear from the enactment of IRCA and the legislative history that the Congress intended that DOL would increase its effort regarding the enforcement of labor standards with respect to the H–2A programs as shown by section 301(g).

(2) The Secretary of Labor is authorized to take such actions, including imposing appropriate penalties and seeking appropriate injunctive relief and specific performance of contractual obligations, as may be necessary to assure employer compliance with terms and conditions of employment under this section.

The Secretary of Labor (the Secretary) has determined that enforcement of the contractual obligations of employers under this program can be most efficiently accomplished by assigning responsibility to the ESA, Wage and Hour Division.

The interim final regulation in this document adopts procedures deemed necessary by DOL to carry out its statutory responsibilities regarding enforcement of an H–2A employer's contractual obligations to H–2A workers and other workers engaged in corresponding employment. The regulation pertaining to the certification of H–2A workers is codified at 20 CFR Part 655, Subpart B.

The proposed rule, in discussing an employer's contractual obligation to workers, referred to "H–2A workers and other workers". Comments were received expressing concern that "other workers" would be taken to mean that all employees of an employer who utilized H–2A workers would be subject to these regulations. The language has been clarified throughout the regulation to indicate that the employer's contractual obligations extend only to H–2A workers and other workers hired by H–2A employers in the occupations and for the period of time set forth in the job order approved by ETA as a condition for granting H–2A certification, including any extension thereof. Such other workers hired by H–2A employers are herein referred to as engaged in corresponding employment.

Other changes have been made to conform to the regulations promulgated by ETA at 20 CFR Part 655. For example, references in the proposed rule to recommendations which ESA would make regarding potential revocation of an employer's H–2A certification have been deleted, in as much as ETA may act to deny future certification, but will not revoke a certificate which is in effect.

An employer seeking such a labor certification must submit a job offer to the Regional Administrator in whose region the area of intended employment is located. That job offer will specify the conditions of employment relative to such matters as wages, transportation, meal charges and housing provided. The minimum requirements of such job offers are established by ETA and set forth at 20 CFR Part 655. In the absence of a separate written work contract, incorporating the required terms and conditions of employment, entered into between the employer and the worker, the work contract at a minimum shall be the terms of the job order included in the application for temporary labor certification and shall be enforced in accordance with this regulation.

Applications for temporary alien agricultural labor certification submitted before June 1 will be governed by the H–2 regulations in 20 CFR Part 655, Subpart C, in effect prior to June 1, and will not be subject to these regulations.

III. Contents of this Interim Final Rule

Following is a section-by-section summary of the primary components of these interim final regulations.

Section 501.1

This section sets forth the statutory basis for importing aliens as H–2A workers under section 216 of the Immigration and Nationality Act (INA). It also defines which responsibilities have been delegated by the Secretary to ETA and which responsibilities were delegated to ESA, Wage and Hour Division and the effective dates of these responsibilities.

Section 501.2

Complaints related to an employer's contractual obligations to workers under the H–2A program received by ETA or any State Employment Service Agency will be forwarded to the Wage and Hour Division for action.

Section 501.3

This section sets forth protections for workers against discrimination in employment by any person as a result of the worker's taking specified actions on behalf of himself or others.

Section 501.4

This section sets forth the prohibition against any H–2A worker or other worker in corresponding employment employed by an H–2A employer from waiving rights conferred under section 216 of INA, 29 CFR Part 655, or these regulations.

Section 501.5

This section sets forth the Secretary's authority to make investigations to determine compliance with applicable provisions of INA. Persons refusing to permit such investigations may be subject to injunction, imposition of civil money penalties or denial of any future labor certifications. Investigations shall be conducted in a manner which provides confidentiality to persons who provide information. Violations may be reported by any person to any local office of the Employment Service, to any office of the Wage and Hour Division, ESA, or any other authorized representative of the Secretary.

Section 501.6

This section sets forth the prohibition against interference by any person with any official of the Department of Labor assigned to perform an investigation, inspection or law enforcement function pursuant to INA and these regulations.

Section 501.7

This section incorporates appropriate language from Title 18, U.S.C. which, provides for a fine of not more than $10,000 and or imprisonment for not more than 5 years for anyone who willfully or knowingly provides false or misleading information in statements and data with regard to any matter under the jurisdiction of the United States.

Section 501.10

This section provides definitions of terms used in these regulations. Definitions promulgated by ETA in 20 CFR Part 655 are also set forth for information purposes. Comments concerning such definitions should be submitted to the Assistant Secretary for Employment and Training, Washington, DC 20210, Attention: Director U.S. Employment Service, or before July 31, 1987. Of particular interest are the definitions of "work contract" at 501.10(d) and "agricultural labor or services" at 501.10(f). As used in these regulations "work contract" means the conditions of employment relating to wages, hours, working conditions, and

other benefits and includes at a minimum, the terms of the job offer included in the application for temporary labor certification under 20 CFR Part 655. The definition of "agricultural labor or services" matches the existing definition in the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) and the Fair Labor Standards Act (FLSA).

Section 501.15

This section identifies those enforcement actions by the Wage and Hour Division, as provided in these regulations, which pertain to the employment of any H–2A worker or other worker in corresponding employment employed by an H–2A employer and include enforcement of any work contract provisions which apply to such employment under section 216 of INA.

Section 501.16

This section sets forth sanctions which may be taken against any person who has violated section 216 of the INA or these regulations. These include denial of labor certification, institution of administrative proceedings for the enforcement of contractual obligations, assessment of civil money penalties, and civil actions through the U.S. District court.

Section 501.17

This section sets forth that multiple remedies may be sought simultaneously against any person who has violated the Act or these regulations.

Section 501.18

This section authorizes the Solicitor of Labor, through authorized representatives, to represent the Secretary in any civil litigation or administrative hearing under the Act and these regulations.

Section 501.19

This section outlines criteria to be considered in determining the amount of civil money penalty to be assessed.

Section 501.20

This section sets forth the manner by which findings of violations disclosed are enforced through: (1) administrative proceedings to recover unpaid wages, to enforce contractual obligations or to assess civil money penalties and/or (2) civil proceedings in any appropriate District Court for injunctive relief or to petition for specific performance of contractual obligations.

Section 501.21

This section indicates that recommendations shall be made by Wage and Hour to ETA, for consideration of labor certification denial where violations disclosed appear to warrant such action.

Section 501.22

This section provides for the payment of civil money penalties which have become a final order of the Secretary, to be submitted to the Wage and Hour Regional Office having jurisdiction over the area in which the violation occurred.

Section 501.30

This section states that the process to assess a civil money penalty and the enforcement of contractual obligations are contained in the following procedures.

Section 501.31

This section advises that any person who is assessed a civil money penalty or against whom administrative action is taken to enforce contractual obligations, including the recovery of unpaid wages, under these regulations shall be notified in writing of such assessment or action taken.

Section 501.32

This section sets forth the information contained in the notification letter concerning any unpaid wages due or contractual obligations required and the amount of any civil money penalty assessment and reasons therefor.

Section 501.33

This section indicates that any person who is assessed a civil money penalty or against whom administrative action is taken to enforce contractual obligations, including the recovery of unpaid wages, may request an administrative hearing on the determination and lists the information that should be included in a request for such a hearing.

Section 501.34

This section indicates that the rules established by the Secretary at 29 CFR Part 18 shall apply to administrative proceedings under this regulation unless otherwise specifically stated herein.

Section 501.35

This indicates that action to grant a hearing on the assessment of civil money penalties shall begin upon receipt of a timely request for such hearing.

Section 501.36

This section explains the manner by which administrative proceedings are captioned.

Section 501.37

This section explains the procedures for referral of a properly filed request for hearing to the Chief Administrative Law Judge.

Section 501.38

This section provides for notification of all parties of docketing by the Chief Administrative Law Judge.

Section 501.39

This section explains procedure for service of pleadings and other documents required for any administrative proceeding upon attorneys for the Department of Labor.

Section 501.40

This section concerns agreements containing consent findings and preparation of any order disposing of all or part of the proceeding prior to hearing and specifies the time frame for negotiating such agreement and the contents thereof.

Section 501.41

This section sets forth the process for the issuance of a Decision and Order by the Administrative Law Judge, the contents thereof, and the right by either party to petition the Secretary to review the decision.

Section 501.42

This section provides for notification by certified mail to be made to all parties of the Secretary's determination to review the Decision and Order of the Administrative Law Judge.

Section 501.43

This section states the responsibility of the Office of Administrative Law Judges to forward documents to the Secretary upon receipt of the Secretary's Notice of Intent to Review a Decision and Order of an Administrative Law Judge.

Section 501.44

This section states the responsibility of the Secretary concerning notification of the parties involved where the Secretary has issued a Notice of Intent to Review a Decision and Order of an Administrative Law Judge.

Section 501.45

This section provides for the distribution of the Secretary's final decision by certified mail where the

Secretary has reviewed a Decision and Order of an Administrative Law Judge.

Section 501.46

This section provides for the retention of official records of completed administrative hearings.

Section 501.47

This section provides for action by the Chief Adminstrative Law Judge upon receipt of a notice of appeal to a U.S. District Court after administrative remedies have been exhausted.

Regulatory Impact

This interim final rule will affect only the small number of employers using nonimmigrant alien workers ("H–2A visaholders") in temporary agricultural jobs in the U.S. The regulations are largely procedural in nature. It will not have the financial or other impact to make it a major rule, and therefore, the preparation of a regulatory impact analysis is not necessary. See Executive Order No. 12291, 3 CFR 1981 Comp., p. 127, 5 U.S.C. 601 note.

At the time the proposed rule was published, the Department of Labor notified the Chief Counsel for Advocacy, Small Business Administration, and made the certification pursuant to the Regulatory Flexibility Act at 5 U.S.C. 605(b), that the rule does not have a significant economic impact on a substantial number of small entities. No significant economic impact is imposed by the proposed regulation above the costs contained in the current temporary alien agricultural labor certification program.

In preparing the interim final rule, the Department of Labor consulted with the Immigration and Naturalization Service of the Department of Justice, and with the Department of Agriculture. This rule was submitted to the Attorney General for approval, pursuant to 301(e) of the Immigration Reform and Control Act of 1986. 8 U.S.C. 1186 note. This interim final rule received such approval.

Catalogue of Federal Domestic Assistance Number

This program is listed in the *Catalogue of Federal Domestic Assistance* as Number 17.202, "Certification of Foreign Workers for Agricultural and Logging Employment."

List of Subjects in 29 CFR Part 501

Administrative practice and procedure, Agriculture, Aliens, Employment, Farmers, Housing, Housing Standards, Immigration, Labor, Migrant labor, Penalties, Transportation Wages.

Accordingly, a new Part 501 is added to Title 29, Code of Federal Regulations. as follows.

Signed at Washington, DC this 26th day of May, 1987.

William E. Brock,

Secretary of Labor.

Part 501—Enforcement of Contractual Obligations For Temporary Alien Agricultural Workers Admitted Under Section 216 of the Immigration and Nationality Act

Subpart A—General Provisions

Sec.

Subpart B—Enforcement of Work Contracts

Subpart C—Administrative Proceedings

Procedures Relating to Hearing

Rules of Practice

Referral for Hearing

Procedures Before Administrative Law Judge

Post-Hearing Procedures

Record

Authority: 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1186.

Subpart A—General Provisions

§ 501.0 Introduction.

These regulations cover the enforcement of all contractual obligations provisions applicable to the employment of H–2A workers under section 216 of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA). These regulations are also applicable to the employment of other workers hired by employers of H–2A workers in the occupations and for the period of time set forth in the job order approved by ETA as a condition for granting H–2A certification, including any extension thereof. Such other workers hired by H–2A employers are hereafter referred to as engaged in corresponding employment.

§ 501.1 Purpose and Scope.

(a) *Statutory Standard.* Section 216(a) of the INA provides that—

(1) A petition to import an alien as an H–2A worker (as defined in subsection (i)(2) may not be approved by the Attorney General unless the petitioner has applied to the Secretary of Labor for a certification that—

(A) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and

(B) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

(b) *Role of the ETA, USES.* The issuance and denial of labor certification under section 216 of the INA has been delegated by the Secretary of Labor to the Employment and Training Administration (ETA). In general, matters concerning the obligations of an employer of H–2A workers related to the labor certification process are administered and enforced by ETA. Included within ETA's jurisdiction are such issues as whether U.S. workers were available, whether positive recruitment was conducted, whether there was a strike or lockout, the methodology for establishing adverse effect wage rates, whether workers' compensation insurance was provided, whether employment was offered to U.S. workers for up to 50 percent of the contract period and other similar matters. The regulations pertaining to the issuance and denial of

labor certification for temporary alien workers by the Employment and Training Administration are found in Title 20 CFR, Part 655.

(c) *Role of ESA, Wage and Hour Division.* Section 216(g)(2) of the INA provides that—

> [T]he Secretary of Labor is authorized to take such actions including imposing appropriate penalties and seeking appropriate injunctive relief and specific performance of contractual obligations, as may be necessary to assure employer compliance with terms and conditions of employment under this section.

Certain investigation, inspection and law enforcement functions to carry out the provisions of section 216 of the INA have been delegated by the Secretary of Labor to the Employment Standards Administration (ESA), Wage and Hour Division. In general, matters concerning the obligations of the work contract between an employer of H–2A workers and the H–2A workers and other workers in corresponding employment hired by H–2A employers are enforced by ESA. Included within the enforcement responsibility of ESA, Wage and Hour Division are such matters as the payment of required wages, transportation, meals and housing provided during the employment. The Wage and Hour Division has the responsibility to carry out investigations, inspections and law enforcement functions and in appropriate instances impose penalties, seek injunctive relief and specific performance of contractual obligations, including recovery of unpaid wages.

(d) *Effect of Regulations.* The amendments to the INA made by Title III of the IRCA apply to petitions and applications filed on and after June 1, 1987. Accordingly, the enforcement functions carried out by the Wage and Hour Division under the INA and these regulations apply to the employment of any H–2A worker and any other workers hired by H–2A employers in corresponding employment as the result of any petition or application filed with the Department on and after June 1, 1987.

§ 501.2 Coordination of Intake Between DOL Agencies.

Complaints received by ETA, or any State Employment Service Agency regarding contractual H–2A labor standards between the employer and the employee will be immediately forwarded to the appropriate Wage and Hour office for appropriate action under these regulations.

§ 501.3 Discrimination prohibited.

No person shall intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any person who has:

(a) Filed a complaint under or related to section 216 of the INA or these regulations;

(b) Instituted or caused to be instituted any proceedings related to section 216 of the INA or these regulations;

(c) Testified or is about to testify in any proceeding under or related to section 216 of the INA or these regulations;

(d) Exercised or asserted on behalf of himself or others any right or protection afforded by section 216 of the INA or these regulations.

(e) Consulted with an employee of a legal assistance program or an attorney on matters related to section 216 of the INA (8 U.S.C. 1186), or to this subpart or any other DOL regulation promulgated pursuant to section 216 of the INA.

Allegations of discrimination in employment against any person will be investigated by Wage and Hour. Where Wage and Hour has determined through investigation that such allegations have been substantiated appropriate remedies may be sought. Wage and Hour may assess civil money penalties, seek injunctive relief, and/or seek additional remedies necessary to make the employee whole as a result of the discrimination, as appropriate, and may recommend to ETA that labor certification of any violator be denied in the future.

§ 501.4 Waiver of rights prohibited.

No person shall seek to have an H–2A worker, or other worker employed in corresponding employment by an H–2A employer, waive rights conferred under section 216 of the INA or under these regulations. Such waiver is against public policy. Any agreement by an employee purporting to waive or modify any rights inuring to said person under the Act or these regulations shall be void as contrary to public policy, except that a waiver or modification of rights or obligations hereunder in favor of the Secretary shall be valid for purposes of enforcement of the provisions of the Act or these regulations. This does not prevent agreements to settle private litigation.

§ 501.5 Investigation authority of Secretary.

(a) *General.* The Secretary, either pursuant to a complaint or otherwise, shall, as may be appropriate, investigate and, in connection therewith, enter and inspect such places and vehicles (including housing) and such records (and make transcriptions thereof), question such persons and gather such information as deemed necessary by the Secretary to determine compliance with contractual obligations under section 216 of the INA or these regulations.

(b) *Failure to permit investigation.* Where any person using the services of an H–2A worker does not permit an investigation concerning the employment of his or her workers the Wage and Hour Division shall report such occurrence to ETA and may recommend denial of future labor certifications to such person. In addition, Wage and Hour may take such action as may be appropriate, including the seeking of an injunction or assessing civil money penalties, against any person who has failed to permit Wage and Hour to make an investigation.

(c) *Confidential Investigation.* The Secretary shall conduct investigations in a manner which protects the confidentiality of any complainant or other person who provides information to the Secretary in good faith.

(d) *Report of Violations.* Any person may report a violation of the work contract obligations of section 216 of the INA or these regulations to the Secretary by advising any local office of the Employment Service of the various States, any office of ETA, any office of the Wage and Hour Division, ESA, U.S. Department of Labor, or any other authorized representative of the Secretary. The office or person receiving such a report shall refer it to the appropriate office of the Wage and Hour Division, ESA, for the area in which the reported violation is alleged to have occurred.

§ 501.6 Prohibition on Interference with Department of Labor Officials.

No person shall interfere with any official of the Department of Labor assigned to perform an investigation, inspection or law enforcement function pursuant to the INA and these regulations during the performance of such duties. Wage and Hour will seek such action as it deems appropriate, including an injunction to bar any such interference with an investigation and/or assess a civil money penalty therefor. In addition Wage and Hour may refer a report of the matter to ETA with a recommendation that the person's labor certification be denied in the future. (Federal statutes which prohibit persons from interfering with a Federal officer in the course of official duties are found at 18 U.S.C. 111 and 18 U.S.C. 1114.)

§ 501.7 Accuracy of information, Statements, Data.

Information, statements and data submitted in compliance with provisions of the Act or these regulations are subject to Title 18, section 1001, of the United States Code, which provides:

Section 1001. Statements or entries generally.

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

§ 501.10 Definitions.

The definitions in (a) through (d) are set forth for purposes of this part. In addition, the definitions in (e) through (v) are promulgated at 20 CFR 655.100(b), are utilized herein, and are incorporated and set forth for information purposes.

(a) "Act" and "INA" mean the Immigration and Nationality Act, as amended (8 U.S.C. 1101 *et seq.*), with reference particularly to section 216.

(b) "Administrative Law Judge (ALJ)" means a person within the Department of Labor Office of Administrative Law Judges appointed pursuant to 5 U.S.C. 3105.

(c) "Administrator" means the Administrator of the Wage and Hour Division, Employment Standards Administration, United States Department of Labor, and such authorized representatives as may be designated to perform any of the functions of the Administrator under this part.

(d) "Work contract" means all the material terms and conditions of employment relating to wages, hours, working conditions, and other benefits, including those terms and conditions required by the applicable regulations in Subpart B of 20 CFR Part 655, *Labor Certification Process for Temporary Agricultural Employment in the United States*, and those contained in the Application for Alien Employment Certification and job offer under that subpart, which contract between the employer and the worker may be in the form of a separate written document. In the absence of a separate written work contract incorporating the required terms and conditions of employment, entered into between the employer and the worker, the work contract at a minimum shall be the terms of the job order included in the application for temporary labor certification, and shall be enforced in accordance with these regulations.

(e) "Adverse effect wage rate (AEWR)" means the wage rate which the Director has determined must be offered and paid, as a minimum, to every H–2A worker and every U.S. worker for a particular occupation and/or area in which an employer employs or seeks to employ an H–2A worker so that the wages of similarly employed U.S. workers will not be adversely affected.

(f) *"Agricultural labor or services".* Pursuant to section 101(a)(15)(ii)(a) of the INA (8 U.S.C. 1101(a)(15)(H)(ii)(a)), "agricultural labor or services" is defined for the purposes of this subpart as either "agricultural labor" as defined and applied in section 3121(g) of the Internal Revenue Code of 1954 (26 U.S.C. 3121(g)) or "agriculture" as defined and applied in section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f)). An occupation included in either statutory definition shall be "agricultural labor or services", notwithstanding the exclusion of that occupation from the other statutory definition. For informational purposes, the statutory provisions are quoted below.

(i) *"Agricultural labor".* Section 3121(g) of the Internal Revenue Code of 1954 (26 U.S.C. 3121(g)) quoted as follows, defines the term "agricultural labor" to include all service performed:

(1) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and furbearing animals and wildlife;

(2) Services performed in the employ of the owner or tenant or other operator of a farm, in connection with the operation, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm;

(3) In connection with the production or harvesting of any commodity defined as an agricultural commodity in section 15(g) of the Agricultural Marketing Act, as amended (12 U.S.C. 1141j), or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes;

(4)(A) In the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity; but only if such operator produced more than one-half of the commodity with respect to which such service is performed;

(B) In the employ of a group of operators of farms (other than a cooperative organization) in the performance of service described in subparagraph (A), but only if such operators produced all of the commodity with respect to which such service is performed. For purposes of this subparagraph, any unincorporated group of operators shall be deemed a cooperative organization if the number of operators comprising such group is more than 20 at any time during the calendar quarter in which such service is performed;

(C) The provisions of subparagraphs (A) and (B) shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; or

(5) On a farm operated for profit if such service his not in the course of the employer's trade or business or is domestic service in a private home of the employer.

As used in this subsection, the term "farm" includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.

(ii) *"Agriculture".* Section 203(f) of Title 29, United States Code, (section 3(f) of the Fair Labor Standards Act of 1938), quoted as follows, defines "agriculture" to include:

(f) * * * farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(iii) *"Agricultural commodity".* Section 1141j(g) of Title 12, United States Code, (section 15(g) of the Agricultural Marketing Act, as amended) quoted as follows, defines "agricultural commodity" to include:

(g) * * * in addition to other agricultural commodities, crude gum (oleoresin) from a living tree, and the following products as processed by the original producer of the crude gum (oleoresin) from which derived: Gum spirits of turpentine, and gum rosin, as defined in section 92 of Title 7.

(iv) *"Gum rosin".* Section 92 of Title 7, United States Code, quoted as follows,

defines "gum spirits of turpentine" and "gum rosin" as—

(c) "Gum spirits of turpentine" means spirits of turpentine made from gum (oleoresin) from a living tree.

* * * * *

(g) "Gum rosin" means rosin remaining after the distillation of gum spirits of turpentine.

(g) *"Of a temporary or seasonal nature"*—(1) *"On a seasonal or other temporary basis"*. For the purposes of this subpart "of a temporary or seasonal nature" means "on a seasonal or other temporary basis", as defined in the Employment Standards Administration's Wage and Hour Division's regulation at 29 CFR 500.20 under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). For informational purposes § 500.20 as it pertains to seasonal or temporary basis is quoted below.

(2) *MSPA definition.* For information purposes, the definition of "on a seasonal or other temporary basis", as set forth at 29 CFR 500.20, is provided below:

On a seasonal or other temporary basis means:

* * * * *

Labor is performed on a seasonal basis, where, ordinarily, the employment pertains to or is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year. A worker who moves from one seasonal activity to another, while employed in agriculture or performing agricultural labor, is employed on a seasonal basis even though he may continue to be employed during a major portion of the year.

* * * * *

A worker is employed on "other temporary basis" where he is employed for a limited time only or the performance is contemplated for a particular piece of work, usually of short duration. Generally, employment, which is contemplated to continue indefinitely, is not temporary.

* * * * *

"On a seasonal or other temporary basis" does not include the employment of any foreman or other supervisory employee who is employed by a specific agricultural employer or agricultural association essentially on a year round basis.

* * * * *

"On a seasonal or other temporary basis" does not include the employment of any worker who is living at his permanent place of residence, when that worker is employed by a specific agricultural employer or agricultural association on essentially a year round basis to perform a variety of tasks for his employer and is not primarily employed to do field work.

(3) *"Temporary"*. For the purpose of this subpart, the definition of "temporary" in paragraph (c)(2)(ii) of this section refers to any job opportunity covered by this subpart where the employer needs a worker for a position, either temporary or permanent, for a limited period of time, which shall be for less than one year, unless the original temporary alien agricultural labor certification is extended based on unforeseen circumstances, pursuant to § 655.106(c)(3) of this part.

(h) "DOL" means the United States Department of Labor.

(i) "Employer" means a person, firm, corporation or other association or organization which suffers or permits a person to work and (1) which has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ workers at a place within the United States and (2) which has an employer relationship with respect to employees under this subpart as indicated by the fact that it may hire, pay, fire, supervise or otherwise control the work of any such employee. An association of employers shall be considered the sole employer if it alone has the indicia of an employer set forth in this definition. Such an association, however, shall be considered as a joint employer with an employer member if it shares with the employer member one or more of the definitional indicia.

(j) "Employment Service (ES)" and "Employment Service (ES) System" mean, collectively, the USES, the State agencies, the local offices, and the ETA regional offices.

(k) "Employment Standards Administration" means the agency within the Department of Labor (DOL), which includes the Wage and Hour Division, and which is charged with the carrying out certain functions of the Secretary under the INA.

(l) "Employment and Training Administration (ETA)" means the agency within the Department of Labor (DOL) which includes the United States Employment Service (USES).

(m) "H–2A worker" means any nonimmigrant alien admitted to the United States for agricultural labor or services of a temporary or seasonal nature under section 101(a)(15)(H)(ii)(a) of the INA (8 U.S.C. 1101(a)(15)(H)(ii)(a)).

(n) "Immigration and Naturalization Service (INS)" means the component of the U.S. Department of Justice which makes the determination under the INA on whether or not to grant visa petitions to employers seeking H–2A workers to perform temporary agricultural work in the United States.

(o) "Job offer" means the offer made by an employer or potential employer of H–2A workers to both U.S. and H–2A workers describing all the material terms and conditions of employment, including those relating to wages, working conditions, and other benefits.

(p) "Secretary" means the Secretary of Labor or the Secretary's designee.

(q) "State agency" means the State employment service agency designated under section 4 of the Wagner-Peyser Act to cooperate with the USES in the operation of the ES System.

(r) "Solicitor of Labor" means the Solicitor, United States Department of Labor, and includes employees of the Office of the Solicitor of Labor designated by the Solicitor to perform functions of the Solicitor under this subpart.

(s) "Temporary alien agricultural labor certification" means the certification made by the Secretary of Labor with respect to an employer seeking to file with INS a visa petition to import an alien as an H–2A worker, pursuant to sections 101(a)(15)(H)(ii)(a), 214 (a) and (c), and 216 of the INA that (1) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the agricultural labor or services involved in the petition, and (2) the employment of the alien in such agricultural labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed (8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184 (a) and (c), and 1186).

(t) "United States Employment Service (USES)" means the agency of the U.S. Department of Labor, established under the Wagner-Peyser Act, which is charged with administering the national system of public employment offices and carrying out certain functions of the Secretary under the INA.

(u) "United States (U.S.) worker" means any worker who, whether a U.S. national, a U.S. citizen, or an alien, is legally permitted to work in the job opportunity within the United States (as defined at section 101(a)(38) of the INA (8 U.S.C. 1101(a)(38)).

(v) "Wages" means all forms of cash remuneration to a worker by an employer in payment for personal services.

Subpart B—Enforcement of Work Contracts

§ 501.15 Enforcement.

The investigations, inspections and law enforcement functions to carry out the provisions of section 216 of the INA, as provided in these regulations for enforcement by the Wage and Hour Division, pertain to the employment of

any H–2A worker and any other worker employed in corresponding employment by an H–2A employer. Such enforcement includes those work contract provisions as defined in § 501.10(d). The work contract enforced includes the employment benefits which must be stated in the job offer, as prescribed in 20 CFR 655.102.

§ 501.16 General.

Whenever the Secretary believes that the H–2A provisions of the INA or these regulations have been violated such action shall be taken and such proceedings instituted as deemed appropriate, including (but not limited to) the following:

(a) Impose denial of labor certification against any person for a violation of the H–2A obligations of the INA or the regulations. ETA shall make all determinations regarding the issuance or denial of labor certification. ESA shall make all determinations regarding the enforcement functions listed in paragraphs (b) through (d) of this section.

(b) Institute appropriate administrative proceedings, including the recovery of unpaid wages, the enforcement of any other contractual obligations and the assessment of a civil money penalty against any person for a violation of the H–2A work contract obligations of the Act or these regulations.

(c) Petition any appropriate District Court of the United States for temporary or permanent injunctive relief, including the withholding of unpaid wages, to restrain violation of the H–2A provisions the Act or these regulations by any person;

(d) Petition any appropriate District Court of the United States for specific performance of contractual obligations.

§ 501.17 Concurrent actions.

The taking of any one of the actions referred to above shall not be a bar to the concurrent taking of any other action authorized by the H–2A provisions of the Act and these regulations, or the regulations of 20 CFR Part 655.

§ 501.18 Representation of the Secretary

(a) Except as provided in section 518(a) of Title 28, U.S. Code, relating to litigation before the Supreme Court, the Solicitor of Labor may appear for and represent the Secretary in any civil litigation brought under the Act.

(b) The Solicitor of Labor, through the authorized representatives shall represent the Administrator and the Secretary in all administrative hearings under the H–2A provisions of the Act and these regulations.

§ 501.19 Civil money penalty assessment.

(a) A civil money penalty may be assessed by the Administrator for each violation of the work contract or these regulations.

(b) In determining the amount of penalty to be assessed for any violation of the work contract as provided in the H–2A provisions of the Act or these regulations the Administrator shall consider the type of violation committed and other relevant factors. The matters which may be considered include, but are not limited to the following:

(1) Previous history of violation, or violations of the H–2A provisions of the Act and these regulations;

(2) The number of workers affected by the violation or violations;

(3) The gravity of the violation or violations;

(4) Efforts made in good faith to comply with the H–2A provisions of the Act and these regulations;

(5) Explanation of person charged with the violation or violations;

(6) Commitment to future compliance, taking into account the public health, interest or safety, and whether the person has previously violated the H–2A provisions of the Act;

(7) The extent to which the violator achieved a financial gain due to the violation, or the potential financial loss or potential injury to the workers.

(c) A civil money penalty for violation of the work contract will not exceed $1,000 for each violation committed against each worker. A civil money penalty for discrimination or interference with Wage and Hour investigative authority will not exceed $1,000 for each such act of discrimination or interference.

§ 501.20 Enforcement of Wage and Hour investigative authority.

Sections 501.5 through 501.7 of this part prescribe the investigation authority conferred upon the Wage and Hour Division for the purpose of enforcing the contractual obligations. These sections indicate the actions which may be taken upon failure to permit or interference with an investigation. No person shall interfere with any employee of the Secretary who is exercising or attempting to exercise this investigative or enforcement authority. As stated in §§ 501.5, 501.6 and in 501.19 of this part, a civil money penalty may be assessed for each failure to permit an investigation or interference therewith, and other appropriate relief may be sought. In addition Wage and Hour shall report each such occurrence to ETA and may recommend to ETA denial of future labor certifications. The taking of any one action shall not bar the taking of any additional action.

§ 501.21 Referral of findings to ETA.

Where Wage-Hour finds violations Wage and Hour shall so notify the appropriate representative of ETA and shall forward appropriate information, including investigative information to such representative for review and consideration.

§ 501.22 Civil money penalties—payment and collection.

Where the assessment is directed in a final order by the Administrator, by an Administrative Law Judge, or by the Secretary, the amount of the penalty is immediately due and payable to the United States Department of Labor. The person assessed such penalty shall remit promptly the amount thereof as finally determined, to the Administrator by certified check or by money order, made payable to the order of "Wage and Hour Division, Labor." The remittance shall be delivered or mailed to the Wage and Hour Division Regional Office for the area in which the violations occurred.

Subpart C—Administrative Proceedings

§ 501.30 Applicability of procedures and rules.

The procedures and rules contained herein prescribe the administrative process which will be applied with respect to a determination to impose an assessment of civil money penalties and which may be applied to the enforcement of contractual obligations, including the collection of unpaid wages due as a result of any violation of the H–2A provisions of the Act or of these regulations. Except with respect to the imposition of civil money penalties, the Secretary may, in his discretion, seek enforcement action in Federal court without resort to any administrative proceedings.

Procedures Relating to Hearing

§ 501.31 Written notice of determination required.

Whenever the Administrator determines to assess a civil money penalty or to proceed administratively to enforce contractual obligations, including the recovery of unpaid wages, the person against whom such action is taken shall be notified in writing of such determination.

§ 501.32 Contents of notice.

The notice required by § 501.31 shall:

(a) Set forth the determination of the Administrator including the amount of any unpaid wages due or contractual

obligations required and the amount of any civil money penalty assessment and the reason or reasons therefor.

(b) Set forth the right to request a hearing on such determination.

(c) Inform any affected person or persons that in the absence of a timely request for a hearing, the determination of the Administrator shall become final and unappealable.

(d) Set forth the time and method for requesting a hearing, and the procedures relating thereto, as set forth in § 501.33.

§ 501.33 Request for hearing.

(a) Any person desiring to request an administrative hearing on a determination referred to in § 501.32 shall make such request in writing to the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, no later than thirty (30) days after issuance of the notice referred to in § 501.32.

(b) No particular form is prescribed for any request for hearing permitted by this part. However, any such request shall:

(1) Be typewritten or legibly written;

(2) Specify the issue or issues stated in the notice of determination giving rise to such request;

(3) State the specific reason or reasons why the person requesting the hearing believes such determination is in error;

(4) Be signed by the person making the request or by an authorized representative of such person; and

(5) Include the address at which such person or authorized representative desires to receive further communications relating thereto.

(c) The request for such hearing must be received by the Administrator at the above address, within the time set forth in paragraph (a) of this section. For the affected person's protection, if the request is by mail, it should be by certified mail.

Rules of Practice

§ 501.34 General.

Except as specifically provided in these regulations, the "Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges" established by the Secretary at 29 CFR Part 18 shall apply to administrative proceedings described in this part.

§ 501.35 Commencement of proceeding.

Each administrative proceeding permitted under the Act and these regulations shall be commenced upon receipt of a timely request for hearing filed in accordance with § 501.33.

§ 501.36 Caption of proceeding.

(a) Each administrative proceeding instituted under the Act and these regulations shall be captioned in the name of the person requesting such hearing, and shall be styled as follows: In the Matter of —, Respondent.

(b) For the purposes of such administrative proceedings the Administrator shall be identified as plaintiff and the person requesting such hearing shall be named as respondent.

Referral for Hearing

§ 501.37 Referral to Administrative Law Judge.

(a) Upon receipt of a timely request for a hearing filed pursuant to and in accordance with § 501.33 the Administrator, by the Associate Solicitor for the Division of Fair Labor Standards or by the Regional Solicitor for the Region in which the action arose, shall, by Order of Reference, promptly refer a copy of the notice of administrative determination complained of, and the original or a duplicate copy of the request for hearing signed by the person requesting such hearing or by the authorized representative of such person, to the Chief Administrative Law Judge, for a determination in an administrative proceeding as provided herein. The notice of administrative determination and request for hearing shall be filed of record in the Office of the Chief Administrative Law Judge and shall, respectively, be given the effect of a complaint and answer thereto for purposes of the administrative proceeding, subject to any amendment that may be permitted under these regulations or 29 CFR Part 18.

(b) A copy of the Order of Reference, together with a copy of these regulations, shall be served by counsel for the Administrator upon the person requesting the hearing, in the manner provided in 29 CFR 18.3.

§ 501.38 Notice of docketing.

Upon receipt of an Order of Reference, the Chief Administrative Law Judge shall appoint an Administrative Law Judge to hear the case. The Administrative Law Judge shall promptly notify all interested parties of the docketing of the matter and shall set the time and place of the hearing. The date of the hearing shall be not more than 60 days from the date on which the Order of Reference was filed.

§ 501.39 Service upon attorneys for the Department of Labor—number of copies.

Two copies of all pleadings and other documents required for any administrative proceeding provided herein shall be served on the attorneys for the Department of Labor. One copy shall be served on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, and one copy on the Attorney representing the Department in the proceeding.

Procedures Before Administrative Law Judge

§ 501.40 Consent findings and order.

(a) *General.* At any time after the commencement of a proceeding under this part, but prior to the reception of evidence in any such proceeding, a party may move to defer the receipt of any evidence for a reasonable time to permit negotiation of an agreement containing consent findings and an order disposing of the whole or any part of the the proceeding. The allowance of such deferment and the duration thereof shall be at the discretion of the Administrative Law Judge, after consideration of the nature of the proceeding, the requirements of the public interest, the representations of the parties, and the probability of an agreement being reached which will result in a just disposition of the issues involved.

(b) *Content.* Any agreement containing consent findings and an order disposing of a proceeding or any part thereof shall also provide:

(1) That the order shall have the same force and effect as an order made after full hearing;

(2) That the entire record on which any order may be based shall consist solely of the notice of administrative determination (or amended notice, if one is filed), and the agreement;

(3) A waiver of any further procedural steps before the Administrative Law Judge; and

(4) A waiver of any right to challenge or contest the validity of the findings and order entered into in accordance with the agreement.

(c) *Submission.* On or before the expiration of the time granted for negotiations, the parties or their authorized representatives or their counsel may:

(1) Submit the proposed agreement for consideration by the Administrative Law Judge; or

(2) Inform the Administrative Law Judge that agreement cannot be reached.

(d) *Disposition.* In the event an agreement containing consent findings and an order is submitted within the time allowed therefor, the Administrative Law Judge, within thirty (30) days thereafter, shall, if satisfied with its form and substance, accept such agreement by issuing a decision based upon the agreed findings.

Post-Hearing Procedures

§ 501.41 Decision and order of Administrative Law Judge.

(a) The Administrative Law Judge shall prepare, within 60 days after completion of the hearing and closing of the record, a decision on the issues referred by the Administrator.

(b) The decision of the Administrative Law Judge shall include a statement of findings and conclusions, with reasons and basis therefor, upon each material issue presented on the record. The decision shall also include an appropriate order which may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator. The reason or reasons for such order shall be stated in the decision.

(c) The decision shall be served on all parties and the Secretary in person or by certified mail. The decision when served by the Administrative Law Judge shall constitute the final order of the Administrator unless the Secretary, as provided for in § 501.42 below determines to review the decision.

Review of Administrative Law Judge's Decision

§ 501.42 Procedures for Initiating and Undertaking Review.

(a) A respondent, the Administrator or any other party wishing review of the decision of an Administrative Law Judge shall, within 30 days of the decision of the Administrative Law Judge, petition the Secretary to review the decision. Copies of the petition shall be served on all parties and on the Administrative Law Judge. If the Secretary does not issue a notice accepting a petition for review within 30 days after receipt of a timely filing of the petition, or within 30 days of the date of the decision if no petition has been received, the decision of the Administrative Law Judge shall be deemed the final agency action.

(b) Whenever the Secretary either on the Secretary's own motion or by acceptance of a party's petition, determines to review the decision of an Administrative Law Judge, a notice of the same shall be served upon the Administrative Law Judge and upon all parties to the proceeding in person or by certified mail.

§ 501.43 Responsibility of the Office of Administrative Law Judges.

Upon receipt of the Secretary's Notice pursuant to § 501.42 of these regulations, the Office of Administrative Law Judges shall, promptly forward a copy of the complete hearing record to the Secretary.

§ 501.44 Additional information, if required.

Where the Secretary has determined to review such decision and order, the Secretary shall notify each party of:

(a) The issue or issues raised;

(b) The form in which submission shall be made (i.e., briefs, oral argument, etc.); and the time within which such presentation shall be submitted.

§ 501.45 Final decision of the Secretary.

The Secretary's final decision shall be issued within 90 days from the notice granting the petition and served upon all parties and the administrative law judge, in person or by certified mail.

Record

§ 501.46 Retention of official record.

The official record of every completed administrative hearing provided by these regulations shall be maintained and filed under the custody and control of the Chief Administrative Law Judge.

§ 501.47 Certification.

Upon receipt of a complaint seeking review of a decision issued pursuant to this part filed in a United States District Court, after the administrative remedies have been exhausted, the Chief Administrative Law Judge shall promptly index, certify and file with the appropriate United States District Court, a full, true, and correct copy of the entire record, including the transcript of proceedings.

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Part III

Department of Labor

Office of Workers' Compensation Program

20 CFR Parts 61 and 62

Claims for Compensation Under the War Hazards Compensation Act; Notice of Proposed Rulemaking

DEPARTMENT OF LABOR

Office of Workers' Compensation Program

20 CFR Parts 61 and 62

Claims for Compensation Under the War Hazards Compensation Act

AGENCY: Office of Workers' Compensation Program, Labor.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Labor proposes to revise the regulations governing the administration of the War Hazards Compensation Act, which provides compensation for injury or death due to a war-risk hazard, or detention by a hostile force or person, of overseas employees of contractors with the United States and certain other employees. The existing regulations fail to reflect amendments made to the Act in 1961, 1959, and 1958 which replaced the World War II frame of reference in the Act with language applicable to current and future conditions faced by employees of contractors working in hazardous overseas locations. Because the existing regulations have been found to be unnecessarily complex and lacking in clarity, the proposed revision will simplify and clarify the requirements for filing a claim under the Act, remove unnecessary and repetitious provisions, and bring the regulations up to date with amendments to the Act and current terminology.

DATE: Written comments must be submitted on or before July 16, 1987.

ADDRESS: Send written comments to Thomas M. Markey, Associate Director for Federal Employees' Compensation, Employment Standards Administration, U.S. Department of Labor, Room S-3229, Frances Perkins Building, 200 Constitution Avenue, NW., Washington, DC 20210; Telephone (202) 523-7552.

FOR FURTHER INFORMATION CONTACT: Thomas M. Markey, Associate Director for Federal Employees' Compensation, telephone (202) 523-7552.

SUPPLEMENTARY INFORMATION: The War Hazards Compensation Act (WHA), 42 U.S.C. 1701 *et seq.*, supplements the Defense Base Act (DBA), 42 U.S.C. 1651 *et seq.*, to complete the workers' compensation protection of Federal contractors' employees and certain other employees performing work in areas outside the United States. Under the WHA, responsibility for the payment of specified injury, death and detention benefits is assumed by the Federal Government and paid from the Employees' Compensation Fund established by 5 U.S.C. 8147. Section 104 of the WHA provides for the reimbursement of an insurance carrier, self-insured employer, or compensation fund that has paid benefits under the DBA, or other workers' compensation programs, if the injury or death was due to a war-risk hazard. If no compensation is payable under the DBA, an employee or his/her survivors may file a claim directly under section 101(a) of the WHA. Section 101(b) of the WHA also authorizes the payment of detention benefits for contractors' employees who are missing, captured or detained by a hostile force or person, or who are not returned to their homes or to the places of employment due to the failure of the United States or its contractor to furnish transportation.

The WHA was passed by Congress during World War II when it was determined that contractors' employees working overseas were not adequately protected under existing workers' compensation provisions. It was probable that any premium for war-risk coverage constructed by an insurance carrier would be either inadequate or excessive in relation to the losses and therefore very costly to the United States. Furthermore, it was believed that a war-risk loss was one which should be borne by the public at large and not by any private organization or individual.

The WHA was changed to remove the World War II frame of reference and its language revised to meet present and future conditions by amendments passed in 1958 (Pub. L. 85-608), 1959 (Pub. L. 86-70), and 1961 (Pub. L. 87-195). Revision of the existing regulations is required to reflect these changes and bring the regulations into conformity with current practice and usage.

The Secretary has determined that the existing regulations would also benefit from a revision that eliminates repetitious sections, removes unnecessary or outdated requirements, and clearly describes the provisions governing the three categories of benefits claimed under the WHA (i.e., reimbursement of an insurance carrier or self-insured employer under section 104 of the WHA; disability or death benefits under section 101(a); and detention benefits under section 101(b)). No major new provisions are proposed; however, the sections have been rearranged to provide the necessary clarity and ease of use.

The existing Part 61, General Administrative Provisions, contains sections concerning claims for disability, death or detention benefits under section 101 of the WHA. Part 61 also contains terminology and general provisions applicable to claims for reimbursement authorized under section 104 of the WHA. Currently, the regulations governing claims for reimbursement are found in Part 62, Reimbursement of Employers, Insurance Carriers, or Compensation Funds. To arrange the provisions more logically and clearly, and thus increase their usefulness to the reader, it is proposed that Part 62 be removed and the sections dealing with reimbursement claims be placed in a new Subpart B of the revised Part 61. The revised Part 61 will consist of five Subparts, as described below.

Subpart A describes the statutory and administrative framework within which claims under the WHA are processed, and defines terms used in the administration of the WHA. The description of coverage under the WHA is revised to reflect the extension of coverage to civilian employees of certain non-appropriated fund instrumentalities and overseas employees of various welfare organizations, as authorized by the 1958 amendments to the WHA. Coverage is also extended, under certain circumstances, to employees engaged under a contract financed by the Mutual Security Act of 1954, as provided by the amendment passed in 1961.

Information in the existing regulations about the historical background of the Bureau of Employees' Compensation (which was abolished and replaced by the Office of Workers' Compensation Programs in 1974) is eliminated, as this material is adequately covered in Subchapter A of Chapter I of Title 20. References to the Bureau of Employees' Compensation as the office with responsibility for administration of the Act have been changed to the Office of Workers' Compensation Programs. Language concerning the geographical areas where coverage applies is revised to recognize the Statehood of Alaska and Hawaii and to include the definition of "Continental United States" added to the WHA in 1959.

The definition of a war-risk hazard is revised to conform to the amended definition in the WHA, which eliminates references to World War II conditions. The statutory definition of a war-risk hazard, as last amended in 1958, does not specifically address coverage for injuries resulting from terrorist attacks. Further, the existing regulations are silent on the application of the WHA to such injuries. This has raised complicated issues in determining coverage under the WHA, as it is not always possible to identify the person or group responsible for a terrorist act, or to determine the intended target of the action. However, in the Department's view the reference to actions by a

hostile force or person as war-risk hazards includes coverage of at least some victims of terrorist acts.

We invite comments on the Department's interpretation. To assist interested parties in responding to this request several case examples are discussed below. For example, coverage under this part would extend to a Defense Base Act (DBA) employee who is injured or killed when a truck driven by members of a known terrorist organization is driven into a U.S. Embassy and exploded in a country where no war is in progress. The attack constitutes an "armed conflict" in itself, thereby satisfying the requirement of section 201(b). It is clearly against the United States since it was aimed at the official political presence of the United States in a foreign nation, the embassy. The United States is ipso facto "engaged" in the conflict whether or not it has a chance to act in response. To meet the requirement of "hostile force or person engaged in armed conflict", the terrorists must be related to an identifiable organization that attempts to achieve its political goals through the use of violence. Hence, it is a "war-risk hazard".

The situation where contractor personnel are off duty, sitting in a public place, and are injured or killed in a terrorist attack, presents a more difficult situation. The "indiscriminate" nature of the attack may preclude automatic characterization of the incident as "against" or "involving" the United States. If the attack is in effect an act of "rebellion or insurrection" against an ally of the United States, it would qualify as "action of a hostile force or person" under section 201(b)(2), (c)(2). However, the attack would also have to qualify as an act "during armed conflict between military forces of any origin." Hence, "military force" is the critical determinant, regardless of the relationship between the United States and the government at which the attack is directed. Therefore, in the situation where off-duty contractor personnel are injured or killed during a terrorist attack in a public place, WHA coverage would extend where the claimant can establish that the attackers were members of or acting on behalf of an identifiable military group, one that pursues its political goals through the use of violence, that has taken up arms against the United States or against the government where the incident arose.

The example of terrorist activity where an unidentified group of individuals hijacks an American airliner in a foreign country serves as another illustration of the analysis necessary to determine WHA coverage. If, for example, the declared mission of the hijackers was to take the airplane to a destination where political prisoners are held to exchange the airplane and its passengers for release of those prisoners, it cannot be said that the action arose during an armed conflict in which the United States is engaged. The United States is not the obvious object of the attack. Therefore, to obtain WHA coverage, a claimant must establish, under section 201(c)(3) that a state of war or armed conflict between identifiable organized military groups existed in the foreign country at the time of the hijacking incident. If this can be shown, an incident of this sort can be said to be a predictable consequence of such a state of affairs; the injury, death or detention of a covered employee serving in that country, resulting from such activity would be due to a war-risk hazard.

Another example of terrorist activity within the scope of WHA coverage exists where employees of a contractor to the Department of Defense in a foreign country are killed during an attack by native insurgents on the U.S. military bus on which they are riding. The claimants have shown that the attackers are members of a military/political group which seeks to overthrow the host (foreign national) government through the use of violence. The host government actively, through the use of its military forces, attempts to subdue this group. This situation comes within the scope of WHA as "an armed conflict in which the United States is engaged" because the attack was on a U.S. military bus, an identifiable symbol of U.S. presence, and because the attack was made by an identifiable terrorist group. This scenario also presents an "armed conflict between military forces of any origin in any country in which a person...is serving."

Where an individual with no connection to an identifiable group seeks revenge against the United States for its role in the Middle East by planting a bomb in a non-American airline, no WHA coverage can be extended. The perpetrator of this act cannot be connected to an identifiable group which pursues its political goals through the use of violence. In this scenario, one can conclude that the attacker is acting only out of personal revenge.

The existing § 61.1 contains a provision stating that any amendment to the Longshore and Harbor Workers' Compensation Act which increases the amount of benefits payable for injury or death must be applied retroactively to benefits being paid under the WHA, as if the amendment had been in effect at the time of the injury or death for which War Hazards benefits are paid. This provision was repealed in 1958, and is therefore deleted from the regulations.

Subpart B describes the procedure by which an insurance carrier, self-insured employer, or compensation fund may file a claim for reimbursement under section 104 of the WHA, and describes the rules for processing a claim for reimbursement and transferring a case for direct payment by the Department of Labor. In the existing regulations, these topics are covered in Part 62. The proposed revisions to the section describing how to file a claim for reimbursement update the name and address of the office to which claims should be sent, clarify the documentation necessary to support a claim, and eliminate the requirement that claims be filed on a quarterly schedule. The section covering reimbursement of claims expense, as proposed, describes a method of computing unallocated claims expense, removes the unnecessary repetition of instructions provided earlier in the subpart, and eliminates the requirement that claims for reimbursement be filed quarterly.

Subpart C contains the rules governing the filing and processing of claims for injury, disability or death benefits under section 101(a) of the WHA. The proposed revisions clarify the instructions for filing these claims and clearly define limitations on benefits, and deductions or exclusions that may apply. The lengthy definition of the term "processed" in the existing regulations is removed as being unnecessary for the effective understanding and use of the subpart. The section concerning the furnishing of medical treatment is revised to reflect the most desirable and expedient means of providing such care.

Subpart D contains provisions related to claims for detention benefits. The provisions have been revised to describe clearly the nature of the benefits provided, the eligibility requirements, and the procedures for filing claims.

Subpart E contains miscellaneous provisions concerning disclosure of program information, approval of claims for legal services, and assignment of claim. Sections dealing with the release of information and the Privacy Act are amended to conform with the general regulatory provisions issued by the Department (20 CFR Part 70a).

Classification

Executive Order 12291

The Department of Labor does not believe that the regulatory proposal constitutes a "major rule" under Executive Order 12291, because it is not likely to result in: (1) An annual effect on the economy of $100 million or more; (2) a major increase in cost or prices for consumers, individual industries, Federal, state or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. Accordingly, no regulatory analysis is required.

Paperwork Reduction Act

The information collection requirements entailed by the proposed regulations will not differ from those currently in effect. No new forms are required. All forms that are referenced have been submitted for approval by the Office of Management and Budget where required.

Regulatory Flexibility Act

The Department believes that the rule will have no "significant economic impact upon a substantial number of small entities" within the meaning of section 3(a) of the Regulatory Flexibility Act, Pub. L. 96–354, 91 Stat. 1164 (5 U.S.C. 605(b)). The Secretary has certified to the Chief Counsel for Advocacy of the Small Business Administration to this effect. This conclusion is reached because the proposed revisions do not impose any additional requirements upon small entities, but only implement the 1958, 1959 and 1961 amendments to the War Hazards Act. Accordingly, no regulatory impact analysis is required.

List of Subjects in 20 CFR Part 61

War claims, Workers' compensation, Claims, Labor, Detention benefits, Indemnity payments.

Accordingly, it is proposed that Parts 61 and 62, Subchapter F, Chapter I of Title 20, Code of Federal Regulations, be amended as set forth below.

1. The authority citation for 20 CFR Part 61 is revised to read as follows:

Authority: 1950 Reorg. Plan No. 19, sec. 1, 3 CFR, 1949–1953 Comp., p. 1010, 64 Stat. 1271; 5 U.S.C. 8145, 8149; 42 U.S.C. 1704, 1706; Secretary's Order 6–84, 49 FR 32473; Employment Standards Order 78–1, 43 FR 51469.

2. 20 CFR Part 61 is revised to read as follows:

PART 61—CLAIMS FOR COMPENSATION UNDER THE WAR HAZARDS COMPENSATION ACT, AS AMENDED

Subpart A—General Provisions

Sec.

Subpart B—Reimbursement of Carriers

Subpart C—Compensation for Injury, Disability, or Death

Subpart D—Detention Benefits

Subpart E—Miscellaneous Provisions

Subpart A—General Provisions

§ 61.1 Statutory Provisions

(a) The War Hazards Compensation Act, as amended (42 U.S.C. 1701 *et seq.*) provides for reimbursement of workers' compensation benefits paid under the Defense Base Act (42 U.S.C. 1651 *et seq.*), or under other workers' compensation laws as described in § 61.100(a), for injury or death causally related to a war-risk hazard.

(b) If no benefits are payable under the Defense Base Act or other applicable workers' compensation law, compensation is paid to the employee or survivors for the war-risk injury or death of—

(1) Any person subject to workers' compensation coverage under the Defense Base Act;

(2) Any person engaged by the United States under a contract for his or her personal services outside the continental United States;

(3) Any person subject to workers' compensation coverage under the Nonappropriated Fund Instrumentalities Act (5 U.S.C. 8171 *et seq.*);

(4) Any person engaged for personal services outside the continental United States under a contract approved and financed by the United States under the Mutual Security Act of 1954, as amended (other than Title II of Chapter II unless the Secretary of Labor, upon the recommendation of the head of any department or other agency of the United States Government, determines a contract financed under a successor provision of any successor Act should be covered by this subchapter), except that in cases where the United States is not a formal party to contracts approved and financed under the Mutual Security Act of 1954, as amended, the Secretary, upon the recommendation of the head of any department or agency of the United States, may waive the application of the Act; or

(5) Any person engaged for personal services outside the continental United States by an American employer providing welfare or similar services for the benefit of the Armed Forces under appropriate authorization by the Secretary of Defense.

(b) The Act also provides for payment of detention benefits to an employee specified in paragraph (a) of this section who—

(1) Is found to be missing from his or her place of employment under circumstances supporting an inference that the absence is due to the belligerent action of a hostile force or person;

(2) Is known to have been taken by a hostile force or person as a prisoner or hostage; or

(3) Is not returned to his or her home or to the place of employment due to the failure of the United States or its contractor to furnish transportation.

§ 61.2 Administration of the Act and this chapter.

(a) Pursuant to 42 U.S.C. 1706, Secretary of Labor's Order 6–84, (49 FR 32473), and Employment Standards Order 78–1, (43 FR 51469), the responsibility for administration of the Act has been delegated to the Director,

Office of Workers' Compensation Programs.

(b) In administering the provisions of the Act, the Director may enter into agreements or cooperative working arrangements with other agencies of the United States or of any State (including the District of Columbia, Puerto Rico, and the Virgin Islands) or political subdivisions thereof, and with other public agencies and private persons, agencies, or institutions within and outside the United States. The Director may also contract with insurance carriers for the use of their service facilities to process claims filed under the Act.

§ 61.3 Purpose and scope of this part.

(a) This Part 61 sets forth the rules applicable to the filing, processing, and payment of claims for reimbursement and workers' compensation benefits under the provisions of the War Hazards Compensation Act, as amended. The provisions of this part are intended to afford guidance and assistance to any person, insurance carrier, self-insured employer, or compensation fund seeking benefits under the Act, as well as to personnel within the Department of Labor who are required to administer the Act.

(b) Subpart A describes the statutory and administrative framework within which claims under the Act are processed, contains a statement of purpose and scope, and defines terms used in the administration of the Act.

(c) Subpart B describes the procedure by which an insurance carrier, self-insured employer, or compensation fund shall file a claim for reimbursement under section 104 of the Act, and describes the procedures for processing a claim for reimbursement and transferring a case for direct payment by the Department of Labor.

(d) Subpart C contains the rules governing the filing and processing of a claim for injury, disability or death benefits under section 101(a) of the Act.

(e) Subpart D contains provisions relating to claims for detention benefits under section 101(b) of the Act.

(f) Subpart E contains miscellaneous provisions concerning disclosure of program information, approval of claims for legal services, and assignment of claim.

§ 61.4 Definitions and use of terms.

For the purpose of this part—

(a) "The Act" means the War Hazards Compensation Act, 42 U.S.C. 1701 *et seq.*, as amended.

(b) "Office" or "OWCP" means the Office of Workers' Compensation Programs, Employment Standards Administration, United States Department of Labor.

(c) "Contractor with the United States" includes any subcontractor or subordinate subcontractor.

(d) "Carrier" means any payer of benefits for which reimbursement is requested under the Act, and includes insurance carriers, self-insured employers and compensation funds.

(e) "War-Risk Hazard" means any hazard arising during a war in which the United States is engaged; during an armed conflict in which the United States is engaged, whether or not war has been declared; or during a war or armed conflict between military forces of any origin, occurring within any country in which a person covered by the Act is serving; from—

(1) The discharge of any missile (including liquids and gas) or the use of any weapon, explosive, or other noxious thing by a hostile force or person or in combating an attack or an imagined attack by a hostile force or person;

(2) Action of a hostile force or person, including rebellion or insurrection against the United States or any of its allies;

(3) The discharge or explosion of munitions intended for use in connection with a war or armed conflict with a hostile force or person (except with respect to employees of a manufacturer, processor, or transporter of munitions during the manufacture, processing, or transporting of munitions, or while stored on the premises of the manufacturer, processor, or transporter);

(4) The collision of vessels in convoy or the operation of vessels or aircraft without running lights or without other customary peacetime aids to navigation; or

(5) The operation of vessels or aircraft in a zone of hostilities or engaged in war activities.

(f) "Hostile Force or Person" means any nation, any subject of a foreign nation, or any other person serving a foreign nation—

(1) Engaged in a war against the United States or any of its allies;

(2) Engaged in armed conflict, whether or not war has been declared, against the United States or any of its allies; or

(3) Engaged in a war or armed conflict between military forces of any origin in any country in which a person covered by the Act is serving.

(g) "Allies" means any nation with which the United States is engaged in a common military effort or with which the United States has entered into a common defensive military alliance.

(h) "War Activities" includes activities directly relating to military operations.

(i) "Continental United States" means the States and the District of Columbia.

(j) "Injury" means injury resulting from a war-risk hazard, as defined in this section, whether or not such injury occurred in the course of the person's employment, and includes any disease proximately resulting from a war-risk hazard.

(k) "Death" means death resulting from an injury, as defined in this section.

(l) The terms "compensation", "physician", and "medical, surgical, and hospital services and supplies" when used in Subparts D and E are construed and applied as defined in the Federal Employees' Compensation Act, as amended (5 U.S.C. 8101 *et seq.*).

(m) The terms "disability", "wages", "child", "grandchild", "brother", "sister", "parent", "widow", "widower", "student", "adoption" or "adopted" are construed and applied as defined in the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. 901 *et seq.*).

Subpart B—Reimbursement of Carriers

§ 61.100 General reimbursement provisions.

(a) The Office shall reimburse any carrier that pays benefits under the Defense Base Act or other applicable workers' compensation law due to the injury, disability or death of any person specified in § 61.1(a), if the injury or death for which the benefits are paid arose from a war-risk hazard. The amount to be reimbursed includes disability and death payments, funeral and burial expenses, medical expenses, and the reasonable and necessary claims expense incurred in processing the request.

(b) The Office shall not provide reimbursement in any case in which an additional premium for war-risk hazard was charged, or in which the carrier has been reimbursed, paid, or compensated for the loss for which reimbursement is requested.

(c) Reimbursement under this section with respect to benefits shall be limited to the amounts which will discharge the liability of the carrier under the applicable workers' compensation law.

§ 61.101 Filing a request for reimbursement.

(a) A carrier or employer may file a request for reimbursement. The request shall be submitted to the U.S. Department of Labor, Office of Workers' Compensation Programs, Branch of Special Claims, P.O. Box 37117, Washington, DC 20013–7117;

(b) Each request for reimbursement shall include documentation itemizing the payments for which reimbursement is claimed. The documentation shall be sufficient to establish the purpose of the payment, the name of the payee, the date(s) for which payment was made, and the amount of the payment. Copies of any medical reports and bills related to medical examination or treatment for which reimbursement is claimed shall also be submitted. If the carrier cannot provide copies of the payment drafts or receipts, the Office may accept a certified listing of payments which includes payee name, description of services rendered, date of services rendered, amount paid, date paid, check or draft number, and signature of certifier.

(c) When filing an initial request for reimbursement under the Act, the carrier shall submit copies of all available documents related to the workers' compensation case, including—

(1) Notice and claim forms;

(2) Statements of the employee or employer;

(3) Medical reports;

(4) Compensation orders; and

(5) Proof of liability (e.g., insurance policy or other documentation).

§ 61.102 Disposition of reimbursement requests.

(a) If the Office finds that insufficient or inadequate information has been submitted with the claim, the carrier shall be asked to submit further information. Failure to supply the requested information may result in disallowance of items not adequately supported as properly reimbursable.

(b) The Office shall not withhold payment of an approved part of a reimbursement request because of denial of another part of the reimbursement request.

(c) The Office shall regard awards, decisions and approved settlement agreements under the Defense Base Act or other applicable workers' compensation law, that have become final, as establishing, prima facie, the right of the beneficiary to the payment awarded or provided for.

(d) The Office shall advise the carrier of the amount approved for reimbursement. If the reimbursement request has been denied in whole or in part, the Office shall provide the carrier an explanation of the action taken and the reasons for the action. A carrier within the United States may file objections with the Associate Director for Federal Employees' Compensation to the disallowance or reduction of a claim within 60 days of the Office's decision. A carrier outside the United States has six months within which to file objections with the Associate Director. The Office may consider objections filed beyond the time limits under unusual circumstances or when reasonable cause has been shown for the delay. A determination by the Office is final.

(e) In determining whether a claim is reimbursable, the Office shall hold the carrier to the same degree of care and prudence as any individual or corporation in the protection of its interests or the handling of its affairs would be expected to exercise under similar circumstances. A part or an item of a claim may be disapproved if the Office finds that the carrier—

(1) Failed to take advantage of any right accruing by assignment or subrogation (except against the United States, directly or indirectly, its employees, or members of its armed forces) due to the liability of a third party, unless the financial condition of the third party or the facts and circumstances surrounding the liability justify the failure;

(2) Failed to take reasonable measures to contest, reduce, or terminate its liability by appropriate available procedures under workers' compensation law or otherwise; or

(3) Failed to make reasonable and adequate investigation or inquiry as to the right of any person to any benefit or payment; or

(4) Failed to avoid augmentation of liability by reason of delay in recognizing or discharging a compensation claimant's right to benefits.

§ 61.103 Examination of records of carrier.

Whenever it is deemed necessary, the Office may request submission of case records or may inspect the records and accounts of a carrier for the purpose of verifying any allegation, fact or payment stated in the claim. The carrier shall furnish the records and permit or authorize their inspection as requested. The right of inspection shall also relate to records and data necessary for the determination of whether any premium or other charge was made with respect to the reimbursement claimed.

§ 61.104 Reimbursement of claims expense.

(a) A carrier may claim reimbursement for reasonable and necessary claims expense incurred in connection with a case for which reimbursement is claimed under the Act. Reimbursement may be claimed for allocated and unallocated claims expense.

(b) The term "allocated claims expense" includes payments made for reasonable attorneys' fees, court and litigation costs, expenses of witnesses and expert testimony, examinations, autopsies and other items of expense that were reasonably incurred in determining liability under the Defense Base Act or other workers' compensation law. Allocated claims expense must be itemized and documented as described in § 61.101.

(c) The term "unallocated claims expense" means costs that are incurred in processing a claim, but cannot be specifically itemized or documented. A carrier may receive reimbursement of unallocated claims expense in an amount up to 15% of the sum of the reimbursable payments made under the Defense Base Act or other workers' compensation law. If this method of computing unallocated claims expense would not result in reimbursement of reasonable and necessary claims expense, the Office may, in its discretion, determine an amount that fairly represents the expenses incurred.

(d) The Office shall not consider as a claims expense any general administrative costs, general office maintenance costs, rent, insurance, taxes, or other similar general expenses. Nor shall expenses incurred in establishing or documenting entitlement to reimbursement under the Act be considered.

§ 61.105 Direct payment of benefits.

(a) The Office may pay benefits, as they accrue, directly to any entitled beneficiary in lieu of reimbursement of a carrier.

(b) The Office will not accept a case for direct payment until the right of the person or persons entitled to benefits has been established and the Office finds that the carrier would be entitled to reimbursement for continuing benefits.

(c) The Office will not accept a case for direct payment until the rate of compensation or benefit and the period of payment have become relatively fixed and known. The Office may accept a case for direct payment before this condition has been satisfied, if the Office determines that direct payment is advisable due to the circumstances in that particular case.

(d) In cases transferred to the Office for direct payment, medical care for the effects of a war-risk injury may be furnished in a manner consistent with the regulations governing the furnishing of medical care under the Federal Employees' Compensation Act, as amended (5 U.S.C. 8101, *et seq.*).

(e) The transfer of a case to the Office for direct payment does not affect the

hearing or adjudicatory rights of a beneficiary or carrier as established under the Defense Base Act or other applicable workers' compensation law.

(f) The Office may retransfer any case to a carrier either for the purpose of completion of adjudicatory processes or for continuation of payment of benefits.

Subpart C—Compensation for Injury, Disability or Death

§ 61.200 Entitlement to benefits.

(a) Compensation under section 101(a) of the Act is payable for injury or death due to a war-risk hazard of an employee listed in § 61.1(a), whether or not the person was engaged in the course of his or her employment at the time of the injury.

(b) Compensation under this subpart is paid under the provisions of the Federal Employees' Compensation Act, as amended (5 U.S.C. 8101 *et seq.*), except that the determination of beneficiaries and the computation of compensation are made in accordance with sections 6, 8, 9 and 10 of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 901 *et seq.*).

(c) The Office may not approve a claim for compensation if any of the following conditions are met:

(1) The employee resides at or in the vicinity of the place of employment, does not live there solely due to the exigencies of the employment, and is injured outside the course of the employment.

(2) The claim is filed due to the injury or death of a prisoner of war detained or utilized by the United States.

(3) The person seeking benefits recovers or receives workers' compensation benefits from any other source for the same injury or death.

(4) The person seeking benefits is a national of a foreign country and is entitled to compensation benefits from that or any other foreign country on account of the same injury or death.

(5) The employee is convicted in a court of competent jurisdiction of any subversive act against the United States or any of its allies.

§ 61.201 Filing of notice and claim.

An employee or his or her survivors may file a claim under section 101(a) of the Act only after a determination has been made that no benefits are payable under the Defense Base Act administered by the Office's Division of Longshore and Harbor Workers' Compensation. Notice and claim may be filed on standard Longshore or Federal Employees' Compensation Act forms. The claimant shall submit notice and claim, along with any supporting documentation, to the U.S. Department of Labor, Office of Workers' Compensation Programs, Branch of Special Claims, P.O. Box 37117, Washington, DC 20013–7117.

§ 61.202 Time limitations for filing notice and claim.

The time limitation provisions found in 5 U.S.C. 8119 through 8122 apply to the filing of claims under section 101(a) of the War Hazards Compensation Act. The Office may waive the time limitations if it finds that circumstances beyond the claimant's control prevented the filing of a timely claim.

§ 61.203 Limitations on and deductions from benefits.

(a) Compensation payable for injury, disability or death may not exceed the maximum limitations specified in section 6(b) of the Longshore and Harbor Workers' Compensation Act, as amended.

(b) In determining benefits for disability or death, the Office shall not apply the minimum limits found in sections 6(b) and 9(e) of the Longshore and Harbor Workers' Compensation Act.

(c) Compensation for death or permanent disability payable to persons who are not citizens of the United States and who are not residents of the United States or Canada is in the same amount as provided for residents, except that dependents in a foreign country are limited to the employee's spouse and children, or if there be no spouse or children, to the employee's father or mother whom the employee supported, either wholly or in part, for the period of one year immediately prior to the date of the injury. The Office may discharge its liability for all future payments of compensation to a noncitizen/nonresident by paying a lump sum representing one-half the commuted value of all future compensation as determined by the Office.

(d) If any employee or beneficiary receives or claims wages, payments in lieu of wages, or insurance benefits for disability or loss of life (other than workers' compensation benefits), and the cost of these payments is provided in whole or in part by the United States, the Office shall credit the amount of the benefits against any payments to which the person is entitled under the Act. The Office shall apply credit only where the wages, payments, or benefits received are items for which the contractor is entitled to reimbursement from the United States, or where they are otherwise reimbursable by the United States.

(e) If an employee who is receiving workers' compensation benefits on account of a prior accident or disease sustains an injury compensable under the Act, the employee is not entitled to any benefits under the Act during the period covered by other workers' compensation benefits unless the injury from a war-risk hazard increases the employee's disability. If the war-risk injury increases the disability, compensation under the Act is payable only for the amount of the increase in disability. This provision is applicable only to disability resulting jointly from two unrelated causes, namely, (1) prior industrial accident or disease, and (2) injury from a war-risk hazard.

(f) Compensation for disability under this subchapter, with the exception of allowances for scheduled losses of members or functions of the body, may not be paid for the same period of time during which benefits for detention under this subchapter are paid or accrued.

§ 61.204 Furnishing of medical treatment.

All medical services, appliances, drugs and supplies which in the opinion of the Office are necessary for the treatment of an injury coming within the purview of section 101(a) of the Act shall be furnished to the same extent, and wherever practicable in the same manner and under the same regulations, as are prescribed for the furnishing of medical treatment under the Federal Employees' Compensation Act, as amended (5 U.S.C. 8101 *et seq.*).

§ 61.205 Burial expense.

(a) When the death of a person listed in § 61.1(a) results from an injury caused by a war-risk hazard, the Office shall pay reasonable burial expenses up to the amount specified in section 9 of the Longshore and Harbor Workers' Compensation Act. If any part of the burial expense has been paid by any other agency of the United States, or by any person under obligation to discharge burial expenses, the amount so paid shall be deducted from the burial expense payable by the Office. Payment will be made directly (1) to the undertaker, (2) to the estate of the deceased if the estate is obligated to make payment, or (3) to any person who has paid such burial expenses and is entitled to such reimbursement.

(b) If the employee's home is within the United States and death occurs away from the employee's home or outside the United States, the Office may pay an additional sum for transporting the remains to the home.

§ 61.206 Reports by employees and dependents.

The Office may require a claimant to submit reports of facts materially affecting the claimant's entitlement to compensation under the Act. These may include reports of recurrence or termination of disability, of employment and earnings, or of a change in the marital or dependency status of a beneficiary.

Subpart D—Detention Benefits

§ 61.300 Payment of Detention Benefits.

(a) The Office shall pay detention benefits to any person listed in § 61.1(a) who is detained by a hostile force or person, or who is not returned to his or her home or to the place of employment by reason of the failure of the United States or its contractor to furnish transportation. Benefits are payable for periods of absence on and subsequent to January 1, 1942, regardless of whether the employee was actually engaged in the course of his or her employment at the time of capture or disappearance.

(b) For the purposes of paying benefits for detention, the employee is considered as totally disabled until the time that the employee is returned to his or her home, to the place of employment, or to the jurisdiction of the United States. The Office shall credit the compensation benefits to the employee's account, to be paid to the employee for the period of the absence or until the employee's death is in fact established or can be legally presumed to have occurred. A part of the compensation accruing to the employee may be disbursed during the period of absence to the employee's dependents.

(c) During the period of absence of any employee detained by a hostile force or person, detention benefits shall be credited to the employee's account at one hundred percent of his or her average weekly wages. The average weekly wages may not exceed the average weekly wages paid to civilian employees of the United States performing the same or most similar employment in that geographic area. If there are eligible dependents, the Office may pay to these dependents seventy percent of the credited benefits.

(d) The Office may not pay detention benefits under any of the following conditions:

(1) The employee resides at or in the vicinity of the place of employment, does not live there solely due to the exigencies of the employment, and is detained under circumstances outside the course of the employment.

(2) The person detained is a prisoner of war detained or utilized by the United States.

(3) Workers' compensation benefits from any other source or other payments from the United States are paid for the same period of absence or detention.

(4) The person seeking detention benefits is a national of a foreign country and is entitled to compensation benefits from that or any other foreign country on account of the same absence or detention.

(5) The employee is convicted in a court of competent jurisdiction of any subversive act against the United States or any of its allies.

§ 61.301 Filing a claim for detention benefits.

(a) A claim for detention benefits shall contain the following information: name, address, and occupation of the missing employee; name, address and relation to the employee of any dependent making claim; name and address of the employer; contract number under which employed; date, place and circumstances of capture or detention; date, place and circumstances of release (if applicable). The employer shall provide information about the circumstances of the detention and the employee's payrate at the time of capture. Dependents making claim for detention benefits may be required to submit all evidence available to them concerning the employment status of the missing person and the circumstances surrounding his or her absence.

(b) A claim filed by a dependent or by the employee upon his or her release should be sent with any supporting documentation to the U.S. Department of Labor, Office of Workers' Compensation Programs, Branch of Special Claims, P.O. Box 37117, Washington, DC 20013–7117.

§ 61.302 Time limitations for filing a claim for detention benefits.

The time limitation provisions found in the Federal Employees' Compensation Act, as amended (5 U.S.C. 8101 *et seq.*) apply to the filing of claims for detention benefits. The Office may waive the time limitations if it finds that circumstances beyond the claimant's control prevented the filing of a timely claim.

§ 61.303 Determination of detention status.

A determination that an employee has been detained by a hostile force or person may be made on the basis that the employee has disappeared under circumstances that make detention appear probable. In making the determination, the Office will consider the information and the conclusion of the Department or agency of the United States having knowledge of the circumstances surrounding the absence of the employee as prima facie evidence of the employee's status. The presumptive status of total disability of the missing person shall continue during the period of the absence, or until death is in fact established or can be legally presumed to have occurred.

§ 61.304 Limitations on and deductions from detention benefits.

(a) In determining benefits for detention, the Office shall not apply the minimum limits found in sections 6(b) and 9(e) of the Longshore and Harbor Workers' Compensation Act.

(b) If any employee or dependent receives or claims wages, payments in lieu of wages, or insurance benefits for the period of detention, and the cost of the wages, payments or benefits is provided in whole or in part by the United States, the Office shall credit the amount of the benefits against any detention payments to which the person is entitled under the Act. The Office shall apply credit only where the wages, payments, or benefits received are items for which the contractor is entitled to reimbursement from the United States, or where they are otherwise reimbursable by the United States.

§ 61.305 Responsibilities of dependents receiving detention benefits.

A dependent having knowledge of a change of status of a missing employee shall promptly inform the Office of the change. The Office must be advised immediately by the dependent if the employee is returned home or to the place of his or her employment, or is able to be returned to the jurisdiction of the United States.

§ 61.306 Transportation of persons released from detention and return of employees.

(a) The Office may furnish the cost of transporting an employee from the point of the employee's release from detention to his or her home, the place of employment, or other place within the jurisdiction of the United States. The Office shall not pay for transportation if the employee is furnished the transportation under any agreement with his or her employer or under any other provision of law.

(b) The Office may furnish the cost of transportation under circumstances not involving detention, if the furnishing of transportation is an obligation of the United States or its contractor, and the United States or its contractor fails to

return the employee to his or her home or to the place of employment.

§ 61.307 Transportation of recovered bodies of missing persons.

If an employee dies while in detention and the body is later recovered, the Office may provide the cost of transporting the body to the home of the deceased or to any place designated by the employee's next of kin, near relative, or legal representative.

Subpart E—Miscellaneous Provisions

§ 61.400 Custody of records relating to claims under the War Hazards Compensation Act.

All records, medical and other reports, statements of witnesses and other papers filed with the Office with respect to the disability, death, or detention of any person coming within the purview of the Act, are the official records of the Office and are not records of the agency, establishment, Government department, employer, or individual making or having the care or use of such records.

§ 61.401 Confidentiality of records.

Records of the Office pertaining to injury, death, or detention are confidential, and are exempt from disclosure to the public under section 552(b)(6) of Title 5, United States Code. No official or employee of the United States who has investigated or secured statements from witnesses and others pertaining to any case within the purview of the Act, or any person having the care or use of such records, shall disclose information from or pertaining to such records to any person, except in accordance with applicable regulations (see 29 CFR Part 70a).

§ 61.402 Protection, release, inspection and copying of records.

The protection, release, inspection and copying of the records shall be accomplished in accordance with the rules, guidelines and provisions contained in Part 70 and Part 70a of Title 29 of the Code of Federal Regulations and the annual notice of systems of records and routine uses as published in the **Federal Register.**

§ 61.403 Approval of claims for legal and other services.

(a) No claim for legal services or for any other services rendered in respect to a claim or award for compensation under the Act to or on account of any person shall be valid unless approved by the Office. Any such claim approved by the Office shall, in the manner and to the extent fixed by the Office, be paid out of the compensation payable to the claimant.

(b) The Office shall not recognize a contract for a stipulated fee or for a fee on a contingent basis. No fee for services shall be approved except upon application supported by a sufficient statement of the extent and character of the necessary work done on behalf of the claimant. Except where the claimant was advised that the representation would be rendered on a gratuitous basis, the fee approved shall be reasonably commensurate with the actual necessary work performed by the representative, and with due regard to the capacity in which the representative appeared, the amount of compensation involved, and the circumstances of the claimant.

§ 61.404 Assignments; creditors.

The right of any person to benefits under the Act is not transferable or assignable at law or in equity except to the United States, and none of the moneys paid or payable (except money paid as reimbursement for funeral expenses), or rights existing under the Act are subject to execution, levy, attachment, garnishment, or other legal process or to the operation of any bankruptcy or insolvency law.

PART 20—[REMOVED]

3. 20 CFR Part 62 is removed.

Signed at Washington, DC, this 27th day of May 1987.

William E. Brock,

Secretary of Labor.

[FR Doc. 87–12374 Filed 5–29–87; 8:45 am]

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Monday
June 1, 1987

Part IV

Department of the Interior

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 700, et al.

Surface Coal Mining and Reclamation Operations; Exemption for Coal Extraction Incidental to the Extraction of Other Minerals; Proposed Rule

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 700, 702, 750, 870, 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947

Surface Coal Mining and Reclamation Operations; Exemption for Coal Extraction Incidental to the Extraction of Other Minerals

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Proposed rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSMRE or Office) of the United States Department of the Interior (DOI) proposes to amend its regulations relating to the exemption contained in § 701(28) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA or Act) concerning the extraction of coal incidental to the extraction of other minerals.

The rule is being proposed in order to provide guidance to the coal and noncoal mining industry and coal regulatory authorities concerning the implementation of the exemption under section 701(28). The proposed rule would result in the administration of the exemption in a practical manner which would provide the exemption for legitimate operations and prevent the use of the exemption for operations that should be subject to the environmental protection measures of SMCRA.

DATES: *Written Comments:* OSMRE will accept written comments on the proposed rule until 5 p.m., Eastern time on August 10, 1987.

Public Hearings: Upon request, OSMRE will hold public hearings on the proposed rule in Washington, DC; and Columbus, Ohio at 9:30 a.m., local time on August 3, 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 July 1, 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 Reclamation and Enforcement, Administrative Record, Room 5131, 1100 L Street, NW., Washington, DC; or mail to the Office of Surface Mining Reclamation and Enforcement, Administrative Record, Room 5131–L, 1951 Constitution Avenue, Washington, DC 20240.

Public Hearings: Department of the Interior Auditorium, 18th and C Streets, NW., Washington, DC, and Room 220 Federal Building, 85 Marconi Blvd., Columbus, Ohio. 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: James Fary, Division of Abandoned Mine Land Reclamation, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue, NW., Washington, DC 20240; Telephone: 202–343–3375 (Commercial or FTS).

SUPPLEMENTARY INFORMATION:

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 necessarily 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 two 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 participation at a hearing at a particular location should inform Mr. Fary (see **"FOR FURTHER INFORMATION CONTACT"**) either orally or in writing of the desired hearing location by 5:00 p.m., Eastern time on July 1, 1987. If no one has contacted My. Fary 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 is 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 701(28) of the Act, 30 U.S.C. 1291, excludes from the definition of surface coal mining operations the extraction of coal incidental to the extraction of other minerals where coal does not exceed 16⅔ percent of the tonnage of minerals removed for purposes of commercial use or sale. Operations meeting the above standard are thereby not subject as surface coal mining operations to certain SMCRA provisions such as bonding, permitting and abandoned mine reclamation fee payment.

The incidental mining exemption first appeared in S. 425 introduced in the 93rd Congress. S. Rept. No. 93–402, 93rd Cong., 1st Sess. 160 (1973). Although subsequent minor changes were made in the text, this provision appeared in every major version of the Act that was considered from 1973 to 1977. Although the legislative history of this provision is limited, the Congressional reports indicate that it was aimed at operations, such as limestone quarries, where the primary mineral being sought is something other than coal and comparatively small proportions of coal are recovered incidental to those operations.

Regulations implementing this section of SMCRA were originally published in 30 CFR Part 700 on March 13, 1979 (44 FR 15315). This section addresses the activities exempted from the Act. With respect to the incidental exemption, § 700.11 simply lists such operations as exempt. Paragraph (c) of § 700.11 provides further that the regulatory

authority may make a written determination, when requested, whether the operation is exempt and that the person requesting the exemption has the burden of establishing the exemption. If a written determination of exemption is reversed through subsequent administrative or judicial action, any person who, in good faith, has made a complete and accurate request for an exemption and relied upon the determination, will not be cited for violations which occurred prior to the date of reversal. For example, an operator's prereversal mining would not be cited as mining without a permit.

Because the regulations did not provide specific guidance concerning whether an operation is exempt, an advance notice of proposed rulemaking and request for public comment on section 701(28) of SMCRA were published in the **Federal Register** on May 7, 1984 (49 FR 19336). Also at that time, OSMRE published guidelines intended to assist operators and the States in implementing this exemption pending promulgation of final regulations.

An important objective for OSMRE is to involve major external groups more effectively in regulatory development. To help accomplish this objective, OSMRE has undertaken an outreach effort to obtain comments on initial drafts of significant rulemaking prior to developing proposed regulations for review and publication in the **Federal Register**. In consideration of the comments received on the advance notice of proposed rulemaking, and after further review of the issue, OSMRE solicited additional public comments during September 1986, as part of its outreach program. The resulting outreach comments were taken into consideration when preparing this proposed rulemaking.

Once a final rule governing the exemption for coal extraction incidental to the extraction of other minerals is promulgated, the States which have achieved primacy will need to amend their regulatory programs to include provisions which are no less effective than those set forth in the final Federal rules.

III. Discussion of Proposed Rule

Part 702

The rule would adopt a new Part 702 relating to the exemption for coal extraction incidental to the extraction of other minerals.

Section 702.1—Scope.

The proposed section 702.1 would explain that Part 702 implements the exemption contained in Section 701(28) of SMRCA concerning the extraction of coal incidental to the extraction of other minerals where coal does not exceed 16⅔ percent of the total tonnage of coal and other minerals removed for purposes of commercial use or sale over the life of the mining operation.

The operations exempt under section 701(28) of SMRCA and Part 702 are not subject to the environmental protection performance standards of Title V and abandoned mine reclamation fee provisions of Title IV of the Act. OSMRE does, however, retain the right of inspection and entry to verify the validity of claimed exemptions.

Section 702.3—Authority.

Under sections 201, 412, and 501 of OSMRE, the Secretary is directed to administer the program for controlling coal mining operations and to publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of SMCRA.

Under Section 701(28) of SMCRA, an exemption is provided from the requirements of SMCRA for the extraction of coal incidental to the extraction of other minerals where coal does not exceed 16⅔ percent of the total tonnage of coal and other minerals removed for purposes of commercial use or sale.

Section 702.5—Definitions.

The proposed rule would define "mining area" as an individual excavation site or pit from which minerals and overburden are removed. The primary purpose for the definition being limited to an individual excavation site or pit is to preclude an operator from averaging mineral tonnages from different locations to gain an otherwise unwarranted exemption from the Act. The proposed definition would also prohibit an operator from claiming an exemption by combining production from distinct non-coal and coal operations. Each excavation site or pit must individually qualify for the exemption in accordance with the requirements for exemption under § 702.14.

The proposed rule defines "other minerals" as any commercially valuable substance mined for its mineral value, excluding coal, topsoil, waste and fill material. The proposed definition requires that the substance be mined for its mineral value, and therefore, allows the regulatory authority the flexibility to consider local conditions in determining whether the mineral has commercial value.

The exclusion of waste and soil from the definition of other minerals is intended to take into account material which is spoiled or othewise disposed of in a manner that it is not used for its mineral value. Fill material is also excluded from the definition of other minerals. Including fill material as an other mineral, or commercial use of an other mineral, could result in the claiming of the exemption to avoid being subject to the environmental protection provisions of SMCRA. For example, a surface coal mining operator could haul "overburden" to a site outside the mining area and claim the material is being commericially placed to prepare a site for construction, farming, etc. Allowing such claims could circumvent the provisions of SMCRA.

A more definitive list of materials to be excluded from the definition of other minerals is not provided, as any attempt to list specific materials that are not materials runs the risk of excluding materials which may serve specialized uses and which may legitimately be exempt.

The definition of other minerals as provided in section 701(14) of SMCRA is not used in the proposed rule. It is clear from the legislative history that the section 701(14) definition is intended for use under section 709 of SMCRA; *Study of Reclamation Standards for Surface Mining of Other Minerals.*

Section 702.11—Requirements for Filing Notice of Exemption.

The proposed rule distinguishes between new and existing operations in establishing timeframes for filing notices of exemption under this part. Under § 702.11(a), proposed operations must file a complete notice of exemption for each mining area at least 30 days prior to commencement of operations.

Existing operations, covered under § 702.11(b), must file a complete notice of exemption with the regulatory authority for each mining area within 60 days after the effective date of this part if they intend to continue operations after the end of the 60-day period. The 60-day timeframe for existing operations is provided to give an existing operator time to determine future plans and ensure compliance with the new regulations, whereas a new operator has the benefit of planning prior to commencing mining. Although each mining area must qualify on its own for exemption, one notice may contain information on more than one mining area.

Pursuant to proposed § 702.11(c)(1), the regulatory authority shall notify persons if the exemption is incomplete

and may at any time require submittal of additional information. A complete notice of exemption would contain the information required under § 702.12 and would be sufficient to allow review for conformance with the requirements for exemption under § 702.14. There is no specific provision for an extension of time when a notice does not contain sufficient information; however, § 702.11(e) requires the operator to file a complete exemption notice which places the burden directly on the operator and eliminates the need for time extensions.

The regulatory authority is required by proposed § 702.11(c)(2) to make a written determination on whether the operation is exempt if so requested by the operator. This provision parallels § 702.11(c) which requires, in part, a written determination when requested and applies to other exemptions besides the 16⅔ percent exemption covered by this part.

To remain exempt under this Part, an operator is required to update the notice of exemption at the request of the regulatory authority or when changes in the information previously submitted are necessary, according to proposed § 702.11(d). No attempt was made to compile an all inclusive list of such changes, but anything which affects the mining operation or mining area, such as tonnage ratio, loss of market for other minerals, change in production, etc., would certainly be included. Also specified in this section, is that a separate notice of exemption is required for each new mining area. This wording again refers back to each mining area qualifying on its own for the exemption; however, as previously stated, one notice may contain information on more than one mining area.

Proposed § 702.11(e) states that failure to file a complete notice of exemption or update the notice of exemption precludes an operator from interposing the exemption as a defense in enforcement action taken under the Act.

Proposed § 702.11(f) states that the regulatory authority may find, based on the information contained in the notice, that the operation is not exempt under this part. Where OSMRE is the regulatory authority, such a determination would constitute a decision of the Director within the meaning of 43 CFR 4.1281 and would contain a right of appeal to the Office of Hearings and Appeals in accordance with 43 CFR Part 4. A decision by a State regulatory authority would also be appealable under State law.

Section 702.12—Contents of Notice of Exemption.

Proposed §§ 702.12 (a) through (k) lists minimum information that must be included in a notice of exemption. Name and address of the operator are required by § 702.12(a).

A list of the other minerals to be extracted for commercial use or sale, annual and total tonnages of all minerals including coal, and the basis of such tonnage estimates are required by § 702.12(b). By requesting the basis of such tonnage estimates, in addition to the figures themselves, the regulatory authority will be able to perform independent calculations based on actual data for comparisons.

Requirements of § 702.12 (c) and (d) are, respectively, a description, including county, township if any, and boundary of the land of sufficient certainty that the mining area may be located and distinguished from other mining areas and surface coal mining operations; and an acreage estimate composing the mining area over the proposed life of the mining operation. Public participation for this regulation is provided for in § 702.12(e). This section requires publication, at least once a week for two consecutive weeks in a newspaper of general circulation in the county of the mining area, of a public notice of filing of a notice of exemption with the regulatory authority, where the public notice identifies the persons claiming the exemption. One public notice may contain information on more than one mining area.

The next three requirements, §§ 702.12 (f), (g), and (h) are, respectively, representative cross-sections showing relative position and approximate thickness and density of all minerals including coal, and the relative position and thickness of any other materials to be extracted; a map of appropriate scale which clearly identifies the mining area; and a general description of mining and mineral processing activities. This information will allow the regulatory authority to evaluate the tonnage ratio of coal to other minerals.

In § 702.12(i), a summary of sales commitments, if any, or a description of potential markets, is required for minerals to be extracted from the mining area. The section also requires that minerals commercially used by the operator be so specified.

An additional information requirement for existing operations (i.e., operations subject to the notice submittal requirement of § 702.11(b)), is found at § 702.12(j). In addition to complying with the other requirements for this section for the mining area over the life of the mining operation, existing operations must also submit documentation of the total tonnage of coal and each other mineral that has been produced (prior to the submittal of the notice) from the mining area for commercial use or sale, and any relevant documents the operator has received from OSMRE or the regulatory authority documenting the exemption. As provided for in § 702.12(k), the regulatory authority may request any other information pertinent to the qualification of the operation as exempt.

Section 702.13—Public Availability of Information.

Proposed § 702.13(a) provides that except as provided for in § 702.13(b), all information submitted to the regulatory authority under this part shall be made available for public inspection and copying at the office of the regulatory authority having local jurisdiction over the mining operation claiming the exemption. The exception to this provision, proposed § 702.13(b), requires the regulatory authority to keep information confidential if the person submitting it requests in writing, at the time of submission, that it be kept confidential and the information concerns trade secrets or is privileged commercial or financial information relating to the competitive rights of the persons intending to conduct operations under this part. Proposed § 702.13(c) goes on to state that information requested to be held as confidential under § 702.13(b) shall not be made publicly available until after notice and opportunity to be heard is afforded persons both seeking and opposing disclosure of the information. The determination as to the proprietary nature of information will be made in accordance with the Freedom of Information Act (5 U.S.C. 552(b)), and Privacy Act (5 U.S.C. 552(a)), at 43 CFR Part 2.

Section 702.14—Requirements for Exemption.

This section lists three tests that must be satisfied in order for activities to be exempt from the requirements of the Act. Proposed § 702.14(a) specifies that the tonnage of coal extracted from the mining area will not exceed 16⅔ percent of the total tonnage of coal and other minerals removed for purposes of bona fide sale or reasonable commercial use over the life of the mining operation. The key to preventing abuse under this provision is requiring that a bona fide market be established. This in turn will sufficiently ensure that the other

minerals sought are commercially valuable.

The following simplified example illustrates the accepted computation procedure for determining the tonnage ratio: for every 100 tons of total minerals mined (coal and other minerals combined), up to 16⅔ tons of that total may be coal in an exempt operation.

The 16⅔ percentage test applies to the total coal and other mineral production achieved over the life of mining at each individual excavation. The life-of-mine concept is used to take into consideration the normal sequence of mining. Determining coal and other mineral percentages under a set period may result in an operation being exempt in one period and not the next. This situation could occur even though the operation would be exempt if the 16⅔ percentage test were applied over the life of the mine.

The second test, found at proposed § 702.14(b), requires coal to be produced from a geological stratum lying above or immediately below the deepest stratum from which other minerals are extracted for purposes of bona fide sale or reasonable commercial use. Although other tests for determining whether the coal is incidental were considered, the proposed provision achieves a balance between environmental concerns and concerns for the full utilization and conservation of the coal. This will minimize the potential for future disturbance of the land to recover coal.

The third test to be satisfied, proposed § 702.14(c), requires that each of the other minerals upon which an exemption under this part is claimed is a commercially valuable mineral. This means that either a market presently exists or the mineral is mined in bona fide anticipation that a market will exist in the reasonably foreseeable future, but not to exceed twelve months.

Section 702.15—Conditions of Exemption and Right of Inspection and Entry.

Although operators qualifying under this part would be exempt from certain provisions of SMCRA, the regulatory authority would be able to exercise its authority to enter and inspect and impose certain conditions on persons claiming the exemption. These provisions provide the regulatory authority access to operations claiming the exemption to determine if the operations qualify for the exemption. Proposed § 702.15(a) requires that operators maintain on-site or at other locations available to authorized representatives of the regulatory authority or the Secretary all information relevant to the exemption including, but not limited to, commercial use and sales information, extraction tonnages, and a copy of the notice of exemption. Operators must also notify the regulatory authority upon the completion of the mining operation.

Inspection and entry rights are exercised and are covered in the remainder of this section. Proposed § 702.15(b) states that authorized representatives of the regulatory authority or the Secretary shall have the right to conduct inspections of operations claiming exemption under this part. Proposed § 702.15(c) follows with more specific inspection rights, providing that the authorized representatives: (1) Shall have a right of entry to, upon, and through any mining and reclamation operations without advance notice or a search warrant, upon presentation of appropriate credentials, (2) may at reasonable times and without delay, have access to any copy and records, and (3) shall have a right to gather physical and photographic evidence to document conditions, practices, or violation at a site. Proposed § 702.15(d) states that no search warrant shall be required with respect to any activity under § 702.15(b) except that a search warrant may be required for entry into a building.

Section 702.16—Stockpiling of Minerals.

The proposed rule gives flexibility to the regulatory authority concerning stockpiling of minerals. Proposed § 702.16 states that the regulatory authority may disallow all or part of an operator's tonnage figures of stockpiled minerals for purposes of meeting the requirements of this part if the operator fails to maintain adequate and verifiable records of the disposition (i.e., additions to and removal from stockpiles) or if the disposition of the stockpiles indicates the lack of commercial use or market for the minerals.

Section 702.17—Enforcement.

Proposed § 702.17 covers enforcement actions to be taken by the regulatory authority or OSMRE if an operation claiming exemption is in fact not exempt. If the regulatory authority or OSMRE has cause to believe that the mining operation claiming exemption is not exempt under the provisions of this part, appropriate enforcement action shall be taken under the relevant inspection, enforcement, and civil penalty provisions of either the applicable provisions of the State program or under Subchapter L of this Chapter, according to § 702.17(a). If the regulatory authority or OSMRE finds that activities conducted in the mining area constitute surface coal mining operations, the regulatory authority or OSMRE shall, in accordance with § 702.17(b): (1) Order the payment of abandoned mine reclamation fees in accordance with Part 870 of this Chapter, and (2) order the operator to cease surface coal mining operations and either obtain a valid surface coal mining permit or undertake and accomplish within a specified time period remedial reclamation in conformance with the standards of the regulatory program which the regulatory authority or OSMRE deems applicable to conditions existing on the mining area. As specified in § 702.17(c), the regulatory authority or OSMRE may require the operator to submit a reclamation bond pursuant to the regulatory program to ensure the performance of remedial reclamation.

Section 700.11(a)(4)—Applicability.

OSMRE proposes to include a cross-reference to the new Part 702 which contains specific rules implementing section 701(28) of SMCRA.

Section 870.11(d)—Applicability.

OSMRE also proposes to remove the words "in any twelve consecutive months" to correspond to use of no specific term in Part 702 which relies on the term "life of the mining operation." This removal would be prospective only and not relieve operators from existing obligations to pay reclamation fees.

Part 750 and Subchapter T—Effect on Indian Lands and in Federal Program States

Under the proposed rules, Part 702 would apply through cross-referencing to Indian lands under Federal programs for Indian lands as provided in 30 CFR Part 750. Proposed Part 702 would also apply through cross-referencing in those States with Federal programs. This includes Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee, and Washington. The Federal Programs for these States appear at 30 CFR Parts 910, 912, 921, 933, 937, 939, 941, 942, and 947 respectively.

IV. Procedural Matters

Federal Paperwork Reduction Act

The information collection requirements in the proposed Part 702 have been submitted to the Office of Management and Budget for approval as required by 44 U.S.C. 3501 *et seq.* There are no information collection requirements for the other parts covered by this proposed rule. The collection of

this information will not be required until it has been approved by the Office of Management and Budget. The information is needed to meet the requirements of sections 201 and 701(28) of Pub. L. 95–87, and will be used by the regulatory authority to implement the exemption under Part 702. The obligation to respond is required to obtain a benefit.

Executive Order 12291 and Regulatory Flexibility Act

The Department of the Interior has determined that this document is not a major rule under E.O. 12291 and certifies that it 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.*). The rule would affect a relatively small number of noncoal mineral operations. The rule does not distinguish between small and large entities. The economic effects of the proposed rule are estimated to be minor and no incremental economic effects are anticipated as a result of the rule.

National Environmental Policy Act

OSMRE has prepared a draft environmental assessment of the proposed rule. This assessment indicates that the proposed rule will not significantly affect the environment. It is anticipated that a Finding of No Significant Impact (FONSI) will be approved for the final rule in accordance with OSMRE procedures under the National Environmental Policy Act of 1969. The environmental assessment for the proposed rule is on file in the OSMRE Administrative Record at the address previously specified (see "ADDRESSES"). An environmental assessment of the final rule will be completed and a final finding made on the significance of any impacts prior to promulgation of the final rule.

Author

The principal authors of this rule are James Fary, Division of Abandoned Mine Land Reclamation, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue NW., Washington, DC 20240; Telephone: 202–343–3375 (Commercial or FTS), and Kathleen Woodward, Casper Field Office, Office of Surface Mining Reclamation and Enforcement, Federal Building, 100 East "B" Street, Room 2128, Casper, Wyoming 82601–1918: 307–261–5826 Commercial or 328–5826 FTS.

List of Subjects

30 CFR Part 700

Administrative practice and procedure, Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 702

Administrative practice and procedures, Surface mining, Underground mining.

30 CFR Part 750

Indians-lands, Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 870

Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 910

Administrative practice and procedure, Environmental protection, Intergovernmental relations, Penalties, Surety bonds, Surface mining, Underground mining.

30 CFR Part 912

Intergovernmental relations, Surface mining, Underground mining.

30 CFR Parts 921 and 922

Administrative practice and procedure, Intergovernmental relations, Penalties, Surface mining, Underground mining.

30 CFR Part 933

Intergovernmental relations, Surface mining, Underground mining.

30 CFR Parts 937 and 939

Administrative practice and procedure, Intergovernmental relations, Penalties, Surface mining, Underground mining.

30 CFR Part 941

Intergovernmental relations, Surface mining, Underground mining.

30 CFR Part 942

Intergovernmental relations, Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 947

Intergovernmental relations, Surface mining, Underground mining.

Accordingly, it is proposed to amend 30 CFR Parts 700, 702, 750, 870, 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947 as set forth below:

Dated: April 7, 1987.

J. Steven Griles,

Assistant Secretary for Land and Minerals Management.

PART 700—GENERAL

1. The authority citation for Part 700 is revised to read as follows:

Authority: Pub. L. 95–87 (30 U.S.C. 1201 *et seq.*).

2. Section 700.11(a)(4) is revised to read as follows:

§ 700.11 Applicability.

(a) * * *

(4) The extraction of coal incidental to the extraction of other minerals where coal does not exceed 16⅔ percent of the total tonnage of coal and other minerals removed for purposes of commercial use or sale in accordance with Part 702 of this chapter.

* * * * *

PART 702—EXEMPTION FOR COAL EXTRACTION INCIDENTAL TO THE EXTRACTION OF OTHER MINERALS

3. Part 702 is added to read as follows:

Sec.

Authority: Pub. L. 95–87 (30 U.S.C. 1201 *et seq.*).

§ 702.1 Scope.

This part implements the exemption contained in 701(28) of SMCRA concerning the extraction of coal incidental to the extraction of other minerals where coal does not exceed 16⅔ percent of the total tonnage of coal and other minerals removed for purposes of commercial use or sale over the life of the mining operation.

§ 702.3 Authority.

(a) Sections 201, 412, and 501 of SMCRA direct the Secretary to administer the program for controlling coal mining operations and to publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of SMCRA.

(b) Section 701(28) of SMCRA exempts from the requirements of SMCRA the extraction of coal incidental to the extraction of other minerals

where coal does not exceed 16⅔ percent of the total tonnage of coal and other minerals removed for purposes of commercial use or sale.

§ 702.5 Definitions.

As used in this part, the following terms have the meaning specified, except where otherwise indicated:

Mining area means an individual excavation site or pit from which minerals and overburden are removed.

Other minerals means any commercially valuable substance mined for its mineral value, excluding coal, topsoil, waste and fill material.

§ 702.11 Requirements for filing notice of exemption.

(a) Any person who plans to commence operations in reliance on the incidental mining exemption after the effective date of this part shall file a complete notice of exemption with the regulatory authority for each mining area at least 30 days prior to the commencement of operations.

(b) Any person who has commenced operations covered by this part prior to the effective date of this part may not continue operations after 60 days of the effective date of this part unless that person files a notice of exemption with the regulatory authority for each mining area within 60 days after the effective date.

(c) The regulatory authority shall:

(1) Notify persons if the notice of exemption is incomplete and may at any time require submittal of additional information; and

(2) Make a written determination on whether the operation is exempt if so requested by the operator.

(d) To remain exempt under this part, an operator shall update the notice of exemption at the request of the regulatory authority or when changes in the mining operation or mining area require changes in the information submitted with the notice. A separate notice of exemption is required for each new mining area.

(e) Failure to file a complete notice of exemption or to update the notice of exemption precludes an operator from interposing the exemption as a defense in enforcement action taken under the Act.

(f) The regulatory authority may find, based on the information contained in the exemption notice, that the persons claiming exemption are not exempt under this part. Where OSMRE is the regulatory authority, such a determination shall constitute a decision of the Office within the meaning of 43 CFR 4.1281 and shall contain a right of appeal to the Office of Hearings and Appeals in accordance with 43 CFR Part 4. Where the State is the regulatory authority, the decision shall be appealable under the provisions of the State program.

§ 702.12 Contents of notice of exemption.

A notice of exemption shall include at a minimum:

(a) The name and address of the operator;

(b) A list of the other minerals sought to be extracted, and an estimate of the annual and total tonnages of other minerals to be extracted for commercial use or sale and coal to be produced within the mining area, and the basis of such tonnage estimates;

(c) A description, including county, township if any, and boundary of the land of sufficient certainty that the mining area may be located and distinguished from other mining areas and surface coal mining operations;

(d) An estimate to the nearest acre of the number of acres that will compose the mining area over the proposed life of the mining operation;

(e) Evidence of publication, at least once a week for two consecutive weeks in a newspaper of general circulation in the county of the mining area, of a public notice of filing of a notice of exemption with the regulatory authority, where the public notice identifies the persons claiming the exemption;

(f) Representative stratigraphic cross-section(s) based on test borings or other information identifying and showing the relative position and approximate thickness and density of the coal and each other mineral to be extracted for commercial use or sale and the relative position and thickness of any material, not classified as other minerals, that will also be extracted during the conduct of mining activities;

(g) A map of appropriate scale which clearly identifies the mining area;

(h) A general description of mining and mineral processing activities;

(i) A summary of sales commitments, if any, which the operator has received for other minerals to be extracted from the mining area or a description of potential markets for such minerals. If the other minerals are to be commercially used by the operator, the summary should specify the use;

(j) For operations having extracted coal or other minerals prior to filing a notice of exemption, documentation of the total tonnage of coal and each other mineral that has been produced from the mining area for commercial use or sale, and any relevant documents the operator has received from the regulatory authority documenting the exemption; and

(k) Any other information pertinent to the qualification of the operation as exempt.

§ 702.13 Public availability of information.

(a) Except as provided in paragraph (b) of this section, all information submitted to the regulatory authority under this part shall be made available for public inspection and copying at the local offices of the regulatory authority having jurisdiction over the mining operation claiming exemption.

(b) The regulatory authority shall keep information confidential if the person submitting it requests in writing, at the time of submission, that it be kept confidential and the information concerns trade secrets or is privileged commercial or financial information relating to the competitive rights of the persons intending to conduct operations under this part.

(c) Information requested to be held as confidential under paragraph (b) of this section shall not be made publicly available until after notice and opportunity to be heard is afforded persons both seeking and opposing disclosure of the information.

§ 702.14 Requirements for exemption.

Activities are exempt from the requirements of the Act if all of the following are satisfied:

(a) The tonnage of coal extracted from the mining area will not exeed 16⅔ percent of the total tonnage of coal and other minerals removed for purposes of bona fide sale or reasonable commercial use over the life of the mining operation.

(b) Coal is produced from a geological stratum lying above or immediately below the deepest stratum from which other minerals are extracted for purposes of bona fida sale or reasonable commercial use.

(c) Each other mineral upon which an exemption under this part is based is a commercially valuable mineral for which a market exists or which is mined in bona fide anticipation that a market will exist for the mineral in the reasonably foreseeable future, not to exceed twelve months.

§ 702.15 Conditions of exemption and right of inspection and entry.

(a) A person conducting activities covered by this part shall:

(1) Maintain on-site or at other locations available to authorized representatives of the regulatory authority and the Secretary all information relevant to the exemption including, but not limited to, commercial use and sales information, extraction

tonnages, and a copy of the notice of exemption; and

(2) Notify the regulatory authority upon the completion of the mining operation.

(b) Authorized representatives of the regulatory authority and the Secretary shall have the right to conduct inspections of operations claiming exemption under this part.

(c) Each authorized representative of the regulatory authority and the Secretary conducting an inspection under this part:

(1) Shall have a right of entry to, upon, and through any mining and reclamation operations without advance notice or a search warrant, upon presentation of appropriate credentials;

(2) May, at reasonable times and without delay, have access to and copy any records; and

(3) Shall have a right to gather physical and photographic evidence to document conditions, practices or violations at a site.

(d) No search warrant shall be required with respect to any activity under paragraphs (b) and (c) of this section, except that a search warrant may be required for entry into a building.

§ 702.16 Stockpiling of minerals.

The regulatory authority may disallow all or part of an operator's tonnage figures of stockpiled minerals for purposes of meeting the requirements of this part if the operator fails to maintain adequate and verifiable records of the disposition of stockpiles or if the disposition of the stockpiles indicates the lack of commercial use or market for the minerals.

§ 702.17 Enforcement.

(a) If the regulatory authority or the Office has cause to believe that the mining operation claiming exemption is not exempt under the provisions of this part, appropriate enforcement action shall be taken under the relevant inspection, enforcement, and civil penalty provisions of either the applicable State program or Subchapter L of this chapter.

(b) If the regulatory authority or the Office finds that activities conducted in the mining area constitute surface coal mining operations, the regulatory authority or the Office shall:

(1) Order the payment of abandoned mine reclamation fees in accordance with Part 870 of this chapter; and

(2) Order the operator to cease surface coal mining operations; and

(i) Obtain a valid surface coal mining permit; or

(ii) Undertake and accomplish within a specified time period remedial reclamation in conformance with the standards of the regulatory program which the regulatory authority or the Office deem applicable to conditions existing on the mining area.

(c) The regulatory authority or the Office may require the operator to submit a reclamation bond in an amount determined under the procedures of the regulatory program in order to ensure the performance of remedial reclamation.

PART 750—REQUIREMENTS FOR SURFACE COAL MINING AND RECLAMATION OPERATIONS ON INDIAN LANDS

4. The authority citation for Part 750 is revised to read as follows:

Authority: Pub. L. 95–87 (30 U.S.C. 1201 *et seq.*).

5. Part 750 is amended by adding § 750.21 as follows:

§ 750.21 Coal extraction incidental to the extraction of other minerals.

Part 702 of this chapter is applicable on Indian lands.

PART 870—ABANDONED MINE RECLAMATION FUND—FEE COLLECTION AND COAL PRODUCTION REPORTING

6. The authority citation for Part 870 is revised to read as follows:

Authority: Pub. L. 95–87, 30 U.S.C. 1201 *et seq.*

7. Section 870.11(d) is revised to read as follows:

§ 870.11 Applicability

* * * * *

(d) The extraction of coal incidental to the extraction of other minerals where coal does not exceed 16⅔ percent of the total tonnage of coal and other minerals removed for commercial use or sale; and

* * * * *

SUBCHAPTER T—PROGRAMS FOR THE CONDUCT OF SURFACE MINING OPERATIONS WITHIN EACH STATE

8. The authority citations for Parts, 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947 continue to read as follows:

Authority: Pub. L. 95–87, 30 U.S.C. 1201 *et seq.*

9. Parts 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947 are amended by adding the following section (the wording for the section added is the same for each affected part):

§ ____.702 Exemption for coal extraction incidental to the extraction of other minerals.

Part 702 of this chapter, *Exemption for Coal Extraction Incidental to the Extraction of Other Minerals,* shall apply to any person who conducts coal extraction incidental to the extraction of other minerals for purposes of commercial use or sale.

[FR Doc. 87–12351 Filed 5–29–87; 8:45 am]

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federal register

Monday
June 1, 1987

Part V

Department of Justice

Immigration and Naturalization Service

8 CFR Part 214

Nonimmigrant Classes; Interim Rule With Request for Comments

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Part 214

[INS No. 1008-87]

Nonimmigrant Classes

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Interim rule with request for comments.

SUMMARY: Section 301 of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. 99-603, amended section 101(a)(15)(H)(ii) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(ii), a nonimmigrant classification commonly called H-2. Prior to amendment this classification applied to an alien coming to perform *any* type of temporary service or labor. IRCA redesignated the H-2 classification as H-2B, and moved agricultural labor off into a new H-2A classification. This interim rule redesignates 8 CFR 214.2(h)(3), which sets special criteria for H-2 workers, as 8 CFR 214.2(h)(3a), and revises the title to indicate that agricultural workers are not included in the classification. It also adds a new paragraph (3) to establish special criteria for the admission, extension and maintenance of status of H-2A workers.

DATES: This interim rule is effective June 1, 1987. Comments must be received on or before July 31, 1987.

ADDRESS: Please submit written comments, in duplicate, to the Director, Office of Policy Directives and Instructions, Immigration and Naturalization Service, 425 I Street, NW., Room 2011, Washington, DC 20536.

FOR FURTHER INFORMATION CONTACT: Michael L. Aytes, Senior Examiner, Adjudications Division, Immigration and Naturalization Service, 425 I Street, NW., Room 7122, Washington, DC 20536. Telephone: (202) 633-3946.

SUPPLEMENTARY INFORMATION: The Immigration Reform and Control Act of 1986 (IRCA) imposes sanctions against employers who hire aliens not authorized to work. Since many of the nation's agricultural employers have become dependent upon such workers to meet production and harvesting needs, Congress created the Special Agricultural Workers (SAW) program and the Replenishment Agricultural Workers (RAW) program to provide permanent resident status to certain agricultural workers. To clarify the process through which employers can employ nonimmigrant seasonal and temporary agricultural workers, Congress moved agricultural employment from the H-2 classification into a separate H-2A class, and incorporated a labor certification process into the statute.

This interim rule establishes special H-2A regulatory criteria. It supplements the Department of Labor's rules covering the temporary agricultural labor certification process, published separately. It was developed after extensive discussions with employers, associations and labor and legal service organizations. Under this rule eligibility will still be determined by the filing of Form I-129B, "Petition to Classify Nonimmigrant as Temporary Worker or Trainee". This interim rule clarifies the filing process. It also clarifies what issues are to be tested in petition proceedings. To reduce the incidence of petitions returned for evidence, this rule also sets initial evidence requirements.

The Labor Certification Process

Some of the most significant changes made in the H-2A area deal with labor certification. There was no statutory certification requirement in the H-2 system. The process itself only existed by regulation, and in such a way that the Secretary of Labor's finding merely constituted advice. Thus denial of a certification did not preclude approval of an H-2 petition.

IRCA extended this structure to the H-2B system, but not to the H-2A system. Instead it incorporated a certification process into statute. The statute does not specifically require that a certification be obtained before a petition can be filed, only that it be applied for. This indicates that Congress intended to leave some room for INS to grant H-2A status even though a certification is denied.

But a number of factors indicate that this was intended to be a narrow role. Whereas certification determinations were previously treated as advice to INS, the incorporation of the certification requirement and process into statute gave independence and greater meaning to the process and its findings. This is underscored by the statute's expansion of the Secretary's authority to deny certification and the institutionalization of an appellate process within the Department of Labor.

In addition, the statute gives the Attorney General, in consultation with the Secretary of Agriculture, authority to approve the Secretary of Labor's regulations in this area. This general authority obviates the need for extensive INS involvement in individual certification determinations.

Therefore, this interim rule significantly reduces INS review of issues the Department of Labor tests in the labor certification process. Under this rule INS will not become involved in issues of proper wages, recruiting requirements, working conditions, housing standards, and other areas in which the Department of Labor has more extensive expertise. This rule limits INS review to where an appeal under section 216(e)(2) of the Act has been denied solely due to the availability of qualified domestic labor.

Consistent with this interpretation, this interim rule also significantly reduces INS case-by-case review of whether employment qualifies as seasonal or temporary. The Department of Labor has traditionally tested this issue in the H-2 labor certification process. However, again, since this process stemmed from INS regulations, and was designed to serve merely as advice regarding the issues tested, INS has separately tested this issue in petition proceedings.

With the incorporation of the Department of Labor's role into the statute, and the authority given to the Attorney General to approve the regulations which that department promulgates concerning the H-2A process, there is no longer a need for redundant review by both agencies of whether employment qualifies as temporary or seasonal. However, since INS has the authority to determine whether certain employment qualifies as a basis for nonimmigrant or immigrant status, this rule does not totally eliminate INS review. It generally defines seasonal and temporary employment, and then, in the interests of streamling the process, and to minimize two agencies independently reviewing the same issue and possibly reaching different conclusions, it structures INS review in such a way that the Department of Labor's certification would be accepted unless there is specific evidence in the record that the employment does not qualify. This will eliminate requests for additional information or justification for a claim that employment is temporary or seasonal after the Department of Labor has concluded that it is. At the same time it allows INS to reach a different finding where there is clear evidence the employment does not qualify as a basis for H-2A status. It structures the review process in much the same fashion as that found in permanent certification matters.

Petition Agreements

An alien cannot be admitted unless it is demonstrated that he or she will comply with the terms of admission. An alien can sometimes overcome doubts of admissibility by posting a bond to guarantee compliance. Historically, H–2 agricultural workers fail to comply with the terms of their status at higher rates than many other nonimmigrant classes. Because the requirement of individual bonds for large numbers of H–2 agricultural workers creates extensive problems for domestic employers, and administrative problems for the Service, a system was developed which allowed an employer to enter into an agreement in lieu of separate bonds being required of each worker. This I–320B agreement, as it is commonly called, also commits the employer to certain general employment practices.

The provisions of IRCA are intended to significantly reduce the incidence of aliens violating their status. However, given historical patterns, some form of liability system must remain for temporary agricultural workers.

This rule incorporates the present system as an integral part of the petition. It limits the agreement to compliance with the rules governing the employment of the H–2A worker. Damage amounts are unchanged pending an analysis of actual costs to the government, but are limited to the failure of the petitioner to notify the Service when employment ends more than five days before the designated date, or when it cannot demonstrate that the H–2A worker departed the United States prior to the expiration of status or that an authorized extension of status was obtained within a certain period.

Admission

This interim rule incorporates the IRCA prohibition on the acquisition of H–2A status by an alien who violated H–2A status during the five years preceding the application for such status. To allow an H–2A worker to be at the worksite on time, it provides for the admission of an H–2A worker up to one week before authorized employment is to begin. It also gives a limited means for H–2A workers to transfer employers at the conclusion of employment by providing that H–2A status shall extend for a short time beyond the petition's expiration.

H–2A eligibility requires that employment be seasonal or temporary, which is generally not longer than one year. It also requires that the beneficiary qualify as a nonimmigrant. An H–2A worker can move from job to job if separate petitions are approved, and theoretically could remain indefinitely by doing so. However, at some point he would no longer qualify as a nonimmigrant. There has traditionally been a three year limit on an H–2 alien's uninterrupted stay. This rule continues this limitation. To ensure that this limitation has meaning it also establishes what length of absence will be considered to interrupt an H–2A alien's employment in the United States. If a significant absence is not required, an alien would be able to effectively bypass the limitation and indefinitely work in the United States at various temporary jobs by vacationing abroad every three years.

Other

This rule clarifies How H–2A workers can be replaced, and allows a limited extension of stay without a new certification. It also precludes a finding that an employer will meet the terms of a job offer if within the prior two years it violated section 274(a) of the Act or employed an H–2A worker in a position other than that described in the relating petition.

This is an interim rule. A final rule will be published after consideration of written comments received during the comment period. We encourage interested parties to comment on this rule.

Regulatory Impact

In accordance with 5 U.S.C. 605(b), the Commissioner certifies that this rule will not have a significant economic impact on a substantial number of small entities.

This rule is not a major rule within the meaning of section 1(b) of E.O 12291.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*), the paperwork requirements included in this interim rule will be submitted to the Office of Management and Budget for approval.

List of Subjects in 8 CFR Part 214

Administrative practice and procedure, Aliens, Employment.

Interim Rule

Accordingly, Part 214 of Chapter I of Title 8 of the Code of Federal Regulations is amended as follows.

PART 214—NONIMMIGRANT CLASSES

1. The authority citation for Part 214 is revised to read:

Authority: 8 U.S.C. 1101, 1103 and 1184.

2. Section 214.2 is amended by redesignating paragraphs (h)(3) through (h)(15) as (h)(4) through (h)(16), revising the heading of newly redesignated (h)(4), and removing the citation "(h)(3)(ii)(A)" and adding in its place "(h)(4)(ii)(A)" in newly redesignated paragraph (h)(4)(ii)(B); and by adding a new paragraph (h)(3), to read as follows:

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

* * * * *

(h) * * *

(3) *Petition for alien to perform agricultural labor or services of a temporary or seasonal nature (H–2A)*—(i) *Filing a petition*—(A) *General.* An H–2A petition must be filed on Form I–129B. The petition must be filed with a single valid temporary agricultural labor certification. However, if a certification is denied, domestic labor subsequently fails to appear at the worksite, and the Department of Labor denies an appeal under section 216(e)(2) of the Act, the written denial of appeal shall be considered a certification for this purpose if filed with evidence which establishes that qualified domestic labor is unavailable. An H–2A petition may be filed by either the employer listed on the certification, the employer's agent, or the association of United States agricultural producers named as a joint employer on the certification.

(B) *Multiple beneficiaries.* The total number of beneficiaries of a petition or series of petitions based on the same certification may not exceed the number of workers indicated on that document. A single petition can include more than one beneficiary if the total number does not exceed the number of positions indicated on the relating certification, and all beneficiaries will obtain a visa at the same consulate or are not required to have a visa and will apply for admission at the same port of entry.

(C) *Unnamed beneficiaries.* The sole beneficiary of an H–2A petition must be named in the petition. In a petition for multiple beneficiaries, each must be named unless he or she is not named in the certification and is outside the United States. Unnamed beneficiaries must be shown on the petition by total number.

(D) *Evidence.* An H–2A petitioner must show that the proposed employment qualifies as a basis for H–2A status, and that any named beneficiary qualifies for that employment. A petition will be automatically denied if filed without the certification evidence required in paragraph (h)(3)(i)(A) of this section and, for each named beneficiary, the

initial evidence required in paragraph (h)(3)(v) of this section.

(E) *Special filing requirements.* Where a certification shows joint employers, a petition must be filed with an attachment showing that each employer has agreed to the conditions of H–2A eligibility. A petition filed by an agent must be filed with an attachment in which the employer has authorized the agent to act on its behalf, has assumed full responsibility for all representations made by the agent on its behalf, and has agreed to the conditions of H–2A eligibility.

(ii) *Effect of the labor certification process.* The temporary agricultural labor certification process determines whether employment is as an agricultural worker, whether it is open to U.S. workers, if qualified U.S. workers are available, the adverse impact of employment of a qualified alien, and whether employment conditions, including housing, meet applicable requirements. In petition proceedings a petitioner must establish that the employment and beneficiary meet the requirements of paragraph (h)(3) of this section. In a petition filed with a certification denial, the petitioner must also overcome the Department of Labor's findings regarding the availability of qualified domestic labor.

(iii) *Ability and intent to meet a job offer*—(A) *Eligibility requirements.* An H–2A petitioner must establish that each beneficiary will be employed in accordance with the terms and conditions of the certification, which includes that the principal duties to be performed are those on the certification, with other duties minor and incidental.

(B) *Intent and prior compliance.* Requisite intent cannot be established for two years after an employer or joint employer, or a parent, subsidiary or affiliate thereof, is found to have violated section 274(a) of the Act or to have employed an H–2A worker in a position other than that described in the relating petition.

(C) *Initial evidence.* Representations required for the purpose of labor certification are initial evidence of intent.

(iv) Temporary and seasonal employment—(A) *Eligibility requirements.* An H–2A petitioner must establish that the employment proposed in the certification is of a temporary or seasonal nature. Employment is of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations. Employment is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than one year.

(B) *Effect of Department of Labor findings.* In temporary agricultural labor certification proceedings the Department of Labor separately tests whether employment qualifies as temporary or seasonal. Its finding that employment qualifies is normally sufficient for the purpose of an H–2A petition, However, notwithstanding that finding, employment will be found not to be temporary or seasonal where an application for permanent labor certification has been filed for the same alien, or for another alien to be employed in the same position, by the same employer or by its parent, subsidiary or affiliate. This can only be overcome by the petitioner's demonstration that there will be at least a six month interruption of employment in the United States after H–2A status ends. Also, eligibility will not be found, notwithstanding the issuance of a temporary agricultural labor certification, where there is substantial evidence that the employment is not temporary or seasonal.

(v) *The beneficiary's qualifications*—(A) *Eligibility requirements.* An H–2A petitioner must establish that any named beneficiary met the stated minimum requirements and was fully able to perform the stated duties when the application for certification was filed. It must be established at time of application for an H–2A visa, or for admission if a visa is not required, that any unnamed beneficiary either met these requirements when the certification was applied for or passed any certified aptitude test at any time prior to visa issuance, or prior to admission if a visa is not required.

(B) *Initial evidence of employment/job training.* A petition must be filed with evidence that at the required time the beneficiary met the certification's minimum employment and job training requirements. Initial evidence must be in the form of the past employer's detailed statement or actual employment documents, such as company payroll or tax records. Alternately, a petitioner must show that such evidence cannot be obtained, and submit affidavits from people who worked with the beneficiary that demonstrate the claimed employment.

(C) *Initial evidence of education and other training.* A petition must be filed with evidence that at the required time each beneficiary met the certification's minimum post-secondary education and other formal training requirements. Initial evidence must be in the form of documents, issued by the relevant institution or organization, that show periods of attendance, majors and degrees or certificates accorded.

(vi) *Petition agreements*—(A) *Consent and liabilities.* In filing an H–2A petition, a petitioner and each employer consents to allow access to the site where the labor is being performed for the purpose of determining compliance with H–2A requirements. The petitioner further agrees to notify the Service in the manner specified within twenty-four hours if an H–2A worker absconds or if the authorized employment ends more than five days before the relating certification document expires, and to pay liquidated damages of ten dollars for each instance where it cannot demonstrate compliance with this notification requirement. The petitioner also agrees to pay liquidated damages of two hundred dollars for each instance where is cannot demonstrate that its H–2A worker either departed the United States or obtained authorized status based on another petition during the period of admission or within five days of early termination, whichever comes first.

(B) *Process.* Where evidence indicates noncompliance under paragraph (h)(3)(vi)(A) of this section, the petitioner shall be given written notice and given ten days to reply. If it does not demonstrate compliance, it shall be given written notice of the assessment of liquidated damages.

(C) *Failure to pay liquidated damages.* If liquidated damages are not paid within ten days of assessment, an H–2A petition may not be processed for that petitioner or any joint employer shown on the petition until such damages are paid.

(vii) *Validity.* An approved H–2A petition is valid through the expiration of the relating certification for the purpose of allowing a beneficiary to seek issuance of an H–2A nonimmigrant visa, admission or an extension of stay for the purpose of engaging in the specific certified employment.

(viii) *Admission*—(A) *Effect of violation of status.* An alien may not be accorded H–2A status who the Service finds to have violated the conditions of H–2A status within the prior five years. H–2A status is violated by remaining beyond the specific period of authorized stay or by engaging in unauthorized employment.

(B) *Period of admission.* Notwithstanding paragraph (h)(10) of this section, and except as provided in paragraph (h)(3)(ix)(C) of this section, an alien admissible as an H–2A shall be

admitted for the period of the approved petition plus a period of up to one week before the beginning of the approved period for the purpose of travel to the worksite, and a period following the expiration of the H–2A petition equal to the validity period of the petition, but not more than ten days, for the purpose of departure or extension based on a subsequent offer of employment. However, this extended admission period does not affect the beneficiary's employment authorization. Such authorization only applies to the specific employment indicated in the relating petition, for the specific period of time indicated.

(C) *Limits on an individual's stay.* An alien's stay as an H–2A is limited by the term of an approved petition. An alien may remain longer to engage in other qualifying temporary agricultural employment by obtaining an extension of stay. However, an individual who has held H–2A status for a total of three years may not again be granted H–2A status, or other nonimmigrant status based on agricultural activities, until such time as he or she remains outside the United States for an uninterrupted period of six months. An absence can interrupt the accumulation of time spent as an H–2A. If the accumulated stay is eighteen months or less, an absence is interruptive if it lasts for at least three months. If more than eighteen months stay has been accumulated, an absence is interruptive if it lasts for at least one-sixth the accumulated stay. Eligibility under this subparagraph will be determined in admission, change of status or extension proceedings. An alien found eligible for a shorter period of H–2A status than that indicated by the petition due to the application of this subparagraph shall only be admitted for that abbreviated period.

(ix) *Substitution of beneficiaries after admission.* An H–2A petition may be filed to replace H–2A workers whose employment was terminated early. The petition must be filed with a copy of the certification document, a copy of the approval notice covering the workers for which replacements are sought, and other evidence required by paragraph (h)(3)(i)(D) of this section. It must also be filed with a statement giving each terminated worker's name, date and country of birth, termination date, and evidence the worker has departed the United States. A petition for a replacement may not be approved where the requirements of paragraph (h)(3)(vi) of this section have not been met. A petition for replacements does not constitute the notice that an H–2A worker has absconded or has ended authorized employment more than five days before the relating certification expires.

(x) *Extensions without labor certification.* A single H–2A petition may be filed and approved without a certification if it is based on a continuation of the employment authorized by the approval of a previous H–2A petition filed with a certification (but not a certification extension granted under 30 CFR 655.106(b)(3)), and the proposed continuation of employment will last no longer than the previously authorized employment and also will not last longer than two weeks.

(4) *Petition for alien to perform temporary non-agricultural services or labor (H–2B).*

* * * * *

Dated: May 27, 1987.

Mark W. Everson,

Executive Associate Commissioner, Immigration and Naturalization Service.

[FR Doc. 87–12432 Filed 5–29–87; 8:45 am]

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federal register

Monday
June 1, 1987

Part VI

Department of Transportation

Federal Aviation Administration

14 CFR Parts 121 and 135
Airborne Low-Altitude Windshear Equipment and Training Requirements; Notice of Proposed Rulemaking

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 121 and 135

[Docket No. 19110; Notice No. 79-11A]

Airborne Low-Altitude Windshear Equipment and Training Requirements

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The National Transportation Safety Board has determined that low-altitude windshear has been a prime causal factor in numerous air carrier accidents. These proposals, if adopted, should reduce windshear-related accidents by enhancing pilot understanding of windshear and by requiring certificate holders to develop and use procedures and flight guidance equipment to facilitate escape from inadvertent hazardous windshear encounters. This notice discusses the various aspects which might have a bearing on possible low-altitude windshear solutions. It also proposes to require that certain turbine-powered airplanes operated in accordance with Part 121 of the Federal Aviation Regulations have airborne systems that warn a pilot of the presence of hazardous low-altitude windshear conditions and if such windshear conditions are inadvertently encountered, provide flight guidance for a missed approach procedure or an escape maneuver. In addition, the notice proposes that all Part 121 operators conduct approved low-altitude windshear flight training in an approved simulator. The NPRM further proposes that Part 121 and 135 certificate holders' training programs be required to include training concerning flight crewmember recognition and escape from low-altitude windshear conditions as part of their normal ground training.

DATE: Comments must be received on or before September 28, 1987.

ADDRESSES: Send comments on the proposal in duplicate to: Federal Aviation Administration, Office of the Chief Counsel, Attention: Rules Docket (AGC-204), Docket No. 19110, 800 Independence Avenue, SW., Washington, DC 20591. One may deliver comments in duplicate to: FAA Rules Docket, Room 916, 800 Independence Avenue SW., Washington, DC 20591. All comments must be marked "Docket No. 19110." Comments may be examined in the Rules Docket weekdays, except Federal holidays, between 8:30 a.m. and 5 p.m.

FOR FURTHER INFORMATION CONTACT: Gary E. Davis, Project Development Branch (AFS-240), Air Transportation Division, Office of Flight Standards, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; Telephone (202) 267-3752.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments and by commenting on the possible environmental, energy, or economic impact of this proposal. The comments should identify the regulatory docket or notice number and be submitted in duplicate to the address above. All comments received, as well as a report summarizing any substantive public contact with FAA personnel on this rulemaking, will be filed in the docket. The docket is available for public inspection both before and after the closing date for making comments.

Before taking any final action on the proposal, the Administrator will consider any comment made on or before the closing date for comments. The proposal may be changed in light of comments received.

The FAA will acknowledge receipt of a comment if the commenter submits with the comment a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. 19110." When the comment is received, the postcard will be dated, time stamped, and returned to the commenter.

Availability of NPRM

Any person may obtain a copy of this notice of proposed rulemaking by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Inquiry Center, APA-230, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267-3484. Requests should identify the docket number of this proposed rule. Persons interested in being placed on a mailing list for future proposed rules should also request a copy of Advisory Circular No. 11-2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

Discussion

Problem To Be Solved

Since July 1973, 13 U.S. air carrier accidents have occurred which were attributed to encounters with severe low-altitude windshear during terminal area flight operations. From 1964 to 1983, 28 transport category airplane takeoff or approach-and-landing accidents occurred in which low-altitude windshear was determined to be a causal factor. Investigative studies concerning some of these accidents, as well as other efforts designed to characterize windshear and document its influence on pilot/aircraft performance and control, have increased awareness of the potential hazard posed by low-altitude windshear in the airport area.

Low-altitude windshear is a sudden change in wind direction and/or speed over a relatively short distance in the atmosphere. Windshear may have a detrimental effect on the performance of an aircraft if encountered on the ground during takeoff or if encountered relatively close to the ground during climbout or approach to landing. Low-altitude windshears may be found at any time of the year. They can also be found in clear air or may be associated with thunderstorm or frontal zone weather activity.

These windshear phenomena represent a serious hazard to aircraft entering these areas of highly unstable air. During low-altitude phases of flight, such as during takeoff or landing, an aircraft may encounter a low-altitude windshear that it cannot recover from in time to avoid impacting the ground or an obstacle because, to avoid an accident when such windshears are encountered, the aircraft must have enough performance, e.g., engine thrust, when compared to its weight, to be capable of accelerating through or climbing out of the windshear condition.

Background

On April 26, 1979, the FAA issued Advance Notice of Proposed Rulemaking (ANPRM) 79-11. The notice requested comments and recommendations to assist the FAA in determining what, if any, regulatory proposals should be developed and established a two-fold approach to the windshear problem. One approach explored the feasibility of placing windshear detection equipment on the ground and transmitting information to the pilot. The other approach tried to determine whether equipment can be installed aboard the aircraft that would provide the pilot with windshear information in "real time."

ANPRM 79-11 invited public participation in the identification and selection of a course or alternative courses of action with respect to a particular rulemaking problem. Advancing technology and continuing research have shown that the specific

questions and certain windshear systems (ground and air), respectively addressed in the ANPRM, are limited in scope and technology and should be categorized as systems that are "reactive" to an aircraft entering a windshear environment. As a result, the FAA concludes that future research should be focused on predictive ground and airborne systems which would identify a windshear phenomena in advance of an aircraft actually penetrating that potentially severe condition.

The FAA also issued Advisory Circular No. 00–50A, Low Level Wind Shear, to provide guidance in recognizing meteorological conditions that produce windshear phenomena and to recommend certain pilot techniques to minimize the effects of windshear when encountered during takeoff or landing. In addition, the FAA established a research and development program to examine the hazards associated with low-altitude windshear, develop solutions to the windshear problem, and integrate those solutions into the National Airspace System. As an outgrowth of those FAA programs, a ground-based Low-Level Windshear Alert System (LLWAS) capable of detecting the presence of hazardous windshear in the vicinity of the airport at the surface has been installed at 90 major airports within the United States. The FAA will install an additional 20 LLWAS's at airports across the Nation, bringing to 110 the number of airports which will have the equipment. In addition, the FAA is currently working on an enhancement modification to the LLWAS to detect microbursts, which are the cause of short-lived but potentially severe windshear. Further, in July 1984, the FAA in cooperation with the National Center for Atmospheric Research began an operational evaluation of a Doppler radar windshear forecasting and alerting system in the area of Stapleton Airport, in Denver, Colorado.

The FAA also is working closely with the scientific community to better understand hazardous windshear conditions and supporting research to help characterize those conditions so prediction of the event is possible. That information will provide the basis for improved pilot training to cope with inadvertent windshear encounters and eventually development of airborne devices which a pilot could use to avoid such encounters.

The FAA, in its research, addressed systems using ground-based equipment and airborne equipment that have been explored and show varying promise of assisting pilots in windshear situations. Examples of ground-based equipment would be barometric systems, acoustic Doppler systems, and laser systems. Examples of airborne equipment are airspeed/groundspeed comparison, modified control laws for flight director and thrust command, and acceleration margin systems.

The FAA identified several airborne windshear systems which showed promise of being effective in alerting a pilot of the existence of windshear once encountered. The FAA awarded a research contract to help determine the most appropriate methods of training air carrier pilots to recover from inadvertent entry into a windshear. Another contract involves weather research utilizing Doppler radar to help pinpoint the location and movement of windshear which will improve future forecasting of the phenomena.

The FAA will continue to foster research programs to design better guidance and control aids to improve a pilot's ability to avoid an accident in the event of a windshear encounter. Future FAA action will place emphasis on fostering the development of predictive technology for use in systems to detect and avoid inadvertent entrance into windshear. For these reasons, the FAA will continue pursuing a "systems concept" which includes an improved low-altitude windshear weather forecasting technique, ground-based windshear detection equipment, and airborne windshear detection and avoidance equipment.

Continuing technological and educational improvements, along with recurring windshear training, research on predictive systems, and research in conjunction with the scientific community to learn more about the phenomena (e.g., microbursts) will allow these basic systems to be continually improved and updated until the eventual goal of detecting and pinpointing windshear, before entry, can be achieved.

Recent Windshear-Related Accidents

On July 9, 1982, Pan American World Airways Flight 759 crashed shortly after taking off from New Orleans International Airport. One hundred and forty-five persons on board the airplane and eight persons on the ground died. On August 2, 1985, Delta Air Lines Flight 191 crashed while approaching to land at the Dallas/Fort Worth International Airport. The National Transportation Safety Board (NTSB) attributed the cause of both accidents to the airplanes' encounter at low altitude with microburst-induced, severe windshears produced by isolated heavy thunderstorms in the vicinity of each airport at the time of the crash. These two accidents are examples of a number of crashes that have been attributed to severe windshear.

NTSB Recommendations

Reports by the NTSB of investigations of air carrier accidents at least partly attributable to windshear have resulted in a series of specific safety recommendations by the NTSB to the FAA. These recommendations were carefully considered and acted on by the FAA and followed up by the NTSB. Together with other FAA activities, these recommendations have contributed to the body of accumulated data the evaluation of which has enabled the FAA to formulate and initiate numerous actions with respect to windshear, some of which will be discussed later in this notice. The NTSB's reports of the accident investigations of Pan American World Airways Flight 759 and Delta Air Lines Flight 191 are the latest in this series of recommendations. Each of those reports contains certain recommendations for priority and longer-term action intended to improve safety in windshear weather conditions.

Recent NTSB recommendations to the FAA concern enhanced windshear pilot training and installation of airborne systems. These proposals have taken into consideration those NTSB recommendations.

Congressional Mandate and Resulting Study

In December 1982, the Congress passed Public Law 97–369 requiring the FAA to contract with the National Academy of Sciences (NAS) "to study the state of knowledge, alternative approaches and the consequences of windshear alert and severe weather condition standards relating to takeoff and landing clearances for commercial and general aviation aircraft." An agreement between NAS and the FAA was signed on March 17, 1983, to accomplish the study mandated by Congress. The report of the NAS committee, entitled "Low-Altitude Windshear and Its Hazard to Aviation," was published by the National Academy Press late in 1983. The report states that 27 aircraft accidents or incidents in U.S.-registered aircraft attributed to low-altitude windshear occurred from 1964 to 1982. There have been at least two additional accidents resulting in several hundred fatalities attributed to that cause since 1982. The complexity and magnitude of the windshear problem is

emphasized by the following summary from the NAS report.

• In 1975, the National Aeronautics and Space Administration (NASA), in cooperation with the FAA, instituted the Aviation Safety Reporting System (ASRS) whereby safety-related incidents involving aircraft operations are submitted voluntarily and treated anonymously with the expectation that potential flight safety problems may be identified and corrective action suggested. A total of 26 reports has been indexed as windshear related out of nearly 21,600 reports received since May 1, 1978. Of these, 17 appear to involve windshear as a primary factor.

• In 1977, the FAA conducted a study of NTSB reports on aircraft accidents and incidents related to low-altitude windshear that occurred from 1964 through 1975. More than 59,000 reports were reviewed, covering all classes of civil aircraft and flight operations. About one-third of the accidents or incidents, more than 19,000, occurred during terminal area operations. Twenty-five accidents or incidents involving large aircraft were identified in which low-altitude windshear could have been a contributing factor. Of these 25 cases, 23 occurred during approach or landing and 2 occurred during takeoff.

• The following table, extracted from the NAS report, lists the 27 U.S. aircraft accidents or incidents that occurred from 1964 to 1982 in U.S.-registered aircraft that are attributed to low-altitude windshear. The list includes most of the 25 cases identified by the FAA. Some were omitted because, on further examination, they could not be attributed to windshear. The table includes windshear-related accidents or incidents that have occurred since 1976, including two during 1982.

TABLE 1.—AIRCRAFT ACCIDENTS AND INCIDENTS RELATED TO LOW-ALTITUDE WIND SHEAR (1964–1982)

No	Year and date	Time (LST)	Location	Airline Flt No. (aircraft type)	T/O or ODG (runway)	Fat/Inj	Wind shear experienced	Weather systems and references ( )
1	1964 Mar 01	1129	Lake Tahoe, NV	Paradise 901A (L-1049).	●LDG	85/0	During climbout after a missed approach.	Strong mountain lee wave during snowstorm (1)(3)(9).
2	1965 Jul 01	2134	JFK New York, NY	AA 64 (B-720B)	●LDG 31R	0/0	Windshift from headwind to crosswind.	Thunderstorm with a sharp pressure rise (1).
3	1965 Mar 17	1858	Kansas City, MO	TWA 407 (B-727)	●LDG 36	0/0	Wind direction change on final, 310°-21kts to 280°-22kts.	Unstable moist air (1).
4	1968 Jun 08	1351	Salt Lake Cty, UT	UAL 8327 (B-727)	●LDG 34L	0/1	260°-13kts at 1351 to 280°-12kts.	Heavy thunderstorm with suspected gust front (1).
5	1970 Jul 20	1136	Naha AB, Okinawa	FLY TIG 45 (DC-8)	●LDG 18	4/0	10kts tailwind near threshold.	Heavy rainshower one mile in diameter (1).
6	1970 Dec 10	1926	St Thomas, VI	Carib-Atl (CV-640)	●LDG 09	NA	Landing in 080°-20kts wind.	Lee side flow in rainshower (1).
7	1971 Jan 04	1832	LGA New York, NY	FAA N-7 (DC-3)	●LDG 04	0/2	Tailwind changed into headwind.	Frontal shear (1) (9).
8	1972 May 18	1421	Ft Lauderdale, FL	EAL 346 (DC-9)	●LDG 09L	0/3	180°-10kts at 1418 to 130°-12kts at 1426.	Heavy thunderstorm (1).
9	1972 Jul 26	1406	New Orleans, LA	NA 32 (B-727)	●LDG 28	0/0	IAS dropped 162 to 122kts.	Intense rainstorm and thunderstorm (1).
10	1972 Dec 12	2256	JFK New York, NY	TWA 669 (B-707)	●LDG 04R	0/0	42kts tailwind at 1500' to 5kts headwind at the surface.	Frontal shear (10); Fog and drizzle (1) (9).
11	1973 Mar 03	1250	Wichita, KS	TWA 315 (B-727)	●LDG 19R	0/0	100°-10kts at 1240:00 to 170°-10kts to 070°-10kts at 1249:10.	Thunderstorm (1).
12	1973 Jun 15	1403	ORD Chicago, IL	Airlift 105 (DC-8)	●LDG 22R	0/0	Estimated downdraft 50fps at 3000', 13fps at 500' AGL.	Heavy rainstorm (1).
13	1973 Jul 23	1643	St Louis, MO	OZ 809 (FH-227B)	●LDG 30L	38/6	Up- and downdrafts	Outflow shear (4); Thunderstorm, sharp pressure rise (1).
14	1973 Nov 27	1851	Chattanooga, TN	DL 516 (DC-9)	●LDG 20	0/42	Low-altitude wind shear	Outflow shear (4); Thunderstorm outflow (1) (9).
15	1973 Dec 17	1543	Boston, MA	Iberia 933 (DC-10)	●LDG 33L	0/16	200°-24kts at 500', 260°-2kts at 200', 315°-08kts at surface.	Frontal shear (4); Rain and fog (1) (9).
16	1974 Jan 30	2341	Pago Pago, SAMOA	PAA 806 (B-707)	●LDG 05	96/5	Decreasing headwind and/or downdraft during the final 4 seconds.	Outflow shear (4); Heavy rainshower (1) (9).
17	1975 Jun 24	1457	JFK New York, NY	EAL 902 (L-1011)	○LDG 22L		8kts headwind to 6kts tailwind with 20fps downdraft.	Small downburst or microburst (5); Strong thunderstorm (1) (9).
18	1975 Jun 24	1505	JFK New York, NY	EAL 66 (B-727)	●LDG 22L	112/12	14kts headwind to 1kt headwind with 21fps downdraft.	Small downburst or microburst (5); outflow shear (4); Strong thunderstorm (1) (9).
19	1975 Aug 07	1511	Denver, CO	CO 426 (B-727)	●T/O 35L	0/15	IAS decreased 158 to 116kts in 5 seconds.	Small downburst or microburst (6); outflow shear (4); thunderstorm (1) (9).
20	1975 Nov 12	2002	Raleigh, NC	EAL 576 (B-727)	●LDG 23	0/1	10° windshift, gust up to 21kts.	3 inch per hour rain fall rate (1) (9).
21	1975 Dec 31	1056	Greer, SC	EAL (DC-9)	●LDG 03	0/0	200° cnange in wind direction.	Light rain and fog (1).
22	1976 Jun 23	1612	Philadelphia, PA	AL 121 (DC-9)	●LDG 27R	0/87	65kts headwind to 20kts tailwind.	Microburst (7); Outflow shear (4); Fast-moving thunderstorm (1) (9).
23	1976 Dec 12	2326	Cape May, NJ	Atl Cty 977 (DHC-6)	●LDG 19	3/7	Gust to 50kts	Frontal shear (1) (9).
24	1977 Jun 03	1258	Tucson, AZ	CO 63 (B-727)	●T/O 21	0/0	30kts headwind to 30kts tailwind.	Microburst (7); Outflow shear (4); Downdraft in thunderstorm (9).
25	1979 Aug 22	1412	Atlanta, GA	EAL 693 (B-727)	○LDG 27L		Strong downdraft and headwind.	Microburst (8); Thunderstorm rainshower (9).
26	1982 Jul 09	1509	New Orleans, LA	PAA 759 (B-727)	●T/O 10	153/9	Headwind tailwind and downdraft shear.	Microburst with heavy rain (9).

TABLE 1.—AIRCRAFT ACCIDENTS AND INCIDENTS RELATED TO LOW-ALTITUDE WIND SHEAR (1964–1982)—Continued

No	Year and date	Time (LST)	Location	Airline Flt No. (aircraft type)	T/O or ODG (runway)	Fat/Inj	Wind shear experienced	Weather systems and references ( )
27	1982 Jul 28	1521	LGA New York, NY	TWA 524 (B-727)	OLDG 22		Severe wind shear at 20-100: AGL.	Strong thunderstorm with gusty winds (2).

Total: ●24 Accidents; ○3 Incidents; 491 Fatalities/206 injuries.

References:
(1) Shrager, 1977; (2) NTSB letter to FAA, March 25, 1983;
(3) Wuttele, 1970; (4) FAA Wind Shear Program, Dec. 1982;
(5) Fujita and Byers, 1977; (6) Fujita and Caracena, 1977;
(7) Fujita, 1978; (8) Fujita, 1980; (9) NTSB Accident/Incident Reports; (10) Sowa, Private Communication.

In 1981, general aviation aircraft numbered more than 200,000 and flew more than 40 million hours (compared with 3,973 aircraft and 8 million flight-hours for air carriers). General aviation operations accounted for 662 fatal accidents from all causes, with 1,265 fatalities. Informal accident statistics from the NTSB for 1981 indicate that weather caused or was a related factor in 40 percent (289 cases) of the U.S. general aviation accidents. Of these, windshear was reportedly the cause of one fatal accident and was a factor in two. It should be noted that the NTSB generally investigates only those general aviation accidents that result in a fatality, and not all of those attributed to weather were analyzed by trained meteorologists. Some type of low-altitude wind variability may have been a factor in some of these accidents.

A recent study concerning the effects of windshear on aircraft operations and flight safety in Australia, including an extensive survey of pilots, concluded that windshear was a causal or contributory factor in numerous aircraft accidents in Australia and elsewhere and that inadequate knowledge of wind structure and of the resulting effects on aircraft operations constitutes a flight safety hazard. Furthermore, the term "windshear" is subject to various interpretations among pilots, and specific definitions are often misunderstood. Pilot judgments as to the aircraft types most susceptible to windshear were not readily explicable in terms of aircraft size, landing speed, or wing loading. The use of standard terminology and improved training for pilots and air traffic controllers was recommended, along with research on optimal piloting techniques during windshear encounters.

In the United Kingdom, the Royal Aircraft Establishment has undertaken a program to extract windshear data from records obtained from 10 Boeing 747 aircraft operated throughout the world by British Airways. This is a continuing effort to obtain wind information on strong windshear events during approach and landing. Time histories of wind velocities and aircraft reactions to windshear events are identified and analyzed. The results may lead to statistics on the probabilities of encountering windshears and criteria for testing and evaluating autopilots and onboard windshear detection systems.

The rarity and lack of a reliable statistical data base on windshear-related accidents, shear encounters, or even the frequency of occurrence of potentially hazardous windshears do not diminish the importance or severity of the safety problem. The potentially catastrophic consequences of an encounter during takeoff or approach and landing require that windshear always be taken into account as a primary safety consideration when weather conditions are such that strong windshears may be present. The widespread lack of appreciation among pilots, air traffic controllers, and aircraft operations personnel of the seriousness of the possible safety hazards has exacerbated the problem.

Windshear Phenomena Research

The following quotation is taken from a report by T. Fujita (Fujita, T. Theodore, "The Downburst—Macroburst and Microburst," 1985, Department of Geophysical Sciences, The University of Chicago, p. 8), which clearly describes the convective storm phenomenon that is perhaps the severest and most hazardous of windshears.

A downburst is a strong downdraft which induces an outburst of damaging winds on or near the ground. Damaging winds, either straight or curved, are highly divergent. The sizes of downbursts vary from one kilometer (km) to tens of km's. Downbursts are divided into macrobursts and microbursts according to their horizontal scale of damaging winds.

Macroburst: A large downburst with its outburst winds extending in excess of 4 km's (2.5 miles) in horizontal dimension. An intense macroburst often causes widespread, tornado-like damage. Damaging winds, lasting 5 to 30 minutes, could be as high as 60 meters/second (m/sec) (134 miles per hour (mph)).

Microburst: A small downburst with its outburst, damaging winds extending only 4 km's (2.5 miles) or less. In spite of its small horizontal scale, an intensive microburst could induce winds as high as 75 m/sec (168 mph).

Fujita first postulated the thunderstorm downburst theory in 1975 after his analysis of the June 24, 1975, Eastern Airlines Flight 66 accident at New York's John F. Kennedy International Airport. In 1978, Fujita and Srivastava operated Project NIMROD (Northern Illinois Meteorological Research on Downbursts) near Chicago, Illinois, using 3 Doppler weather radars and 27 automated surface stations. NIMROD was followed in 1982 by the Joint Airport Weather Study (JAWS), involving Fujita, McCarthy, and Wilson as principal investigators. As in NIMROD, three Doppler radars and an extensive surface network were used to detect and measure microburst activity.

In 1984 and 1985, the FAA sponsored research in testing Doppler weather radar's operational use in the airport environment. The Massachusetts Institute of Technology Lincoln Laboratory established a mesometeorological network (mesonet) on and around Memphis International Airport in Tennessee. This mesonet included one S-band and one C-band Doppler weather radar, 30 mesonet surface stations, and data feeds from the Memphis LLWAS and the National Weather Service Weather Service Radar–57 (NWS WSR–57) located north of Memphis.

Analysis of the meteorological data provided by these research projects has established that a microburst:

(1) Can be either "wet" (with rain) or "dry" (without rain—often with virga (rain which does not reach ground));

(2) Has a horizontal dimension of 2.5 miles or less;

(3) Has a lifetime of 15 minutes or less;

(4) Has an average wind differential of 25 m/sec (56 mph); and

(5) Can seriously degrade aircraft performance and has been a primary causal factor in a number of aircraft accidents.

These most recent projects coupled with prior FAA-sponsored windshear investigations have contributed directly to the development of windshear computer models and wind profile data. These data have been incorporated into the certification process for airborne windshear equipment. The FAA is continuing to sponsor research

concerning all types of windshear phenomena. It has been established that the microburst and macroburst phenomena are serious forms of windshear. The analysis and understanding of the impact of these phenomena are presently being used in the development of a windshear course of training.

ANPRM 79–11 and Related FAA Actions

As previously discussed, low-altitude windshear is a change in wind direction and/or speed over a relatively short distance in the atmosphere which may have a detrimental effect on the performance of an aircraft if encountered on the ground during takeoff or if encountered relatively close to the ground during climbout or approach to landing. In May 1977 the FAA amended Part 121 of the Federal Aviation Regulations (FAR) to require air carriers to adopt an approved system for obtaining forecasts and reports of adverse weather conditions, including low-altitude windshear, that could affect the safety of flight on the routes to be flown and at airports to be used.

As previously discussed, the FAA also issued Advisory Circular (AC) No. 00–50A, Low Level Wind Shear, to provide guidance in recognizing meteorological conditions that produce windshear phenomena and to recommend certain pilot techniques to minimize the effects of windshear when encountered during takeoff or landing. In addition, the FAA established a research and development program to examine the hazards associated with low-altitude windshear, develop solutions to the windshear problem, and integrate those solutions into the National Airspace System.

Subsequently, in November 1983 the FAA issued AC No. 120–41, Criteria For Operational Approval Of Airborne Windshear Alerting And Flight Guidance Systems, to provide industry with an acceptable means of obtaining operational approval for the use of various airborne windshear systems on air carrier aircraft.

As previously discussed, on April 26, 1979, the FAA issued ANPRM 79–11 (44 FR 25867, May 3, 1979), which specifically discussed three possible airborne windshear avoidance systems and asked the following questions:

1. Is there a valid need to amend Part 121 and require windshear detection equipment?

Twenty-six commenters responded to question No. 1. Five commenters state that a requirement for some type of airborne windshear detection equipment is necessary. One recommends voluntary action on the part of the air carriers to provide solutions to the windshear problem, and two recommend that the FAA's major windshear efforts be directed toward ground-based equipment. The remaining commenters state that some alternate method of detecting windshear from that discussed in the ANPRM is needed, such as a change in the present technique of managing airspeeds, improved angle-of-attack indicators, and an optional system that projects data on the cockpit windshield, e.g., "head-up display."

The FAA does not agree with the commenters who oppose regulatory action or state that the proposal is premature. Devices, systems, and techniques currently exist which, if properly used, can provide an increased margin of safety in detecting, evaluating, and avoiding low-altitude windshear. The FAA does not agree that reliance solely on voluntary action on the part of the air carriers to provide solutions to the windshear problem is a proper course of action. The windshear problem directly affects safety and is complex, and regulatory action as proposed in this notice would require the entire industry to assist in addressing this most serious problem. Indeed, the fact that windshear-related accidents continue to occur shows that voluntary action is not solving the problem.

The FAA also does not agree with those commenters who urge that the FAA concentrate primarily upon ground-based windshear equipment. Because of the dynamic nature of windshear, ground-based equipment alone may not be responsive enough to provide timely data. It also may not be feasible to provide ground-based equipment at each air carrier airport throughout the world. For these reasons the FAA is pursuing a "systems concept" to solve the problem of low-altitude windshear. This concept includes an improved low-altitude windshear weather forecasting technique, ground-based windshear detection equipment, airborne windshear warning and flight guidance, and improved pilot training.

2. Which of the various systems is best suited to Part 121 operations, would be cost effective, and would provide a flightcrew with adequate and timely information to avoid windshear hazards?

Ten commenters responded to question No. 2. Four commenters believe that further development of airborne windshear equipment is necessary to determine the suitability of the various systems proposed in the ANPRM. The remaining commenters are evenly divided as to the suitability of these systems. Although the FAA agrees that windshear research should continue, there should not be a delay in initiating regulatory action to bring about a reduction in windshear-related accidents. There are at least two systems which have already received FAA certification as airborne windshear alerting and flight guidance devices on various aircraft. In addition, several other manufacturers have made formal application for a Supplemental Type Certificate (STC) for other systems. Any of these systems could provide the flightcrew with a margin of warning that could enhance the probability of successfully accomplishing the windshear escape procedure for the particular system. These systems also provide flight guidance which, if followed, would permit optimum aircraft performance to be used during a windshear escape maneuver.

3. Have all practical solutions to the windshear problem been explored, or are there other simpler and less costly solutions available?

Eight commenters offered responses to portions of question No. 3. The majority of the commenters believe that all practical solutions to the windshear problem have not been explored, but none offered any specific ideas for other solutions. Several of these commenters recommend further research. The FAA agrees that all practical solutions to the windshear problem may not have been explored; however, research and development efforts are continuing within both the Government and industry, and other practical solutions might be found. Nevertheless, because of the seriousness of the windshear problem, a regulatory proposal to require implementation of any system that could alleviate it should not be delayed.

4. How reliable would the various systems be in poviding windshear information and what operating and maintenance costs would each of them be likely to impose on aircraft operators?

Eight commenters responded to question No. 4, but their comments were limited to airborne systems. Four commenters believe there is insufficient data available to judge the reliability and operating and maintenance costs of the various systems. None of the commenters provided reliability estimates or cost figures to support their expressed concern. Of the eight commenters, several state that the cost of an Inertial Navigation System (INS) groundspeed source used in the airspeed/groundspeed comparison system (discussed below) is prohibitive. One commenter states that groundspeed sensors are too expensive and

unreliable. The FAA is aware that several devices are available that are capable of providing groundspeed information, and most of them are less costly than an INS groundspeed sensor. Another commenter states that because of compelling safety reasons, a windshear system is essential whatever the cost. The FAA does not propose to specify any particular airborne system for the windshear solution. Of course, the FAA would have to take into account the costs and benefits of any rulemaking action.

In light of the foregoing discussion, it is clear that now is the time to act because the public must be given maximum protection available from the catastrophic accidents which can occur. Certainly, research will continue, but industry must join the FAA in minimizing this threat.

Discussion of Pertinent Studies

Windshear Equipment

As stated in ANPRM 79–11, the FAA research and development effort, with respect to windshear equipment, has taken a two fold approach to the low-altitude windshear problem. One approach explored the feasibility of placing windshear detection equipment on the ground and transmitting information to the pilot. The other approach tried to determine whether equipment that would provide the pilot with windshear information in "real time" could be installed aboard the aircraft. Before the ANPRM was issued, the FAA, through a series of simulator experiments, began to investigate the effectiveness of airborne low-altitude windshear systems designed to warn pilots of the existence of windshears and to assist them in transiting or avoiding such shears. The scope of this investigation concerned the operation of airline transport category airplanes in windshears. The following airborne systems were identified as having a possibility of being effective in helping to alleviate the problem of windshears:

1. *Airspeed/Groundspeed (Range Rate) Comparison.* This is a concept that provides a rationale and procedure for adding airspeed to the approach speed without compromising landing performance, It can be implemented in a variety of ways, including a digital display of groundspeed and a dual indicating airspeed/groundspeed instrument.

2. *Modified Control Laws for Flight Director and Thrust Command.* Acceleration augmentation and quickening of pitch steering commands have been found to provide the pilot with improved glide slope tracking during windshear encounters. When combined with thrust commands based on a minimum groundspeed-augmented computation, the flight director indicator may provide the pilot with the necessary commands for coping with moderate to severe windshear.

3. *Acceleration Margin.* This concept compares known airplane acceleration potential with a predicted approximation of acceleration loss due to along-track wind difference (headwind loss), modified with altitude and altitude rate-of-change values.

Simulator Testing of Windshear Procedures and Equipment

The FAA conducted a series of flight simulator tests over a 4-year period to determine the most effective way to manage windshear penetrations. These tests evaluated airborne displays, instrumentation, and procedures for aiding a pilot in detecting, evaluating, and avoiding low-altitude windshear conditions during takeoff, climbout, approach, and landing. These simulator tests analyzed windshear effects and development of wind models and consist of six large-scale piloted flight simulation exercises.

A set of standard low-altitude windshear profile models was developed for use in these tests. These windshear profile models were developed from meteorological math models, tower measurements, and reconstructed wind conditions that may have existed during actual aircraft accidents attributed to low-altitude windshear. Report FAA–RD–79–117, "Airborne Aids for Coping with Low-Level Wind Shear" (July 1979), discusses the development and use of existing windshear profile models and offers a method of evaluating systems by testing them in a flight simulator.

A series of flight simulator studies was conducted to compare pilot responses in windshear using conventional, unmodified instruments to the pilot responses in windshear using modified and new instruments (See "Piloted Flight Simulation Study of Low Level Wind Shear, Phases 1 through 4" available from the National Technical Information Service, 5285 Port Royal Road, Springfield, Virginia 22216.) These flight simulator studies were conducted during the takeoff, climbout, approach, and landing phases of flight. An analysis of the effects of windshear during each phase of flight follows:

Studies with computer models show that the hazard from low-altitude windshear on takeoff and climbout is as great as that on approach and landing, and the range of possibly effective control actions is more limited. During climbout when a headwind loss, a downdraft, or both, occurs (either can lead to the airplane sinking below the desired flight path), the appropriate response is to advance the throttles to full thrust and to increase pitch attitude to minimize the loss of altitude and provide maximum available lift.

The FAA initiated flight simulator tests that were designed to further investigate the effects of low-altitude windshear during the takeoff and climbout of flight. The simulator was programmed to represent a normal, full-thrust takeoff of a DC–10 airplane. Air density and temperature conditions represented in the simulation were set for a sea-level field elevation and a standard day. The runway was 150 by 10,400 feet, and there were no visibility restrictions.

Four low-altitude windshear profiles were developed especially for these tests. The shears were representative of certain meteorological conditions and consisted of the following:

1. A highly mixed atmospheric boundary layer wherein temperature stratification is consistent with adiabatic distribution (9.8 degrees/km);

2. A low-altitude temperature inversion overlaid by fairly strong winds immediately above the inversion;

3. Fast-moving frontal zones producing significant turning of the winds immediately above the inversion;

3. Fast-moving frontal zones producing significant turning of the wind vector with altitude; and

4. A thunderstorm cold air outflow producing abrupt changes in both horizontal and vertical wind velocities.

All takeoff and climbout sequences were flown using a standard DC–10 instrument panel configuration, with modified flight director pitch-steering commands developed for go-around guidance. These modified control laws were designed to provide the pilot with optimum performance guidance to determine minimum altitude loss if a shear was encountered. The standard DC–10 pitch steering command for takeoff, which attempts to stabilize the climbout at constant airspeed, was compared with the modified procedures. The tests showed that there are windshear conditions which occur during takeoff and climbout that exceed the aerodynamic and thrust capability of the airplane. In such conditions, the most appropriate procedures are not to attempt the takeoff, or take off in a different direction.

Investigation of low-altitude windshear effects during the approach-and-landing phase of flight was also conducted and consisted of a series of

piloted flight simulation studies supported by analytical and experimental studies of airplane responses to windshear and the meteorological phenomena that produce low-altitude windshear.

Approach-and-landing tests were run under different conditions of visibility, with different levels of approach instrumentation (precision-full Instrument Landing System (ILS) and nonprecision-ILS without glide slope) using both wide-body and narrow-body jet transports. The tests showed similar results as those conducted for takeoff and climbout, i.e., implementation and use of enhanced approach instrumentation greatly increase the potential for survival of an inadvertent encounter with severe windshear. However, there are windshear conditions which occur near the ground which would exceed the aerodynamic and thrust capability of any aircraft.

Windshear Training

The FAA contracted with a consortium of aviation specialists from The Boeing Company, United Airlines, McDonnell Douglas, Lockheed-California, Aviation Weather Associates, and Helliwell, Inc., to produce windshear training aid documents and videos. The training aids are designed to present an effective means of training flightcrews to minimize the windshear threat.

The windshear training program resulting from the windshear training contract is aimed at flying procedures to help pilots handle encounters with windshear. This near-term effort will complement efforts to develop electronic cockpit aids for windshear detection and flight guidance and planned long-term improvements in ground-based avoidance systems.

The consortium of aviation specialists who developed this uniform industry-wide windshear training program focused on the cause and effect of windshear and has developed instructions on windshear avoidance, identification, and recovery. This contract is expected to provide any operator the necessary data to create or update its own windshear training program.

The need for effective windshear training is clear and is independent of other aviation activities within the industry. Operators using this information will be encouraged to formulate a windshear training policy with emphasis on avoidance and recovery technique training, and, with minimum delay, design and implement a windshear training program suited to their needs.

Discussion of the Proposals

The need for airborne windshear warning and flight guidance equipment and enhanced pilot training is demonstrated by the above discussion. It should be noted in the discussion of proposals that "an approved low-altitude windshear flight training program" is referenced for ease of understanding of the proposed upgraded flight training requirements. This phrase is not intended to mean that there should be a separate training program. Instead, the intention is that the approved low-altitude windshear training would be incorporated into the certificate holder's approved training program. The specific proposals are explained below.

(New) Section 121.358 Low-altitude windshear system equipment requirements.

This proposed new section would require that after 2 years after the effective date of the proposed rule, no person may operate a turbine-powered airplane unless it is equipped with an approved system providing airborne windshear warning with flight guidance. For the purpose of this section, "turbine-powered airplane" includes, e.g., turbofan-, turbojet-, propfan-, and ultra-high bypass fan-powered airplanes. The definition specifically excludes turbopropeller-powered airplanes. The approved airborne windshear warning with flight guidance system to be installed must have been certificated in accordance with the appropriate sections of Part 25 of the FAR and must meet the operational approval criteria addressed in AC 120–41, anticipated upgraded advisory material, or approved equivalent.

New generation turbine-powered airplanes are included in the proposal because it is expected that these airplanes will have performance characteristics similar to current turbine-powered airplanes. Although the thrust available from the powerplants of these next generation airplanes is more than sufficient for normal flight conditions, the excess thrust available in a windshear situation is expected to be similar to the excess thrust available from certain large current generation turbine-powered airplanes which, by accident history, has proven to be insufficient to escape certain windshear situations. For the purposes of this proposal, the FAA has determined that windshear escape and avoidance could be a major operational factor for next generation turbine-powered airplanes. On the other hand, transport category reciprocating engine-, turbopropeller-, and turbine-powered airplanes operated under Parts 91, 125, and 135 are not included in this proposal since accident history does not justify their inclusion.

It should be noted that if, as a result of future research, additional systems are developed which the FAA deems to be necessary for better dealing with the windshear problem, the FAA will consider further rulemaking action.

Section 121.407 Training program: Approval of airplane simulators and other training devices.

A new paragraph (d) would be added which would require that an airplane simulator approved under this section be used instead of the airplane to satisfy the pilot flight training requirements prescribed in the certificate holder's approved low-altitude windshear flight training program set forth in proposed new § 121.409(d) described below.

It is proposed that an airplane simulator, instead of an airplane, be used to satisfy the pilot training requirements prescribed in the certificate holder's approved low-altitude windshear flight training program. This revision is necessary because of the obvious safety factor involved when attempting to fly through hazardous windshear conditions in an airplane.

Section 121.409 Training courses using airplane simulators and other training devices.

It is proposed to add a new paragraph (d) to require that an airplane simulator which has installed in it the windshear equipment needed to conform to the airplane type being simulated be used in the certificate holder's approved low-altitude windshear flight training program. The simulator would be required to be used in pilot flight training courses discussed below that provide training in at least the procedures and maneuvers set forth in the certificate holder's approved low-altitude windshear flight training program.

The approved low-altitude windshear flight training program must be incorporated in each of the pilot flight training courses prescribed in §§ 121.409(b), 121.418, 121.424, and 121.427.

The changes under this proposal are necessary to ensure through the training program approval process, that Part 121 operators of large turbine-powered airplanes use a simulator in their training programs to reinforce the procedures taught in the ground training curriculum and train both pilots in command (PIC's) and seconds in

command (SIC's) in the application of the approved procedures for escape from an inadvertent windshear encounter during both takeoff and landing. The goal of the combined ground and simulator flight training is to stress the concept of recognition and avoidance of a hazardous windshear encounter. However, in recognition of the fact that "predictive" or "look-ahead" airborne systems are not yet available, the training must provide escape procedures to use in case of an inadvertent encounter.

Section 121.419 Pilots and flight engineers: Initial, transition, and upgrade ground training.

It is proposed to reorganize and revise § 121.419(a)(2)(vi) to require all certificate holders to provide ground training to their flightcrews, including recurrent ground training in accordance with the provisions of § 121.415(a)(2), to include a program of instruction which identifies the potential hazard of an inadvertent windshear encounter on takeoff or landing. Procedures for recognition and escape with respect to all severe weather situations, in addition to the present requirement for avoidance, would also be required under this proposal. These revisions are necessary to make available to the pilot the latest meteorological information and procedures available to help the pilot to recognize the environmental conditions which are indicative of potential windshear. They would also stress the concept of avoidance of such an encounter by emphasizing flightcrew management procedures which require that any flight crewmember who, by use of the certificate holder's procedures, recognizes a hazardous windshear situation prior to its encounter and immediately announces that situation to the other flight crewmembers. At this point, the certificate holder's procedures should direct the PIC to take appropriate action, depending upon the circumstances, to avoid such encounters. These revisions are designed to ensure a transfer of learning from the classroom and simulator to the airplane to provide the pilot with the necessary information to stress delay of takeoff or landing or a takeoff from or landing on an unaffected runway when conditions, reports, radar, alerting devices, etc., indicate that a windshear encounter is probable.

Finally, the proposed revision would require each certificate holder to develop and require the use of procedures for escaping from inadvertent severe low-altitude windshear encounters. This revision is necessary because an analysis of the data from selected cockpit voice and flight data recorders recovered from certain airplanes involved in accidents attributed to windshear show that, in a significant number of cases, windshear escape procedures were not used by those pilots involved in the accidents. Since the FAR do not require certificate holders to have low-altitude windshear escape procedures and the development of such procedures on the part of certificate holders is voluntary, the FAA believes that pilot acceptance and use of such procedures would be strengthened by adoption of this proposal.

Section 212.424 Pilots; Initial, transition, and upgrade flight training.

It is proposed to revise § 121.424(a) by requiring for pilots the inclusion of the maneuvers and procedures set forth in the certificate holder's low-altitude windshear flight training program in the initial, transition, and upgrade flight training courses prescribed in current § 121.424(a). It is also proposed to revise § 121.424(b) to require in an approved airplane simulator only the accomplishment of the windshear manuevers and procedures prescribed in the proposed revision to § 121.424(a) discussed above. Current § 121.424(b) provides that the maneuvers and procedures required by paragraph (a) of that section must be performed inflight in an airplane except that certain maneuvers and procedures may be performed in an airplane simulator, an appropriate training device, or a static airplane as permitted in Appendix E to this part.

In addition, under this proposal, § 121.424(d) would be restructured so that paragraph (d)(1) would reference current § 121.409(c) and paragraph (d)(2) would reference proposed new § 121.409(d). Consistent with proposed new § 121.409(d), proposed paragraph (d)(2) would require training and practice in at least all of the maneuvers and procedures set forth in the certificate holder's approved low-altitude windshear flight training program that are capable of being performed in an airplane simulator in which the maneuvers and procedures are specifically authorized. These revisions are necessary to provide quality training in a simulated windshear environment which cannot be accomplished safely in-flight in an airplane.

Section 121.427 Recurrent training.

It is proposed to revise § 121.427(d)(1) by adding to each certificate holder's pilot recurrent flight training course training in maneuvers and procedures set forth in the certificate holder's approved low-altitude windshear flight training program. This revision is necessary to provide training that cannot be accomplished safely inflight in an airplane and a training environment which will provide a transfer of learning and general review of the training previously received during the initial or transition training portion of a certificate holder's approved low-altitude windshear flight training program.

Section 121.433 Training required.

Current § 121.427(d)(1)(ii) provides that satisfactory completion of a proficiency check may be substituted for recurrent flight training as permitted in § 121.433(c). Under this proposal, § 121.433 would be revised by adding a new paragraph (e) which would provide that a proficiency check may not be substituted for flight training conducted in an approved simulator in maneuvers and procedures in the certificate holder's low-altitude windshear flight training program. The reason for this proposed change is to ensure that a pilot does not receive a proficiency check in lieu of the flight training in a simulator in the maneuvers and procedures in the certificate holder's low-altitude windshear flight training program. This change is necessary since the purpose of a proficiency check is for the pilot to demonstrate proficiency in certain maneuvers and procedures in Appendix F. The low-altitude windshear flight training program required by this proposal is not included in Appendix F because the FAA finds that it would not be practical to develop and apply a standard of performance concerning windshear maneuvers and procedures. This is due to the dynamics and extremes of variability generated by a pilot maneuvering his simulated airplane into a given windshear condition and the fact that this dynamic and variable entry would prevent a standard performance from being identified. Low-altitude windshear flight training must initially emphasize the best procedures to use to avoid hazardous windshear and, secondarily, provide an opportunity to recognize the need for and practice the recommended procedures that will permit the use of all available airplane performance in an attempt to escape from an inadvertently encountered windshear condition. Therefore, although proficiency in escaping from or transiting hazardous windshear cannot precisely be determined, training is a necessity.

Appendix E—Flight Training Requirements

It is proposed to revise the first paragraph of Appendix E to require that low-altitude windshear flight training be performed in an approved airplane simulator. This revision is necessary for the same reasons discussed above under proposed §§ 121.424 and 121.427.

Section 135.293 Initial and recurrent pilot testing requirements.

Current § 135.293(a)(7) requires initial and recurrent pilot testing on procedures for avoiding operations in thunderstorms and hail, and for operating in turbulent air or in icing conditions.

It is proposed to reorganize and revise this section to require initial and recurrent pilot testing in recognizing and escaping from severe weather situations, in case of inadvertent encounters, including low-altitude windshear. In addition, initial and recurrent pilot testing would be required on procedures for operating in or near thunderstorms and hail, and other potentially hazardous meteorological conditions. After analyzing those aircraft accidents attributed to windshear, the FAA is convinced that frequent testing concerning hazardous windshear recognition and avoidance, as well as escape procedures to be followed if severe low-altitude windshear situations are inadvertently encountered, is necessary to aid in alleviating windshear-related accidents.

Section 135.345 Pilots: Initial, transition, and upgrade ground training.

The FAA proposes to reorganize and revise § 135.345(b)(6) to add to the procedures included in pilot initial, transition, and upgrade ground training listed in current paragraph (b)(6) procedures for recognizing the hazardous weather phenomena listed in that paragraph. In addition, the FAA proposes to add to the above training procedures for escaping from those phenomena in case of inadvertent encounters. The revision is necessary to ensure that the pilot has adequate procedures available for use to assist him in avoiding hazardous weather. Lack of knowledge on the pilot's part often results in deliberate or inadvertent penetration of hazardous weather. If penetration occurs, the pilot should be able to rely on company procedures and training to assist in escaping, in case of inadvertent encounters, from hazardous weather situations including low-altitude windshear.

Section 135.351 Recurrent training.

It is proposed to revise § 135.351(b)(2) to include windshear training that emphasizes recognition, avoidance, and escape procedures in case of inadvertent windshear encounters in the instruction required by this paragraph. This revision is necessary for the same reasons discussed above in proposed § 121.345.

Economic Summary

This notice proposes that all turbine-powered airplanes (except turbopropeller-powered airplanes) operated in accordance with Part 121 be equipped with an approved airborne system that warns a pilot of the presence of hazardous low-altitude windshear conditions and, if such windshear conditions are inadvertently encountered, provides flight guidance for a missed approach procedure or an escape maneuver. In addition, the notice proposes that all Part 121 operators conduct approved low-altitude windshear flight training in a simulator which has installed in it the windshear equipment needed to conform to the airplane type being simulated. The NPRM further proposes that Part 121 and 135 certificate holders' training programs be required to include training concerning flight crewmember recognition of and escape from inadvertently encountered hazardous low-altitude windshear conditions as part of their normal ground training.

Low altitude windshear has been the prime cause or a contributing factor in numerous air carrier accidents in the last 20 years. The objective of the proposals in the NPRM, therefore, is to prevent or reduce accidents attributed to inadvertent encounters with low-altitude windshear.

The FAA finds that, with the exception of proposed new § 121.358 and the proposed amendments to §§ 121.407, 121.409, 121.424, and 121.427, the proposals affecting Part 121 operators will have a negligible cost or no cost impact. The FAA has also determined the cost of compliance with the upgraded testing and training requirements of the proposed amendments to §§ 135.293, 135.345, and 135.351 to be minimal. Proposed new § 121.358 and the proposed amendments to §§ 121.407, 121.424, and 121.427 have been analyzed independently. For the purpose of this evaluation, however, the costs associated with these proposals have been aggregated. The reason is that these proposals are inextricably related and share the common objective of improving the skills of pilots in recognizing and escaping from inadvertently encountered low-altitude windshear conditions.

The methods and assumptions used in this evaluation to prepare the cost and benefit estimates for proposed new § 121.358 and the proposed changes to §§ 121.407, 121.409, 121.424, and 121.427 have been developed by the FAA. Data used to develop cost estimates were obtained from manufacturers, air carriers, and industry trade associations. Information for analysis of benefits was obtained from the safety records of the NTSB and the FAA. The cost and benefits calculated for these proposals have been projected over 15 years to reflect the estimated useful life of the proposed avionics required by § 121.358. The estimates of impacts may be revised after the close of the public comment period if better information becomes available.

The proposal to add new § 121.358 would have an economic impact on the 3,249 airplanes expected to be in service in 1988 and 1,147 new production and newly certificated airplanes entering service between 1989 and 2002 because they would be required to be equipped with an FAA-approved system providing airborne windshear warning with flight guidance. The estimated cost of this proposed requirement is $217.5 million in 1985 dollars and $160.3 million at a present worth discount rate of 10 percent over the 15-year period of 1988 to 2002.

The proposal to amend § 121.407 would require air carriers to install approved windshear aerodynamic data programs in their flight simulators. The estimated cost of modifying the 144 flight simulators currently in use by Part 121 certificate holders is $1.8 million in 1985 dollars and $1.6 million discounted at a rate of 10 percent for the 15-year period of 1988 to 2002.

The cost per hour of additional simulator utilization has been estimated under proposed § 121.409 and added to the time pilots and copilots would spend in a flight simulator to comply with the windshear simulator flight training requirements of proposed §§ 121.424 and 121.427.

The proposals to amend the flight training requirements of §§ 121.424 and 121.427 would impact 20 percent of the active and future pilots and copilots of the 146 Part 121 certificate holders affected by these proposals. The estimated cost of compliance with the initial, transition, and upgrade windshear flight simulator training requirements of proposed § 121.424 is $13.0 million in 1985 dollars and $7.3 million when discounted at 10 percent over the 15-year span between 1988 and

2002. The estimated cost of requiring the affected pilots and copilots to undergo windshear simulator flight training pursuant to the recurrent training requirements specified in proposed § 121.427 is $29.6 million in 1985 dollars and $15.0 million at a present worth discount rate of 10 percent over the same time period.

This evaluation indicates that the total cost of compliance with the equipment acquisition, installation, maintenance, and ground and flight training requirements contained in this notice is estimated to have a present value of $184.2 million over the 15-year period of 1988 to 2002.

To estimate the benefits of these proposals, the FAA examined the safety record of Part 121 air carriers for the 15-year period between 1971 and 1985. This review indicates that 15 accidents attributed to windshear phenomena occurred during this period.

To arrive at a loss rate indicative of these accidents, the total financial loss of these accidents was divided into the total number of turbine-powered airplane (except turbopropeller-powered airplane) air carrier operations for the same 15-year period. This calculation established a loss rate of $4.18 per turbine-powered airplane (except turbopropeller-powered airplane) air carrier operation over the 15-year period of 1971 to 1985. Similarly, to estimate the future accident prevention value of these proposals, the established loss rate was multiplied by the number of operations forecast for the 15 years from 1988 to 2002. This calculation reveals the maximum potential discounted benefit associated with the prevention of casualty loss in accidents attributed to windshear to be $452.8 million.

The FAA has been unable to quantitatively estimate the accident prevention effectiveness of these proposals. The total discounted cost of compliance of these proposals can be fully recovered if the rule is only 40 percent effective in reducing future casualty loss. The FAA believes that enactment of these proposals will significantly reduce the number of future windshear incidents and accidents and that benefits would exceed costs.

The FAA has estimated the cost of compliance with proposed new § 121.358 on the assumption that the great majority of airplanes now in service are equipped with flight director systems designed to provide flight guidance to the pilot during approach, takeoff, and go around. These systems provide guidance which, if followed, will ensure stall prevention and permit the airplane to be flown at best engine-out and climb speeds. There is uncertainty concerning a small number of airplanes that may have flight directors that provide only approach flight guidance. The flight director systems of these airplanes may require substantial modification and, in some instances, replacement. Therefore, the FAA solicits information, data, views, etc., regarding the following:

1. The number of airplanes in service equipped only with approach flight guidance systems.

2. Estimates of the cost of modifying these flight directors to encompass approach, takeoff, and go around flight guidance.

3. Estimates of the number of airplanes that will require new flight director systems as a result of this proposal.

At the present time, there are 146 Part 121 operators which would be subject to these proposals. For the purpose of this evaluation, the FAA has assumed that 80 percent of the pilots and copilots who would be subject to the training proposals contained in this notice currently undergo windshear simulator flight training, similar in duration to the proposed training. Thus, for the majority of pilots and copilots, these proposals would only revise and upgrade their training curriculums and will not impose additional training time. In this context, only 20 percent of active and future pilots and copilots would undergo additional windshear simulator flight training as a result of this proposal. The FAA needs more detailed information regarding this assumption for the evaluation of any final rule that may result from these proposals. Specific comments related to the proposals for adding windshear training to the current flight training requirements in §§ 121.424 and 121.427 are requested as follows:

1. The identity of carriers providing windshear simulator flight training during initial training including the duration of this training.

2. The identity of carriers providing windshear simulator flight training during recurrent training including the frequency and duration of this training.

3. The identity of carriers providing windshear simulator flight training during transition and upgrade flight training including the frequency and duration of this training.

The FAA believes that Part 135 operators would incur only minimal costs in complying with the upgraded testing and training requirements specified in the proposed amendments to §§ 135.293, 135.345, and 135.351. The FAA, however, has not determined the extent to which Part 135 operators provide instruction to their pilots and train them in procedures to recognize severe weather situations and to escape from severe weather situations, in case of inadvertent encounters, including low-altitude windshear. Therefore, because there is uncertainty concerning the number of carriers that would be required to modify their behavior and incur additional costs, the FAA solicits the following information:

1. The identity of Part 135 operators that do not train their pilots in the proposed procedures.

2. Estimates of the cost of compliance with these proposals.

Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 requires a review of rules to assess their impact on small business. For the reasons discussed in the full economic evaluation of the proposals contained in this notice, which is filed in the docket, the proposed Part 121 amendments would have a significant economic impact on a substantial number of small entities. However, the FAA finds that there are no viable alternatives for small Part 121 air carriers to adopt that would reduce the cost of compliance yet achieve the level of protection sought by these proposals.

The proposed amendments to Part 135 have been determined to imposed only minimal costs. Therefore, Part 135 certificate holders would not incur a significant economic impact as a result of the proposed amendments.

International Trade Impact Statement

These proposals, if adopted, would have little or no impact on trade opportunities of U.S. firms doing business overseas or for foreign firms doing business in the United States. These proposals would primarily affect Part 121 certificate holders and assign responsibility for the provision of the required avionics and windshear training programs specified in the NPRM to the operating certificate holder. Thus, neither domestic nor foreign manufacturers would be affected by these proposals. Because most Part 121 operators compete domestically for passenger revenues with other U.S. operators, these proposals would not cause a competitive fare disadvantage for U.S. carriers.

Conclusion

This notice proposes regulations that would require that all turbine-powered airplanes (except turbopropeller-powered airplanes) operated in accordance with Part 121 be equipped with an approved airborne system that warns a pilot of the presence of hazardous low-altitude windshear conditions and, if such windshear

conditions are inadvertently encountered, provides flight guidance for a missed approach procedure or an escape maneuver. In addition, the notice proposes regulations that would require that Part 121 operators conduct approved low-altitude windshear flight training in a simulator which has installed in it the windshear equipment needed to conform to the airplane type being used. The notice further proposes regulations that would require Part 121 and 135 certificate holders' training programs to include training concerning flight crewmember recognition and escape from inadvertently encountered hazardous low-altitude windshear conditions as part of their normal ground training. These proposals, if adopted, should reduce windshear-related accidents by enhancing pilot understanding of windshear and by requiring certificate holders to develop and use procedures for its recognition and to use procedures and flight guidance equipment to facilitate escape from inadvertent hazardous windshear encounters.

Under the terms of the Regulatory Flexibility Act of 1980, the FAA has reviewed these proposals to determine what impact they would have on small entities if they were adopted. For the reasons discussed in the full economic evaluation of the proposals contained in this notice, which is filed in the docket, the proposed Part 121 amendments would have a significant economic impact on a substantial number of small entities. However, the FAA finds that there are not viable alternatives for small air carriers to adopt that would reduce the cost of compliance yet achieve the level of protection sought by this rulemaking. The proposed amendments to Part 135 have been determined to impose only minimal costs. Therefore, Part 135 certificate holders would not incur a significant economic impact as a result of the proposed amendments.

These proposals, if adopted, will not result in an annual effect on the economy of $100 million or more or a major increase in costs for consumers; industry; or Federal, State, or local government agencies. Accordingly, it has been determined that these are not major proposals under Executive Order 12291. In addition, the proposals would have little or no impact on trade opportunities for U.S. firms doing business overseas or for foreign firms doing business in the United States.

Since the proposals concern an issue on which there is a substantial public interest, the FAA has determined that this action is significant under Department of Transportation Regulatory Policies and Procedures (44 FR 11034; February 26, 1979).

A draft regulatory evaluation of the proposals, including a Regulatory Flexibility Analysis, has been placed in the regulatory docket. A copy may be obtained by contacting the person identified under **"FOR FURTHER INFORMATION CONTACT."**

List of Subjects

14 CFR Part 121

Aviation safety, Safety, Air carriers, Air transportation, Transportation, Common carriers, Windshear.

14 CFR Part 135

Air carriers, Aviation safety, Safety, Air transportation, Air taxi, Windshear.

The Proposed Amendments

In consideration of the foregoing, the Federal Aviation Administration proposes to amend Parts 121 and 135 of the Federal Aviation Regulations (14 CFR Parts 121 and 135) as follows:

PART 121—CERTIFICATION AND OPERATIONS: DOMESTIC, FLAG, AND SUPPLEMENTAL AIR CARRIERS, AND COMMERCIAL OPERATORS OF LARGE AIRCRAFT

1. The authority citation for Part 121 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1355, 1356, 1357, 1401, 1421–1430, 1472, 1485, and 1502; 49 U.S.C. 106(g) (Revised, Pub. L. 97–449, January 12, 1983).

2. By adding a new § 121.358 to read as follows:

§ 121.358 Low-altitude windshear system equipment requirements.

After [2 years after the effective date of the proposed rule], no person may operate a turbine-powered airplane unless it is equipped with an approved system providing airborne windshear warning with flight guidance. For the purpose of this section, "turbine-powered airplane" includes, e.g., turbofan-, turbojet-, propfan-, and ultra-high bypass fan-powered airplanes. The definition specifically excludes turbopropeller-powered airplanes.

3. By amendment § 121.407 by adding a new paragraph (d) to read as follows:

§ 121.407 Training program: Approval of airplane simulators and other training devices.

* * * * *

(d) An airplane simulator approved under this section must be used instead of the airplane to satisfy the pilot flight training requirements prescribed in the certificate holder's approved low-altitude windshear flight training program set forth in § 121.409(d) of this part.

4. By amending § 121.409 by adding a new paragraph (d) to read as follows:

§ 121.409 Training courses using airplane simulators and other training devices.

* * * * *

(d) Each certificate holder required to comply with § 121.358 must use an approved simulator for each airplane type in each of its pilot training courses that provides training in at least the procedures and maneuvers set forth in the certificate holder's approved low-altitude windshear flight training program. The approved low-altitude windshear flight training program, if applicable, must be included in each of the pilot flight training courses prescribed in §§ 121.409(b), 121.418, 121.424, and 121.427 of this part.

5. By amending § 121.419 by revising paragraph (a)(2)(vi) to read as follows:

§ 121.419 Pilots and flight engineers: Initial, transition, and upgrade ground training.

(a) * * *

(2) * * *

(vi) Procedures for—

(A) Recognizing and avoiding severe weather situations;

(B) Escaping from severe weather situations, in case of inadvertent encounters, including low-altitude windshear; and

(C) Operating in or near thunderstorms (including best penetrating altitudes), turbulent air (including clear air turbulence), icing, hail, and other potentially hazardous meteorological conditions;

* * * * *

6. By amending § 121.424 by revising paragraphs (a), (b), and (d) to read as follows:

§ 121.424 Pilots: Initial, transition, and upgrade flight training.

(a) Initial, transition, and upgrade training for pilots must include flight training and practice in the maneuvers and procedures set forth in the certificate holder's approved low-altitude windshear flight training program and in Appendix E to this part, as applicable.

(b) The maneuvers and procedures required by paragraph (a) of this section must be performed inflight except—

(1) That windshear maneuvers and procedures must be performed in a simulator in which the maneuvers and procedures are specifically authorized to be accomplished; and

(2) To the extent that certain other maneuvers and procedures may be performed in an airplane simulator, an appropriate training device, or a static airplane as permitted in Appendix E to this part.

* * * * *

(d) If the certificate holder's approved training program includes a course of training utilizing an airplane simulator under § 121.409 (c) and (d) of this part, each pilot must successfully complete—

(1) With respect to § 121.409(c) of this part—

(i) Training and practice in the simulator in at least all of the maneuvers and procedures set forth in Appendix E to this part for initial flight training that are capable of being performed in an airplane simulator without a visual system; and

(ii) A flight check in the simulator or the airplane to the level of proficiency of a pilot in command or second in command, as applicable, in at least the maneuvers and procedures set forth in Appendix F to this part that are capable of being performed in an airplane simulator without a visual system.

(2) With respect to § 121.409(d) of this part, training and practice in at least all of the maneuvers and procedures set forth in the certificate holder's approved low-altitude windshear flight training program that are capable of being performed in an airplane simulator in which the maneuvers and procedures are specifically authorized.

7. By amending § 121.427 by revising the introductory test of paragraph (d)(1) to read as follows:

§ 121.427 Recurrent training.

* * * * *

(d) * * *

(1) For pilots, flight training in an approved simulator in maneuvers and procedures set forth in the certificate holder's approved low-altitude windshear flight training program and flight training in maneuvers and procedures set forth in Appendix F to this part, or in a flight training program approved by the Administrator, except as follows—

* * * * *

8. By amending § 121.433 by revising paragraph (c)(2) and adding a new paragraph (e) to read as follows:

§ 121.433 Training required.

* * * * *

(c) * * *

(2) For pilots, a proficiency check as provided in § 121.441 of this part may be substituted for the recurrent flight training required by this paragraph and the approved simulator course of training under § 121.409(b) of this part may be substituted for alternate periods of recurrent flight training required in that airplane, except as provided in paragraphs (d) and (e) of this section.

* * * * *

(e) Notwithstanding paragraphs (c)(2) and (d) of this section, a proficiency check as provided in § 121.441 of this part may not be substituted for training in those maneuvers and procedures set forth in a certificate holder's approved low-altitude windshear flight training program when that program is included in a recurrent flight training course as required by § 121.409(d) of this part.

9. By amending Appendix E by revising the first paragraph to read as follows:

Appendix E—Flight Training Requirements

The maneuvers and procedures required by § 121.424 of this part for pilot initial, transition, and upgrade flight training are set forth in the certificate holder's approved low-altitude windshear flight training program and in this appendix and must be performed inflight except that windshear maneuvers and procedures must be performed in an airplane simulator in which the maneuvers and procedures are specifically authorized to be accomplished and except to the extent that certain other maneuvers and procedures may be performed in an airplane simulator with a visual system (visual simulator), an airplane simulator without a visual system (nonvisual simulator), a training device, or a static airplane as indicated by the appropriate symbol in the respective column opposite the maneuver or procedure.

* * * * *

PART 135—AIR TAXI OPERATORS AND COMMERCIAL OPERATORS

10. The authority citation for Part 135 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1355(a), 1421 through 1431, and 1502; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983).

11. By amending § 135.293 by revising paragraph (a)(7) to read as follows:

§ 135.293 Initial and recurrent pilot testing requirements.

(a) * * *

(7) Procedures for—

(i) Recognizing and avoiding severe weather situations;

(ii) Escaping from severe weather situations, in case of inadvertent encounters, including low-altitude windshear; and

(iii) Operating in or near thunderstorms (including clear best penetrating altitudes), turbulent air (including clear air turbulence), icing, hail, and other potentially hazardous meteorological conditions; and

* * * * * *

12. By amending § 135.345 by revising paragraph (b)(6) to read as follows:

§ 135.345 Pilots: Initial, transition, and upgrade ground training.

* * * * *

(b) * * *

(6) Procedures for—

(i) Recognizing and avoiding severe weather situations;

(ii) Escaping from severe weather situations, in case of inadvertent encounters, including low-altitude windshear; and

(iii) Operating in or near thunderstorms (including best penetrating altitudes), turbulent air (including clear air turbulence), icing, hail, and other potentially hazardous meteorological conditions;

* * * * *

13. By amending § 135.351 by revising paragraph (b) (2) to read as follows:

§ 135.351 Recurrent training.

* * * * *

(b) * * *

(2) Instruction as necessary in the subjects required for initial ground training by this subpart, as appropriate, including low-altitude windshear training as prescribed in § 135.345 of this part and emergency training.

* * * * *

Issued in Washington, DC, on May 21, 1987.

William T. Brennan,

Acting Director of Flight Standards.

[FR Doc. 87-12401 Filed 5-28-87; 10:50 am]

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Monday
June 1, 1987

Part VII

Department of Transportation

Federal Highway Administration

49 CFR Parts 383 and 391

Commercial Driver Licensing Standards; Requirements and Penalties; Final Rule and Request for Comments

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

49 CFR Parts 383 and 391

[OMCS Docket No. MC-125; Notice No. 87-06]

Commercial Driver Licensing Standards; Requirements and Penalties

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FHWA is amending the Federal Motor Carrier Safety Regulations (FMCSR) to implement the requirements of the Commercial Motor Vehicle Safety Act of 1986 (the Act). The FHWA, with this rulemaking, is requiring that operators of commercial motor vehicles possess only a single driver's license; is establishing disqualification requirements for driving under the influence of alcohol, leaving the scene of an accident, certain felonies, including controlled substance felonies, and serious traffic violations; is establishing requirements for a driver to notify his/her home State and employer of driving violations and license suspensions; and is prohibiting employers from using a driver whose license has been suspended. The FHWA is also requesting comments on a possible expansion of the rule's applicability to include drivers of commercial motor vehicles not now subject to this final rule and to further define the term "serious traffic violations," as used in the section providing for the disqualification of drivers. These actions are being taken to improve the safe operation of commercial motor vehicles, and to help reduce truck and bus accidents and injuries by disqualifying unsafe drivers who operate commercial motor vehicles. The Secretary of Transportation (the Secretary) has delegated responsibility for implementation of the Act to the FHWA.

DATES: This final rule is effective July 1, 1987. Written comments must be received on or before July 31, 1987.

ADDRESS: All written comments should refer to the docket number and notice number that appear at the top of this document and should be submitted (preferably in triplicate) to Room 3404, Office of Motor Carrier Standards, 400 Seventh Street SW., Washington, DC 20590. All comments received will be available for examination at the above address from 7:45 to 4:15 p.m., ET, Monday through Friday, except legal holidays.

FOR FURTHER INFORMATION CONTACT: Mr. Michael F. Trentacoste, Office of Motor Carrier Standards, (202) 366-4009, or Mr. Thomas P. Holian, Office of the Chief Counsel, (202) 366-1355, Federal Highway Administration, Department of Transportation, 400 Seventh Street SW., Washington DC 20590. Office hours are from 7:45 to 4:15 p.m. ET, Monday through Friday.

SUPPLEMENTARY INFORMATION: On October 27, 1986, the Commercial Motor Vehicle Safety Act of 1986 (Title XII of Pub. L. 99-570) was signed into law by the President. This supplementary information section contains background on the problem, the Congressional mandates, the implementation procedure, and a section-by-section analysis of the rule.

Background

The Cost of Commercial Motor Vehicle Accidents

The social and economic losses associated with accidents involving large trucks and buses have been a focus of public concern for a number of years. Recent Congressional actions taken to direct increased Federal attention toward improving the safety of commercial motor vehicle operations, as embodied in the Surface Transportation Assistance Act of 1982 (Pub. L. 97-424), the Motor Carrier Safety Act of 1984 (Pub. L. 98-554), and, now, the Commercial Motor Vehicle Safety Act of 1986, reflect that public concern.

National accident statistics have shown that the public's concern with the cost of accidents involving trucks and buses is well founded. The cost attributable to the fatalities, injuries, and property damage losses associated with commercial motor vehicle accidents have totaled several billion dollars each year for the past decade. As shown in Table 1, accident statistics collected by the FHWA, which include only motor carrier-involved accidents reported by motor carriers engaged in interstate and foreign commerce, indicate that the economic cost of accidents involving trucks and buses averaged more than $3 billion annually, during the 1980's. The FHWA accident statistics do not include accidents involving carriers engaged in intrastate commerce. The FHWA estimates that the addition of accidents involving intrastate motor carriers would result in at least a doubling of the accident cost estimate.

TABLE 1.—Accidents of Interstate Motor Carriers, 1980-1985

Year	1980	1981	1982	1983	1984	1985
Accidents:						
Truck [1]	31,388	32,306	32,277	31,628	36,853	39,273
Bus [2]	748	832	855	711	637	678
Fatalities:						
Truck [1]	2,528	2,810	2,456	2,528	2,721	2,646
Bus [2]	74	95	76	67	57	62
Injuries:						
Truck [1]	27,149	28,533	26,117	26,692	29,149	28,988
Bus [2]	1,711	2,041	1,970	1,827	1,512	1,793
Property Damage: [3]						
Truck [1]	311.2	355.1	325.4	342.9	404.1	393.8
Bus [2]	4.7	5.3	5.5	6.8	4.9	6.4
Costs: [4]						
Truck [1]	3,135.3	3,441.0	3,028.0	3,096.2	3,355.5	3,265.5
Bus [2]	93.1	116.3	97.1	88.3	73.1	81.4
Total	3,228.4	3,557.3	3,125.1	3,184.5	3,428.6	3,346.9

[1] Based on accident reports submitted to the Federal Highway Administration by motor carriers of property operating in interstate or foreign commerce. Data for 1985 are preliminary. The increase in accidents in 1984-85 may be a reflection of improved reporting procedures.

[2] Based on accident reports submitted to the Federal Highway Administration by motor carriers of passengers operating in intrastate or foreign commerce. Data for 1984 and 1985 are preliminary.
[3] Millions of 1985 dollars.
[4] Millions of 1985 dollars. Based on average cost (in 1985 dollars) of $1 million per fatality and $7,410 per injury.

The number of accidents on Table 1 reflects the accident reporting threshold for property damage established in 1974; any accident with property damage of at least $2,000. If this reporting threshold were increased annually to reflect the Gross National Product deflator, the number of reported property damage accidents would be less than those shown in Table 1. For example, total truck accidents in 1980 would have been 28,220, 27,772 in 1981, 27,001 in 1982, 26,032 in 1983, 29,579 in 1984, and 29,068 in 1985. While the number of reportable accidents would be less, the cost to the public from truck accidents would still amount to over $3 billion in 1985.

Accident statistics collected by the National Highway Traffic Safety Administration (NHTSA) also illustrate the seriousness of the problem of accidents involving commercial motor vehicles. The Fatal Accident Reporting System (FARS) provides data on all traffic accidents involving fatalities within the 50 States, the District of Columbia, and Puerto Rico. The FARS data indicate that, in 1985, 58,230 vehicles of all types were involved in 39,168 fatal accidents. Medium and heavy trucks (trucks and combinations with Gross Vehicle Weight Rating (GVWR) greater than 10,000 pounds) were involved in 4,840 fatal accidents, or 12.3 percent of all fatal accidents. In 87 percent of the accidents involving medium and heavy trucks, the vehicle involved was in the heavy truck category (GVWR greater than 26,000 pounds). In addition, 337 buses were involved in fatal accidents in 1985.

When the FARS accident data for medium and heavy trucks are compared to measures of vehicle exposure, as in Table 2, trucks are seen to be overrepresented in comparison to vehicle miles traveled. Medium and heavy trucks were involved in 12.3 percent of fatal accidents, but they accounted for only 4.9 percent of vehicle miles traveled and approximately 2 percent of registered vehicles. Vehicles in the heavy truck category were responsible for most of this overinvolvement, with trucks in the "26,001 pounds and over" weight group involved in 10.7 percent of fatal accidents, but accounting for 3.7 percent of vehicle miles traveled and 0.9 percent of registered vehicles. Trucks in the "10,001 pounds to 26,000 pounds" category were involved in 1.6 percent of fatal accidents and accounted for 1.2 percent of vehicle miles traveled and 1.1 percent of registered vehicles. The FARS data also illustrate the danger to occupants of vehicles involved in accidents with large trucks and buses. In the 4,840 fatal accidents involving medium and heavy trucks, 74 percent of the 5,769 fatalities were occupants of other vehicles. Of the 398 fatalities resulting from fatal bus accidents in 1985, 56 percent of the victims were occupants of other vehicles.

TABLE 2.—FATAL ACCIDENT INVOLVEMENT AND EXPOSURE MEASURES, 1985

[Vehicle Group]

Measure	All vehicles	Trucks		
		10001 lbs and over	26001 lbs and over	10001 lbs 26,000 lbs
Fatal Accidents	39,168	4,840	4,198	642
Percent	100	12.3	10.7	1.6
VMT (mil.)	1,774,800	86,597.1	65,611	20,986.1
	100	4.9	3.7	1.2
Vehicles (mil.)	177.1	3.6	1.6	2.0
Percent	100	2.0	0.9	1.1

Source: Fatal accident data from U.S. Department of Transportation, National Highway Traffic Safety Administration, "Fatal Accident Reporting System, 1985;" VMT and number of registered vehicles—all vehicles from Federal Highway Administration, Highway Statistics, 1985; VMT and number of registered trucks by truck weight group estimated by applying 1982–1985 growth factor for all vehicles to estimates of 1982 VMT and number of registered vehicle for truck weight groups as contained in United States Bureau of Census, "Census of Transportation (1982): Truck Inventory and Use Survey," September, 1985.

The Vehicle Operator and Accident Causation

With several different factors related to the highway, the environment, the vehicle, and the driver all contributing to accident causation, it is difficult, and often impossible, to isolate a single "causal factor" of an accident involving a commercial motor vehicle. Yet, there is little doubt that the qualifications, condition, and many times, even the attitude, of the vehicle operator play a central role in explaining why an accident has occurred.

In addition to the many examples of commercial vehicle accidents related to driver error, studies of accident causation support the conclusion that a significant share of commercial vehicle accidents are related to human factors. A 1985 study of preventable commercial vehicle accidents, prepared for the Federal Highway Administration by Mandex, Inc.[1], found that driver failure was the prime accident factor in 94.5 percent of preventable accidents (68 percent of the 29,895 accidents sampled were classed as preventable using accepted industry standards for determining preventability of accidents). A driver "failing to allow for adverse environmental conditions" was the most common factor of driver failure accidents (20.1 percent), followed by "following too closely" (11.8 percent), "failure to maintain control" (7.3 percent), "careless, reckless" (6.9 percent), and "improper/erratic lane change" (4.6 percent).

The 1986 study of hazardous materials transportation by the Office of Technology Assessment (OTA) [2] found that human factors, rather than equipment shortcomings, were the cause of 62 percent of reported vehicle accidents and hazardous materials spills. The OTA recommended creation of a national motor carrier driver's

license, with special certification for hazardous material drivers. A 1979 study by P. F. Waller and L. K. Li [3] identified probable accident factors for 156 heavy truck accidents occurring during 1976 and 1977. Human factors accounted for 86 percent of the 107 probable cause (confidence of 95 percent or more that the factor was involved in the accident) items identified. The five most commonly identified accident factors were "improper lookout" (typically failing to look when changing lanes), "inadequate directional control" (typically drifting out of lane), "delay in recognition for unknown reasons" (typically a rear end collision where the lead vehicle slowed or stopped and the truck driver did not respond), "excessive speed" (relative to other traffic), and "improper driving technique" (careless path or speed control).

While many drivers of commercial motor vehicles are fully qualified professionals, there clearly are also drivers who represent a threat to public safety. Federal involvement in a commercial driver licensing and testing program can help remove unqualified or reckless drivers from the road. As a result, the public, as well as commercial drivers and motor carrier companies, stand to realize substantial benefits.

The Congress, the DOT, the National Transportation Safety Board (NTSB), and the motor carrier industry have recognized the inadequacy of the commercial motor vehicle licensing system as it exists today. Two major flaws in the present system have been identified, as follows:

(1) Drivers can easily obtain licenses from more than one State. With multiple licenses, a driver can avoid license suspensions and revocations by spreading his/her violations across several licenses. In a recent NHTSA/American Association of Motor Vehicle Administrator's (AAMVA) study [4], up to 32 percent of drivers were found to hold multiple licenses. In 1980, an NTSB study [5] found that 44 commercial motor vehicle drivers involved in large truck accidents held 63 commercial motor vehicle drivers' licenses, had 98 suspensions, were involved in 104 traffic accidents, and had 465 traffic violations.

(2) The licensing procedures used in the various States are not uniform and, in most cases, do not allow for a valid evaluation of an applicant's qualifications to drive a large commercial motor vehicle. For example, in 19 States, a person can legally drive a tractor/trailer combination if he/she possesses an automobile driver's license.

To overcome these two problems, there are six major areas of concern that need to be addressed:

(1) Single licensing requirements;

(2) Lack of uniform licensing systems in the various States;

(3) Knowledge and skill examination standards;

(4) Positive driver identification methods;

(5) Need for an information system to maintain and access a complete single driver's license record; and

(6) Strict penalties to remove unsafe drivers from the road.

This rule focuses on eliminating multiple licensing (Item No. 1) and on disqualification criteria (Item No. 6). The licensing standards, examination standards, identification methods, and information system will be dealt with in a subsequent rulemaking or other actions to implement the Act.

Commercial Motor Vehicle Safety Act of 1986 (the Act)

Following is a summary of the Act. The summary sets the stage for the discussion regarding implementation of the Act and the section-by-section analysis of this final rule.

Drivers (Sections 12002 and 12003)

(1) Effective July 1, 1987, it shall be illegal for a commercial motor vehicle operator to have more than one driver's license.

(2) Effective July 1, 1987, a commercial motor vehicle operator shall notify: (a) His/her employer if his/her driver's license has been suspended, revoked, canceled, or if he/she is disqualified and (b) his/her employer and a State license official if he/she is convicted of a moving traffic violation.

(3) Effective July 1, 1987, commercial motor vehicle operators applying for employment must provide a history of any employment as a commercial motor vehicle operator within the preceding 10 years.

Employers (Section 12004)

Effective July 1, 1987, no employer shall knowingly allow an employee to operate a commercial motor vehicle if the employee's driver's license has been suspended, revoked, canceled, or if the employee has been disqualified or has more than one driver's license.

Test and Licensing Standards (Sections 12005, 12006, and 12011)

(1) Not later than July 15, 1988, the Secretary shall issue regulations establishing minimum uniform standards for:

(a) The written and driving tests to be taken by operators of commercial motor vehicles;

(b) The fitness requirements for individuals who operate commercial motor vehicles;

(c) The classes of commercial motor vehicle driver's licenses to be issued; and

(d) The information to be contained on the commercial motor vehicle driver's license.

(2) By April 1, 1992, every commercial motor vehicle operator must have a State-issued driver's license that meets the minimum requirements established by the Secretary.

(3) By October 1, 1993, all States must comply with the minimum uniform standards for testing and licensing or face the possible loss of 5 percent of their Federal-aid highway construction funds. The withholding would increase to 10 percent on October 1, 1994.

Information System (Section 12007)

(1) Not later than January 1, 1989, the Secretary shall either establish or enter into an agreement with a State(s) to establish an information system which will serve as a clearinghouse and depository of information pertaining to the licensing and identification of operators of commercial motor vehicles.

(2) States will be required to provide the information system with certain information on each commercial motor vehicle operator they license.

(3) The Secretary, the States, employees, and employers shall be permitted access to the information system.

Federal Disqualification (Section 12008)

(1) The Secretary shall disqualify, at least for 1 year, a commercial motor vehicle operator who is found to have committed a first violation of:

(a) Driving a commercial motor vehicle under the influence of alcohol or other controlled substance;

(b) Leaving the scene of an accident while driving a commercial motor vehicle; and

(c) Operating a commercial motor vehicle in the commission of a felony, except a controlled substance felony as described in (4) below.

(2) If the operator commits any of these violations while carrying hazardous materials, the disqualification shall be for a period of 3 years.

(3) The Secretary shall disqualify for life, or a period not less than 10 years, according to DOT regulations, a commercial motor vehicle operator who is found to have committed a second violation of:

(a) Driving a commercial motor vehicle under the influence of alcohol or other controlled substance;

(b) Leaving the scene of an accident while driving a commercial motor vehicle; and

(c) Using a commercial motor vehicle in the commission of a felony.

(4) The Secretary shall disqualify for life, a commercial motor vehicle operator who is found to have used a commercial motor vehicle in the commission of a felony involving the manufacture, distribution, or dispensing of a controlled substance, or possession with intent to distribute.

(5) The Secretary shall disqualify for a period of not less than 60 days each person who in a 3-year period has committed two serious traffic violations involving a commercial motor vehicle, and for not less than 120 days each person who has committed three serious traffic violations in a 3-year period.

State Participation Requirements (Section 12009)

To avoid having funds withheld under the Act, each State shall comply with the following requirements by October 1, 1993:

(1) Adopt and administer a program for testing and ensuring the fitness of persons to operate commercial motor vehicles in accordance with all the minimum standards established by the Secretary;

(2) Adopt the Federal criteria for disqualification of commercial motor vehicle operator;

(3) Issue a commercial motor vehicle driver's license only to persons who pass a written and driving test for operation of a commercial motor vehicle that complies with the minimum Federal standards;

(4) Only issue commercial motor vehicle drivers' licenses which meet the information requirements and other specifications contained in the minimum standards;

(5) Allow a nonresident driver who has a commercial motor vehicle driver's license issued by a State that complies with the minimum Federal standards for the issuance of such licenses, to operate a commercial motor vehicle in the State;

(6) Notify the operator of the information system and check the National Driver Register (NDR) prior to issuing a commercial motor vehicle driver's license;

(7) Request the driver's record from the prior State of issuance before issuing a commercial motor vehicle driver's license;

(8) Notify the operator of the information system within 30 days of issuing a commercial motor vehicle driver's license;

(9) Notify the information system within 10 days after disqualifying a commercial motor vehicle driver for 60 days or more;

(10) Notify the State of issuance of any conviction for moving traffic violations by an operator of a commercial motor vehicle within 10 days after conviction;

(11) Not issue a commercial motor vehicle driver's license to a person who is disqualified from operating a commercial motor vehicle, or whose driver's license is suspended, revoked, or canceled;

(12) Not issue a commercial vehicle driver's license to a person who has a commercial motor vehicle driver's license issued by any other State, unless such person first surrenders the other license;

(13) Issue commercial motor vehicle drivers' licenses only to persons domiciled in the State, except in accordance with regulations issued by the Secretary concerning persons domiciled in another State that does not issue licenses meeting the minimum Federal standards;

(14) Impose such penalties as the State determines appropriate and the Secretary approves, for operating a commercial motor vehicle while not having a commercial motor vehicle driver's license, or while a driver's license is suspended, revoked or canceled, or while disqualified from operating a commercial motor vehicle;

(15) Adopt the blood alcohol concentration level determined by the Secretary at or above which a person is deemed to be operating a commercial motor vehicle under the influence of alcohol; and

(16) Adopt and enforce any out-of-service regulations issued by the Secretary under section 12008(d)(1) of the Act.

Funding Assistance (Sections 12005 and 12010)

(1) Grants are available to assist the States in the development and implementation of a commercial motor vehicle driver's license program:

(a) Minimum "Basic" grant per State is $100,000;

(b) Authorized funding for the Basic grants is $5 billion a year for fiscal years 1987 through 1991;

(c) "Supplemental" grants are made on a discretionary basis in fiscal years 1987 through 1989, and are distributed in fiscal years 1990 and 1991 on the basis of the number of tests administered and licenses issued for operation of a commercial motor vehicle; and

(d) Authorized funding for the "Supplemental" grants is $3 million a year for fiscal years 1987 through 1991.

(2) Information system grants are available to the States that agree to participate in the commercial motor vehicle driver's license program, the information system required by the Act and to comply with the requirements for State participation delineated in section 12009 of the Act;

(a) Minimum grant per State is $100,000 a year; and

(b) Authorized funding for this grant program is $5 million for fiscal years 1989 through 1991.

Implementation of the Act

Implementation of all provisions of the Act will take over 6 years to complete. This rulemaking action is the first major step in establishing a single license and single record for each commercial motor vehicle operator. This section of the preamble describes how the FHWA intends to coordinate the development and implementation of the single license requirement, the minimum Federal test, fitness and licensing standards, and other major provisions of the Act.

Public participation, including comment from the States and the motor carrier industry, is essential to the development of a comprehensive and workable licensing system. The FHWA Regional and Division Administrators and staff, the Regional Director for Motor Carrier Safety and the Motor Carrier Safety Officer In-Charge in each State will work with State officials to help implement the licensing program and the enforcement requirements. The FHWA field offices have already worked with the department of motor vehicles or other lead agency in each State to execute the grant funding program, to collect information on State information systems, and to coordinate other early implementation activities.

Single License and Notification Requirements

This final rule pertains to the provisions that by law become effective July 1, 1987: Single license requirements (section 12002); requirements for the employee notification of violations, suspensions, and previous employment (section 12003); and employer responsibilities (section 12004). This rule also implements the disqualification provisions (section 12008) and associated penalty provisions (section 12012). This rule is based, in part, on the comments received by the FHWA in response to the advanced notice of proposed rulemaking (ANPRM)

published at 51 FR 27567 on August 1, 1986 (MC–125). The written comment period for that ANPRM extended through November 5, 1986.

The FHWA also received views and comments during a workshop funded by the FHWA and sponsored by the AAMVA and Highway Users Federation for Safety and Mobility on January 22 and 23, 1987, for State, industry, and driver groups. Finally, FHWA considered advice received from the National Motor Carrier Advisory Committee (NMCAC) which conducted two meetings, announced in the **Federal Register** (51 FR 45981 and 52 FR 2814), and open to the public on January 12–13 and February 4, 1987. The transcripts from the workshop and the NMCAC meetings and their recommendations have been included as part of Docket MC–125.

The FHWA has issued a final rule in the areas discussed in this document for several reasons. First, the Act is specific in the application and effective date of the provisions contained in this rule. Second, a delay of this rule to allow additional public comment would unduly delay the single license requirement which presents an immediate opportunity for improving truck and bus safety by removing unsafe drivers from the road. Third, the Congress has mandated an ambitious schedule for implementation; a delay of this rule would be disruptive to the implementation by the States of other sections of the Act. In areas where FHWA determined additional views were needed before provisions are included in the regulation, public comment is requested. The FHWA will deal with these questions and other issues in future rulemaking if warranted. The Act also provides for a waiver process to exclude specific classes of persons or vehicles from the requirements of the Act.

Testing, Fitness, and Licensing Requirement

The FHWA is currently developing the minimum testing and fitness standards (section 12005) and licensing standards (section 12006) required of this agency by July 1988. The FHWA is also developing specifications for information to be included on the license document and in the driver's record (section 12006). The FHWA plans to issue a notice of proposed rulemaking (NPRM) addressing these areas in the fall of this year.

In a separate but related effort, a group of 12 States has initiated a research effort to prepare licensing tests, manuals, and related materials for use by State licensing authorities to test driver license applicants. This research will be distributed for review to all States. The research is being funded under the grant provisions of the Act. The FHWA will work closely with the States to develop the July 1988 minimum fitness and testing standards and to pilot test these materials by late 1988.

Blood Alcohol Concentration (BAC) Level Requirement

As required by section 12008 of the Act, the National Academy of Sciences (NAS) is conducting research on the appropriate BAC level to be used as a threshold for determining if a person has been driving under the influence of alcohol while operating a commercial motor vehicle. A final report will be available later this year. The FHWA has asked the NAS to reflect in its final report consideration of the comments received in response to the ANPRM published in the **Federal Register** on March 23, 1987 (52 FR 9192). An NPRM addressing the BAC level is expected by early 1988 and following an opportunity for public comment, a final rule is expected by October 27, 1988.

Information System Requirement

Under section 12007, the DOT must establish, or enter into an agreement with a State(s) to establish, an information system to help ensure that a driver does not hold multiple driver licenses and to determine whether his/her license is still valid. A contract is currently underway to review State information systems, to determine if one or more systems could function as the information system, to identify the long term requirements for the system, and to develop preliminary system design specifications. This contract should be concluded by the fall of 1987. A decision on the use of an existing State system should be made by late 1987. Implementation of the selected system should begin by early 1988 and testing should be completed by January 1, 1989.

State Responsibilities

Throughout the next several years, the FHWA will work closely with the States to implement the requirements (section 12009) placed on the States by the Act. The development of the driver tests, manuals, and training materials is one example of this cooperative effort. The FHWA will also provide grant funds or assistance to States in the areas of information systems, information dissemination, model legislation, international driver issues, and training programs.

Policy Statement

The DOT recognizes the negative impact on highway safety of a driver possessing multiple licenses and violation records for operation of a commercial motor vehicle. The Department also recognizes the need to have minimum, uniform standards for the testing of such operators. The Department supports the goals and objectives of the Act to improve highway safety by eliminating the problems of multiple licenses and records and the lack of minimum testing standards.

It is the policy of the DOT to implement all provisions of the Act within the specified time frames. In doing so, the Department will solicit comment from the public, especially those parties affected by the Act. The Department will utilize the advanced notice and proposed notice rulemaking steps when information and comment are necessary; comments may also be requested in conjunction with a final rule.

For purposes of implementing the provisions of the Act that become effective July 1, 1987, the Department has identified several areas, such as enforcement of certain commercial motor vehicles carrying hazardous materials, where public comment is necessary before the Department includes the provisions in the Federal Motor Carrier Safety Regulations (49 CFR, Chapter III, Subchapter B). In the other areas with a July 1, 1987, effective date, where public comments are unnecessary, the Department has included these provisions in the final rule.

Section-by-Section Analysis of the Final Rule

The remainder of the preamble presents a section-by-section analysis of the final rule. The final rule specifies the duties of the affected groups (drivers, employees, employers, and governmental entities), actions required by these groups, and the consequences for violation of the requirements. The rationale for the requirements is also discussed. Where the FHWA has determined a need for additional public comment, specific questions have been posed.

Section 383.1 Purpose and scope.

This section states that this part implements the single license requirements, employee and employer responsibilities, and the disqualification and penalty provisions of the Commercial Motor Vehicle Safety Act of 1986.

Section 383.3 Applicability.

This section states that this part is applicable to any person who operates a commercial motor vehicle, whether involved in interstate or intrastate commerce and whether employed in private, private nonprofit, or public sector. "Commercial motor vehicle" is defined as a vehicle with a gross vehicle weight rating of 26,001 or more pounds, or one designed to transport more than 15 passengers (including the driver), or one which is transporting hazardous materials and is required to be placarded under the Hazardous Materials Transportation Act.

The Act defines "commerce" as: (a) Trade, traffic, and transportation within the jurisdiction of the United States between a place in a State and a place outside of such State (including a place outside the United States) and (b) trade, traffic, and transportation in the United States which affects any trade, traffic, and transportation described in (a) above. Commerce is defined broadly and Congress clearly intended for the provisions of the Act to apply both to interstate and intrastate operators (H.R. Rep. No. 901, 99th Cong., 2nd Sess. 6 (1986)).

The Act defines "employer" as " . . . any person (including the United States, a State, or a political subdivision of a State) who owns or leases a commercial motor vehicle or assigns employees to operate such a vehicle." Congress clearly intended the Act to apply to the broadest set of employers involved in trade, traffic, and transportation in all sectors of the economy. The only persons who may be excluded from the Act are those operators who use a motor vehicle, which otherwise meets the commercial motor vehicle definition, strictly and exclusively to transport personal possessions or family members for nonbusiness purposes.

In addition to entities covered by the FMCSR, the Act and the final regulations apply to individuals and entities previously exempt from these regulations. The rule applies to all drivers operating wholly in intrastate commerce, military personnel, persons conducting private transportation of passengers, and employees of Federal, State, and local governments. The rule applies to all drivers transporting passengers for nonprofit organizations, such as church groups, schools and scouting organizations, as well as independent truck farmers who sell agricultural commodities in the marketplace.

Applicability to drivers domiciled in contiguous foreign countries

Foreign commercial motor vehicle drivers operating in the United States are covered by the final rule and are subject to United States licensing requirements and enforcement provisions stated in the Act. Effective July 1, 1987, a Canadian or Mexican commercial motor vehicle driver's license will be accepted as a driver's single license within the meaning of the Act. In order to maintain the single license concept, foreign drivers should retain one license and return all other driver licenses they may have.

As part of its future commercial driver's license rulemakings, the FHWA will receive the licensing standards of foreign jurisdictions. If the foreign standards do not meet United States' standards, section 12009(a)(12) of the Act, allows States to issue commercial driver licenses to foreign commercial motor vehicle drivers who are not domiciled in a State.

To assist in the continuing review of the foreign commercial vehicle driver area, the FHWA requests comments to the following questions:

Question Area 1: Drivers Domiciled in Contiguous Foreign Countries

(a) How do Canadian and Mexican licensing standards compare to United States' standards?

(b) What process should be used for a State to issue a commercial driver's license to foreign drivers?

(c) If foreign drivers retain their foreign licenses, how should they be included in the information systems to enforce the single record concept?

Section 383.5 Definitions.

This section defines the terms used in this part. Some of the key terms are "'commercial motor vehicle," "conviction," and "serious traffic violations."

Definition of Commercial Motor Vehicle

"Commercial motor vehicle" is defined as a vehicle with a gross vehicle weight rating of 26,001 or more pounds, or one designed to transport more than 15 passengers (including the driver), or one which is transporting hazardous materials and is required to be placarded under the Hazardous Materials Transportation Act.

The FHWA estimates that this definition will result in approximately 5.5 million drivers being required to be licensed under these requirements. This definition (1) targets regulation on those drivers that pose the greatest hazard to the public, (2) enhance the States' ability to implement and enforce the commercial motor vehicle driver's license program within the mandated timeframes, and (3) limits the economic impact and compliance burden on drivers, carriers, and States.

Gross Vehicle Weight Rating (GVWR)

This section defines commercial motor vehicle as a vehicle with a GVWR threshold at 26,001 pound or more. While the Congress established this threshold in the Act, the Secretary may lower the threshold to 10,001 pounds if safety warrants. Current FMCSR for interstate and foreign carriers use a 10,001 pounds threshold (GVWR), and a majority of comments to Docket MC-125 supported a 10,001 pounds threshold for interstate drivers.

In the last few years, there has been a proliferation of what is known in the industry as "hot shot" vehicles. These vehicles are typically a combination of a pick-up truck with the fifth wheel, i.e., trailer coupling mechanism located in the pick-up truck bed, and a semitrailer. These vehicles are often in excess of 50 feet in overall length even though they are usually registered at less than 26,001 GVWR. Presently, the FHWA does not have sufficiently comprehensive statistics on the safety performance of these vehicles because their usage is a recent phenomenon. However, there is some concern about the growing potential for accidents involving these vehicles.

Since the Act requires that inclusion of vehicles below the 26,001 pounds threshold be handled by regulation, the FHWA is requesting comments on the following questions pertaining to this issue.

Question Area 2: Vehicles with GVWR under 26,001 Pounds

(a) Is a GVWR to 26,001 pounds an appropriate threshold for applicability of this rule?

(b) What are the potential safety benefits and economic implications of using a 10,001 pounds GVWR or an intermediate GVWR threshold?

(c) What current data should FHWA consider in its analysis of the respective risk profiles of vehicles in the 10,001 to 26,001 pounds GVWR range as compared to the safety performance of vehicles above 26,000 pounds GVWR?

(d) How many additional vehicles would be subject to the rule at 10,001 pounds GVWR?

(e) For vehicles below 26,001 pounds GVWR, should the number of articulation points be a determinant for inclusion as a commercial motor vehicle? Should "hot shot" vehicles

below 26,001 pounds GVWR, be defined a commercial motor vehicle?

(f) Should the number and kind of axles be a consideration?

(g) Should a combination of items—GVWR, axles, and articulations points—be considered?

The comments received will also assist the agency in determining whether other groups of vehicle size classes should be included in the definition of commercial motor vehicle.

Commercial Motor Vehicles Transporting Hazardous Materials

This section defines a commercial motor vehicle transporting hazardous materials as one which is required to be placarded under the Hazardous Materials Transportation Act and related regulations (49 CFR Parts 100–199). Vehicles larger than 26,001 pounds GVWR transporting hazardous materials (regardless of placarding requirements) are subject to the regulations due to their GVWR.

The Act defines a commercial motor vehicle as any vehicle, regardless of size or placarding requirements, that transports hazardous materials. Congress exempted vehicles transporting certain hazardous materials of limited quantity, consumer commodity (ORM–D), and certain hazardous substances (ORM–E). These exemptions appear very minor when compared to all of the hazardous materials covered by the Act. As it is rare to find a commercial enterprise that would transport only commodities that would fall into the exempted hazardous material categories, the Act includes millions of drivers who operate vehicles that are less than the 26,001 pounds GVWR threshold. If the broad definition of hazardous materials under the Act is used, the FHWA estimates that the total number of drivers subject to the requirements would increase from 5.5 million to 11.0 million drivers.

Since enactment, the FHWA has received comments about the coverage of drivers of vehicles transporting hazardous materials. At its public session on February 4, 1987, the NMCAC, Subcommittee on Safety, proposed a limitation to include only those vehicles requiring placarding. The full NMCAC endorsed this proposal in a formal vote of its members.

Similar suggestions were made by the State representatives to the January 22, 1987, public workshop. State officials indicated that if all vehicles transporting any nonexcluded hazardous materials were covered by the requirements, State and local law enforcement agencies would have difficulty in distinguishing between vehicles carrying the exempted hazardous material from the total population of hazardous material commodities. Moreover, enforcement agencies would have no way of distinguishing those non-placarded vehicles below 26,001 pounds GVWR that are carrying non-exempted hazardous matarials from other vehicles below 26,001 pounds GVWR to which the Act does not apply. The State representatives indicated that it would be impractical to enforce anything except placarded vehicles.

In consideration of these comments, this regulation applies to vehicles below a GVWR of 26,001 pounds only if the vehicle is transporting hazardous materials which require it to be placarded in accordance with the hazardous materials regulations. Responses to specific questions are requested later in the preamble to determine how best to expend the scope of the regulations to administer the broader definition of commercial motor vehicle specified in the Act, which includes vehicles of any size carrying hazardous materials, regardless of placarding requirements.

Placarding Requirements

If a motor vehicle transports any quantity of the following classifications of hazardous materials, a placard is required:

Class A Explosives
Class B Explosives
Poison A
Flammable solid (DANGEROUS WHEN WET label only)
Radioactive Material (applies only to any quantity of packages bearing the Radioactive Yellow III label)
Radioactive Material: Uranium hexafluoride, fissile (containing more than 1.0 pct U 235); Uranium hexafluoride, low specific activity (containing 1.0 pct or less U 235).

If a motor vehicle transports 1,000 pounds or more of any combination thereof of the following classifications of hazardous materials, a placard is required:

Class C Explosive
Blasting Agent
Nonflammable Gas
Nonflammable Gas (chlorine)
Nonflammable Gas (fluorine)
Nonflammable Gas (oxygen, cryogenic liquid)
Flammable Gas
Combustible Liquid
Flammable Liquid
Flammable Solid
Oxidizer
Organic Peroxide
Poison B
Corrosive Material
Irritating Material

Cargo tanks (including nurse tanks) and portable tanks also require placards regardless of the quantity of hazardous materials being transported.

Motor vehicles transporting any quantity of hazardous materials subject to the "Poison-Inhalation Hazard" shipping paper description must be placarded POISON in addition to the placards required for the primary hazard class.

The FHWA requests comment on the following questions in order to determine how to administer and enforce the Act's provision for hazardous materials laden vehicles.

Question Area 3: Vehicles Transporting Hazardous Materials

(a) How many additional individuals will be subject to the provisions of the rule if all vehicles, regardless of size, which are transporting hazardous materials, exclusive of limited quantities, ORM–D, and ORM–E, are included?

(b) What is the reasonable break distinguishing point between vehicles requiring placarding and vehicles with smaller amounts of hazardous materials being transported? Should it conform to some current criteria which excludes nonbulk shipments of 110 gallons or less? Should United Nations' packaging limits which could exclude hazardous materials quantities in packages of 450 liters (118.88 gallons) or 400 kilograms (881.84 pounds) or less be considered? Should there be an intermediate cutoff such as 50 pounds or 10 gallons?

(c) Are there entire hazardous materials classes or chemicals within classes that, because of accident experience or potential hazard in transportation, should be included or excluded from the requirements of the Act?

(d) What accident and incident information is available that would make it necessary to include some smaller quantities of certain hazardous materials that will not be covered by this rulemaking (placarded amounts)?

(e) What accident data are available which indicates deaths, injuries, or property damage accidents during the transportation of certain hazardous materials? Are these data sufficiently comprehensive and valid to be considered in any future rule?

(f) How can the provisions of the Act be enforced for hazardous material laden vehicles below 26,001 gross vehicle weight rating, other than placarded vehicles? Would enforcement be practicable if all vehicles above a certain weight rating, such as 10,000 pounds, were included?

Definition of Conviction

"Conviction" is defined as "the final judgment on a verdict of finding of guilty, a plea of guilty, or forfeited bond or collateral as a result of proceedings upon any violation of the requirements in this Part."

This definition is intended to clarify when a driver is "found to have committed" a violation. Congress intended "to give broad meaning to various enforcement acts of the States and the Federal Government. For example, it should apply in violations for which the applicant was convicted or forfeited bail or collateral." (H.R. Rep. 901 at p. 4) This definition is currently used in the FMCSR. The final regulations continue this interpretation.

Several States raised a question at the January 23, 1987, public workshop regarding whether State "implied consent laws," (i.e., an implied admission of guilt for refusal to submit to a breathalyzer or other test), constitutes a conviction for driving under the influence. Current State laws support the notion that such a refusal by the driver carries the same penalty as a conviction. The NDR also treats refusal as a conviction. If a State penalizes "refusal to submit" similar to a conviction, refusal will also constitute a conviction under this rule.

The FHWA is requesting comment regarding the term "found to have committed." Specifically, the FHWA is asking whether there are any other means, in addition to conviction, to determine when a person is found to have committed a violation of this part. The FHWA is requesting comment whether a plea of nolo contendere should be treated as a conviction, and if so, what impact would it have on State judicial procedures.

Definition of serious traffic violation

"Serious traffic violation" is defined as a "conviction, when operating a commercial motor vehicle, of:

(1) Excessive speeding;

(2) Reckless driving, as defined under State or local law; or

(3) A violation of a State or local law relating to motor vehicle traffic control (other than a parking violation) and arising in connection with a fatal accident."

The Act includes these three examples of serious traffic violations and allows the Secretary to expand and to clarify the definition through regulation. The second and third examples, as discussed below, are referenced to State or local laws, but the first example, "excessive speeding," is not so referenced nor is it further defined in the Act or in Committee reports. The Congress delegated defining "excessive speeding" to the Secretary through the rulemaking process. The FHWA believes that the Congress intended "excessive speeding" to mean more than just exceeding the speed limit. The National Motor Carrier Advisory Committee has passed a resolution indicating that excessive speeding be defined as "15 or more miles per hour over the speed limit on an open highway." A national insurance association has indicated that 15 miles per hour is an established threshold in the insurance industry for excessive speeding. As required in the Act and in order to emphasize the immediate concern with excessive speeding, the FHWA has included it as one of the serious traffic violations. The FHWA, however, requests comments from the public on establishing a more explicit definition.

The other two examples of serious traffic violations are reckless driving and a violation of a State or local law relating to motor vehicle traffic control (other than a parking violation) arising in connection with a fatal traffic accident. In H.R. Rep. No. 901 at p. 4, it is stated that these serious violations should be limited to "traffic control laws, and, plainly cannot apply to violations concerning vehicle weight or vehicle defects." The intent included in the House Committee Report was to cover driving violations. This limitation is further reinforced in H.R. Rep. No. 901 at p. 6, which states that violations be ". . . related to the driving of the vehicle." The report also states that violations are ". . . not meant to include vehicle equipment or load-related offenses."

The FHWA recognizes that a situation could arise in which a commercial motor vehicle operator could be involved in a fatal traffic accident, and subsequently convicted of a violation of a State or local motor vehicle traffic control law, but where the violation did not cause the fatal accident or was not a contributing factor. The FHWA does not intend for these convictions to be regarded as serious traffic violations. It should be made clear that, the FHWA intends that all moving traffic violations which cause or are causally related to the occurrence of a fatal traffic accident should be included as a serious traffic violation and considered in any disqualification decision.

Question Area 4: Definition of Conviction and Serious Traffic Violations

Conviction

(a) What other means, other than conviction, are there to determine when a person is "found to have committed" a violation?

(b) Should a plea of nolo contendere constitute a conviction as used in the final rule? How would the inclusion of such pleas impact the State judicial process?

Excessive Speeding

(a) Should the FHWA define excessive speed as any speed in excess of a posted speed limit?

(b) Should FHWA define excessive speed as a certain speed above the speed limit? 10 m.p.h? 15 m.p.h? 20 m.p.h?

(c) Should the definition be adjusted for different types of highway facilities or adjacent land use development, i.e., Interstate System or freeways with a national posted speed limit as opposed to travel in a town or near a school?

(d) What limits should be written into the rule which address speeding under adverse driving conditions? Should anything above a designated speed, such as 70 m.p.h., be considered excessive speeding?

Reckless Driving

(a) Should reckless driving constitute any driving violation which is contrary to State or local law?

(b) Should reckless driving mean only those violations which result in injury or death?

(c) Should reckless driving include endangerment of the public which does not result in injury or death but only property damage?

(d) Should reckless driving be determined by the State or local jurisdiction in which the violation occurred?

Other Violations

What other violations should be considered serious traffic violations?

Section 383.7 Waiver provisions.

This section includes the process for individuals to request a waiver. The Federal Highway Administrator has the authority to waive in whole or in part, application of the requirements of the regulations with respect to a class of persons or a class of commercial motor vehicles. The Administrator may grant a waiver after determining it is not contrary to the public interest and does

not adversely affect the safe operation of commercial motor vehicles.

An individual must submit a written request for a waiver to the Federal Highway Administrator. The request should identify the requirement the individual wants waived, the class of persons or class of commercial motor vehicles for which the waiver is sought, the reasons why a waiver would not adversely affect safety, and other pertinent information. The Administrator may approve or deny the petition based upon findings and public interest determinations. If the Administrator determines that a petition may have merit, the FHWA will publish a notice in the **Federal Register** providing interested parties with an opportunity to comment on the waiver requests. The disposition of each waiver application will subsequently be published in the **Federal Register.**

Section 383.21 Single license requirement.

This section prohibits a person who operates a commercial motor vehicle from operating such vehicle if at any time the person has more than one driver's license. The two exceptions to this are during the 10-day period beginning on the date the person is issued a driver's license and whenever a State law enacted on or before June 1, 1986, requires the person to have more than one driver's license. The 10-day period will help an individual comply with the single license requirement. The period provides time for an individual to surrender a license issued by another State. It also provides time for a State to verify and record related information.

The second exception allows an individual to comply with existing State laws which require a driver to possess a license issued by a particular State in order to operate a vehicle in that State, regardless of whether the driver holds a valid license from another State. As of June 1, 1986, a number of States either authorized or required an individual to hold more than one license. The exception, however, only applies to States which require by law or regulation, a multiple license. Thus, the above exception will apply only to States which actually require a nonresident individual to have a multiple license. Furthermore, the exception is not effective after December 31, 1989. The States which meet this exception are listed in Appendix A to this preamble. In most of these States, only specific vehicle types, such as school buses, require the multiple license.

Method To Return Multiple Licenses

After consultation with the States, motor carriers, and driver groups, the FHWA recommends that illegal multiple licenses be returned to the State of issuance. If a driver possesses a license from more than one State other than the State of domicile and/or a State listed as requiring an additional license, the driver should keep the license issued by his or her State of domicile, and return the other license(s) to the State of issuance.

If a driver has lost a currently valid license issued by a State and also holds a license from another State, other than a State listed in Appendix A, the driver should notify the State which issued the lost license that he or she is licensed in another State. The driver should include in the notice his or her full name, sex, and date of birth. Several driving groups have recommended that a returned license be sent via certified mail return receipt requested, so that the driver has a receipt of the action.

Drivers with multiple licenses should not destroy a license or simply wait for it to expire. If the license is not returned or if the State is not notified, the State's record will still show that the license is active. The FHWA will, in the next year, be checking State data systems as part of the enforcement of the single license rule. Any person found to have more than one "active" license will be subject to the penalties prescribed in the regulation.

Section 383.31 Notification of convictions for driver violations.

This section, as mandated by the Act, requires a driver of a commercial motor vehicle to report convictions for violations from another State to his/her employer and the State which issued the license and all convictions for violations to his/her employer. The Act specifies that all violations of "State or local law relating to motor vehicle traffic control (other than a parking violation)" should be reported. The House Report (H.R. Rep. 901 at p. 6) further specifies that this is meant ". . . to apply only to laws directly related to the driving of the vehicle; it is not meant to include vehicle equipment or load-related offenses such as defective brakes or overweight vehicles." The rule requires that violations in commercial motor vehicles, as well as other vehicles be reported. As defined earlier, conviction includes forfeiture of bail or collateral, or in the case of a test for driving under the influence, if the driver refuses to submit to a State test and the State has an "implied consent" law.

The driver must notify his/her employer and the State within 30 days of the conviction. The driver must provide his/her name, license number, nature of violation, and date of conviction.

Many motor carrier representatives have indicated that they review a driver's record both in a commercial motor vehicle and in other highway vehicles in order to assess and monitor the drivers' safety performance. Current FMCSR, applying to interstate and foreign operators, also require the driver to report annually to the employer all violations of motor vehicle traffic laws and ordinances (other than parking) of which the driver has been convicted or forfeited collateral during the preceding 12 months, 49 CFR 391.27. If an interstate driver has provided the information under this section (49 CFR 383.31), he/she does not have to repeat the information in the annual report.

State representatives have indicated at the public workshops that the State cannot suspend or revoke a license based on the driver's notification. States require direct and official notification from other States regarding convictions for traffic violations before the State can suspend a license. State representatives have also expressed concern regarding the volume of letters which they would receive because of this requirement in the Act.

One purpose of the driver notification requirements to the States is to alert a State of violations which, when considered with other violation convictions, warrant the suspension or revocation of a driver's license. When State-to-State reporting of traffic violations (required by Subsection 12009(a) of the Act) is fully operational, a comprehensive system to ensure complete single license records would exist. At that time, the driver notification would likely be unnecessary and the FHWA would consider seeking elimination of that legislative requirement.

Several State representatives have suggested that the driver notification requirements to the State be waived if a State belongs to the Driver License Compact (DLC). Presently, 35 States and the District of Columbia belong to the DLC. The DLC contains four major provisions which member-States are committed to uphold. These are:

(1) The one driver license concept;

(2) The one driver record concept;

(3) The exchange of information between States; and

(4) Ensure uniform and predictable treatment of offenders.

The goals of the DLC are consistent with the single license, single record, and information exchange provisions in the Act. In fact, Article III of the DLC requires member States to report each traffic conviction to the offender's State of license issuance. However, because 15 States do not belong to the DLC and because many States in the DLC do not fully implement or administer the major provision of the DLC, it does not appear that participation in the DLC would adequately substitute for the driver notification requirements. However, the FHWA requests comments in this area.

The FHWA realizes that the number of violation notices to the States may be significant. The FHWA will work with the States to establish the information system and form the basis for eliminating any unnecessary notification requirements. The FHWA believes that the States should handle the notifications in an appropriate manner. Special attention should be given to driver notices dealing with serious, i.e., disqualification level offenses. Because the FHWA can only disqualify a driver who has been convicted of a serious offense in a commercial motor vehicle, the FHWA will focus enforcement of the notification provision on these drivers and offenses. Such concentration will also allow the FHWA to direct limited resources to the area which could have the greatest effect on safety.

In light of the issues above, the FHWA requests comments on the following:

Question Area 5: Notification of Driver Violations

(a) Can the Driver License Compact (DLC) adequately serve the purpose of the driver notification requirements to the State?

(b) What level of State participation in the DLC and what level of State compliance with the terms of the DLC should be met, before the DLC is considered as an alternative to the notification requirements?

Section 383.33 Notification of driver's license suspension.

This section requires a driver to notify his/her employer when his/her driver's license is suspended, revoked or canceled. The driver must notify the employer before the end of the business day following such loss of his/her driving privilege.

Under current FMCSR, an interstate driver is required to notify his/her employer of any suspension, revocation, or cancellation of a commercial motor vehicle driver's license before the end of the business day following the day he/she received such notification. This requirement is more stringent than the maximum 30 days allowed in the Act. From a safety position, there is no benefit to allow a driver additional time to notify his/her employer about the suspension. There is no question that safety is enhanced by having an employer informed, at the earliest possible moment, of a driver's license suspension, revocation, or cancellation. Since the existing requirement has worked for interstate drivers (See 49 CFR 392.42), the requirement to notify employers within at most, 2 days should not be a large burden for intrastate motor carriers and employers.

The suspension of a commercial motor vehicle driver's license will not necessarily result in the loss of the right of a driver to operate a noncommercial motor vehicle. A State may issue a license to allow the driver to operate a passenger car or other noncommercial motor vehicle. This will ultimately be a State decision. Furthermore, if a driver holds a commercial motor vehicle driver's license from one State and another State suspends, revokes, or cancels his/her privilege to operate a commercial motor vehicle in that State, that person would be disqualified from operating a commercial motor vehicle anywhere until the commercial operating privilege is restored.

Section 383.35 Notification of employment history.

This section requires an applicant for a job as a commercial motor vehicle driver to inform the prospective employer of any previous employment as an "operator of a commercial motor vehicle," if any, for the 10-year period before the application date. The applicant must include the name(s) of his/her previous employer(s), dates of employment, and the reason for leaving the job(s).

The Act states that the employment history period, if any, shall be established by regulation, but shall not be less than a 10-year period ending on the date of application. The Act places the burden on the job applicant to provide the employment history. The FHWA realizes that it may be difficult for a person to comply with the requirement without assistance from the potential employer. Accordingly, the rule requires that employers request the information from all applicants seeking employment as an operator of a commercial motor vehicle.

This section also allows employers to request additional information and informs the applicant that the employment information may be verified by the employer. These provisions are similar to those now in the FMCSR.

Since the Act leaves open the option for lengthening the employment history period as a commercial motor vehicle operator which should be provided the employer, the FHWA is requesting comments on that issue.

Question Area 6: Notification of Previous Employment

(a) Should the FHWA require an applicant for employment as a commercial motor vehicle operator to provide the employer information on all jobs, not just jobs as a commercial driver, he/she had for the 10-year period prior to the date of application?

(b) Should the FHWA require the applicant's employment history for a period longer than 10 years?

(c) Should the FHWA require an applicant for employment as a commercial motor vehicle operator to provide the employer with information about his/her driving license status and details on past license suspensions, revocations, etc.?

Section 383.37 Employer responsibilities.

This section prohibits an employer from knowingly allowing an employee to operate a commercial motor vehicle if the employee's license to operate such vehicle has been suspended, revoked, or canceled, if the employee has been disqualified from driving, or if the employee has more than one license. Employers may continue to allow employees to drive with more than one license if those employees are subject to State laws in effect prior to June 1, 1986, which require them to have a work license or other additional license. This latter exception is void after December 31, 1989.

When the Commercial Driver's License Information System becomes operational, an employer will be able to check the driver's license status and record through one source. Until that time, employers are encouraged to utilize other available means to verify or check driver's license status.

As discussed in the previous section, employers are subject to the notification of employment history requirement. Violations of any of the above employer requirements are subject to penalty provisions in § 383.53 of this rule.

Section 383.51 Disqualification of drivers.

This section prescribes the minimum disqualification provisions of the Act. The Act establishes a strict set of disqualification requirements for persons who commit criminal offenses or serious traffic violations while

operating a commercial motor vehicle. It requires a 1-year disqualification for the first offense of driving a commercial motor vehicle under the influence of alcohol or a controlled substance, leaving the scene of an accident, or using a commercial motor vehicle in the commission of a felony. If the commercial motor vehicle was transporting hazardous materials required to be placarded, the minimum disqualification is 3 years. Second offenders of these offenses are disqualified for life, as are first offenders who use a commercial motor vehicle in the commission of a felony involving the manufacture, distribution, or dispensing of controlled substances. The Act also specifies a minimum of 60 days to 120 days disqualification for commission of serious traffic violations.

Criminal Offenses

The Secretary is required to disqualify drivers who are "found to have committed" the specified offenses. As presented in the section on "Notification of Violations," this means conviction, or forfeiture of bond or collateral. A "driving under the influence" disqualification would also be issued to drivers in States with "implied consent laws," where a driver's refusal to submit to a breathalyzer or similar test is considered tantamount to a conviction.

Section 383.51 contains the disqualification provisions. The first paragraph specifies that drivers can not operate a commercial motor vehicle if disqualified, and employers shall not knowingly allow or require drivers to operate a commercial motor vehicle if they are disqualified. The second paragraph contains the disqualifying offenses included in the Act.

The Act includes "leaving the scene of an accident" as a disqualifying offense. A concern was raised by several truck driver groups regarding the severity for leaving the scene of an accident involving a fatality versus an accident involving solely property damage. For example, a driver could be disqualified for life for leaving the scene of an accident where only minor damages occurred or where the commercial motor vehicle operator was genuinely unaware of the accident. The 1-year disqualification provision in paragraph 391.15(c) of the FMCSR for leaving the scene of an accident applies only to accidents involving an injury or a fatality. The FHWA is asking for comments from the public regarding revising the definition in § 383.51(b)(2) to parallel § 391.15(c).

Section 383.51(b)(3) language in the FMCSR contains the duration of disqualification for criminal misconduct. One year, 3 years, and lifetime disqualifications are prescribed.

The Act provides that the Secretary may issue regulations which establish guidelines (including conditions) under which a lifetime disqualification may be reduced to a period of not less than 10 years. In order to assist the FHWA in determining whether the lifetime disqualification should be reduced, public comment is sought. Although the Act does not provide for a reduction of the 10-year suspensions, public comments are sought on the desirability of using various mechanisms and defining under what circumstances a less than 10-year suspension might be warranted: Comment is requested in order to determine whether the FHWA should seek a change to the Act.

Question Area 7: Driver Disqualification

(a) Should the disqualification offense, leaving the scene of an accident, be limited only to accidents which involve an injury or death?

(b) Is there a simple way to differentiate minor from serious incidents of leaving the scene of an accident?

(c) Should the FHWA reduce the lifetime disqualification for second offenders of any combination of (1) driving under the influence, (2) leaving the scene of an accident, or (3) the use of a commercial motor vehicle in the commission of a felony?

(d) What types of guidelines or conditions, such as successful completion of a rehabilitation program, should be established in order to reduce the lifetime disqualification?

(e) Should a commercial motor vehicle operator who is convicted of the transportation, possession, or unlawful use of a Schedule I controlled substance (in contrast to being under the influence or distributing such substances) be disqualified from operation of such vehicle? Should the offense also cover Schedule II through V controlled substances? What should be the period of disqualification for such offenses? Should the period be more severe for offenses involving hazardous materials laden vehicles?

(f) Should the 1-year or 3-year disqualification requirements be reduced for successful completion of a rehabilitation program? Is so, what sort of rehabilitation or evidence should be provided?

(g) Consistent with our questions regarding requirements for vehicles carrying hazardous materials, how can the minimum 3-year disqualification be applied to vehicles transporting hazardous materials that are not placarded?

(h) Should there be a mechanism to lift lifetime or 10-year suspensions for disqualification violations listed under § 383.37?

(i) If a State expunges convictions as part of a rehabilitation program, for example, after successfully completing an alcohol rehabilitation program, should FHWA lift a long term suspension because there is no longer a "conviction?"

Method of Disqualification and Enforcement

The FHWA will work to obtain information from the States to begin enforcing the disqualification provisions and the prohibition from having more than one driver's license. A process is envisioned whereby the States will notify the FHWA's Regional Offices of drivers convicted of disqualifying offenses, as outlined in this part, committed while operating a commercial motor vehicle.

When during an investigation or a roadside inspection or if it becomes otherwise apparent that a commercial motor vehicle operator is not qualified pursuant to either the provisions found in Part 391 Driver Qualifications, or the rules in Part 383 Commercial Driver License Standards; Requirements and Penalties, the driver will be cited for the violation. Subsequently, the driver will be sent a letter stating why such person is not qualified and offer the driver an opportunity to petition for a hearing. The letter will be substantially in the form and content of the model letter attached (Appendix B) and may be signed by the Regional Director Motor Carrier Safety or a designee. If the employer of the person not qualified is known, such employer will also be notified by letter.

The FHWA Regional office will assign each letter a docket number which will be entered on the letter. Service and distribution of these proceedings may be done as provided for in 49 CFR Part 386. If the offense committed by the person is one which is listed in the disqualifying offenses contained in §§ 391.15 or 383.51, such person shall be disqualified for the specified period of time provided for the offense.

If a person is found not to be qualified under other provisions contained in this Part, e.g., operating a commercial motor vehicle with more than one license, except as provided for by State law, such person would not be qualified to operate a commercial motor vehicle and would continue to be unqualified until such time as that person surrenders any license(s) which are not authorized under this Part. Upon finding that a commercial motor vehicle operator is

operating with more than one license, a letter notifying such person that he/she is not qualified to operate a commercial motor vehicle will be sent and the driver will be subject to a civil or criminal penalty. A model letter is contained in Appendix C. The employer, if known, will also be notified.

Penalties

The Act amended section 521(b) of Title 49, United States Code, to add the civil and criminal penalties for violations of certain sections of the Act. These penalties, in conjunction with the disqualification penalties described earlier, provide a severe deterrent. Federal civil penalties not to exceed $2,500 are provided.

The FHWA will provide the person who is subject to the penalty with a notice and opportunity for a hearing. The method now used by the FHWA to impose civil penalties and to determine the level of penalty for violations of the FMCSR will be employed for penalties in Part 383. The Act also provides for Federal criminal penalties of up to $5,000 or up to 90 days imprisonment, or both, for a person who "knowingly and willfully" violates the applicable regulations.

Violations of any of the following provisions may lead to civil or criminal penalties:

(1) Operation of a commercial motor vehicle while possessing more than one license (§ 383.21);

(2) Failure of a driver to notify his/her home State of any violation of a State or local law relating to motor vehicle traffic control (other than a parking violation, § 383.31);

(3) Failure of a driver to notify his/her employer of a conviction of any violation of a State or local law relating to motor vehicle traffic control (other than a parking violation, § 383.31);

(4) Failure of a driver to notify his/her employer of a suspended, revoked, canceled license, or a disqualification. (§383.33);

(5) Failure of an employer to request, or an employment applicant to provide, the prescribed employment history (§ 383.35); and

(6) Knowingly allowing, requiring, permitting, or authorizing an employee to operate a commercial motor vehicle when the employee's driver's license is suspended, revoked, canceled, or the driver is otherwise disqualified, or when the employee possesses more than one driver's license (§ 383.37).

Regulatory Impact

The FHWA has determined that this action does not constitute a major rule under Executive Order 12291. The final rule is not expected to result in an annual effect on the economy of $100 million or more, or lead to a major increase in costs or prices, or have significant adverse effects on the United States economy. However, because of the public interest in the issue of commercial motor vehicle safety and the expected benefit in transportation, this final rule is considered significant under the regulatory policies and procedures of the DOT. For this reason and pursuant to Executive Order 12498, this rulemaking action has been included on the Regulatory Program for significant rulemaking actions.

The FHWA believes that circumstances warrant the issuance of this rulemaking action immediately without notice and an additional opportunity for comment. The Act requires the issuance of regulations to implement several statutory provisions aimed at improving commercial motor vehicle safety. The Act provides various statutory deadlines and implementation schemes for individual provisions. A detailed explanation has been previously provided which documents the reasons for addressing certain statutory provisions in this final rulemaking rather than in other proposed rulemakings soon to be promulgated.

Among the reasons stated is the fact that the statutory deadline provided by Congress for most of the provisions addressed in this document is July 1, 1987. On August 1, 1986, prior to enactment of the Act, the FHWA, on its own initiative, published an ANPRM (51 FR 27567) requesting public comments on many motor vehicle safety issues relating to a single classified driver's license system. These issues are also addressed by the Act. If additional time for public comment were to be provided via an NPRM, the statutory deadline could not be met and the implementation schedule required by Congress would be unduly delayed. Consequently, the public interest in improving commercial motor vehicle safety would not be served.

The disqualification provisions of section 12008 of the Act were effective upon enactment. However, this section requires the Secretary to implement the provision by indicating how the Secretary will determine that a driver has "committed a violation" of a disqualifying offense. In this final rule, the FHWA has followed the approach currently used to disqualify drivers for certain criminal offenses under section 391.15(c) of the FMCSR, 49 CFR 391.15(c). Under this approach, a driver will be disqualified if convicted of, or forfeits bond or collateral on a charge of, certain offenses, such as operating a commercial motor vehicle under the influence of alcohol or controlled substance. In this way, a driver is afforded ample due process. The FHWA believes that there is no question that Congress intended that drivers convicted by a State of having committed these types of offenses be disqualified under section 12008. Thus, further public comment on this point is considered unnecessary. Moreover, because the disqualification provision of section 12008 was effective upon enactment, the FHWA believes that drivers and motor carriers need immediate guidance as to how the FHWA intends to implement this section. Notice and public procedure would unduly delay this implementation and is, thus, impracticable. For these reasons, the FHWA believes that good cause exists for issuance of this rule without notice and opportunity for comment. Additional public comment, however, is requested on whether other means should be adopted to determine that a driver "committed a violation."

For the foregoing reasons, the FHWA finds good cause to make this regulation effective without prior notice and opportunity for comment pursuant to 5 U.S.C. 553(b)(3)(B). Accordingly, the regulation will become effective on July 1, 1987. However, the FHWA gives notice that comments on the procedures promulgated to implement the statutory provisions will be accepted and evaluated in determining the need for future procedural revisions to the final rule.

While the FHWA does not anticipate that there will be any useful public comment on the general issue of the statutory provisions themselves, there may be some procedural comments on the provisions contained in this final rule. For this reason, publication of this final rule without an opportunity for prior comment, but with a request for comments following publication, is consistent with the DOT's regulatory policies.

The economic impacts of this rulemaking that will occur are primarily mandated by the statutory provisions themselves. For this reason, a full regulatory evaluation is not required. However, since an analysis of impacts, including economic factors, is necessarily involved in the preparation of related motor vehicle safety regulations, a regulatory evaluation has been prepared for the rulemaking actions that will be issued to implement the Act's remaining provisions. This evaluation, which will also address some of the provisions contained in this

final rule, has been placed in the public docket and is available for inspection in the Headquarters office of the FHWA, 400 Seventh Street, SW., Washington, DC 20590.

A significant part of the motor carrier industry and other employers covered by the Act are made up of small firms, from one-person, one-truck operations of some owner-operators, to the thousands of small fleet operators throughout the country. For this reason, the benefit and cost considerations described in the preliminary regulatory evaluation/initial regulatory flexibility analysis as applicable to employers and the motor carrier industry in general, are equally applicable to the small entity component of the industry. Small entities have been represented at public meetings held to discuss the Act and small entities have had the opportunity to submit comments to the public docket established in conjunction with FHWA's August 1, 1986, ANPRM. The FHWA is fully committed to doing all that it can to ensure that no undue burdens are placed on small entities as a result of this final rule.

Paperwork Reduction Act

The reporting requirements in these interim regulations are subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501). Accordingly, the information collection requirements are being submitted to the Office of Management and Budget.

Footnotes

1. Mandex, Inc., "Identification of Preventable Commercial Vehicle Accidents and Their Causes," Final Report to the Federal Highway Administration (DTFH-61-84-C-00034), September 1985.

2. U.S. Congress, Office of Technology Assessment, "Transportation of Hazardous Materials: State and Local Activities," (OTA-SET-301), March 1986.

3. Patricia F. Waller and Livia K. Li, University of North Carolina, Highway Safety Research Center, "Truck Drivers: Licensing and Monitoring," (A report prepared for the National Highway Traffic Safety Administration and the Federal Highway Administration), December 1979.

4. Department of Transportation, National Highway Traffic Safety Administration, "Multiple Licensing and Interstate Truck Drivers," (DOT HS-805-645), A study conducted by the American Association of Motor Vehicle Administrators, January 1981.

5. National Transportation Safety Board, "Safety Effectiveness Evaluation of Detection and Control of Unsafe Interstate Commercial Drivers . . .," (NTSB-SEE-80-1), Washington, DC, February 1980. Cited in U.S. Department of Transportation, National Highway Traffic Safety Administration, "A Report to the Congress on Large Truck Accident Causation," January 1982, p. IV-26.

Appendix A—States Where Multiple/Special Licenses for Nonresidents Are Required (Multiple Licenses Not Allowed After December 31, 1989)

States and Operator/License Type

Connecticut: Operators of tandem-trailer trucks
District of Columbia: Operators of school buses
Florida: All commercial motor vehicle operators if employed in or a part-time resident of the State (license only valid in Florida)
Illinois: Operators of school buses and vehicles transporting senior citizens and day-care children
Massachusetts: Operators of school buses and instructors of driving training schools.
New Hampshire: Operators of school buses
Vermont: Operators of school buses
Virginia: All commercial motor vehicle operators if employed in the State
West Virginia: Operators of school buses
Wisconsin: Operators of school buses

Appendix B—Model Letter (for Disqualification of Drivers)

In reference to Docket No. R-——— D, in the matter of ———, Driver Disqualification.

Dear ———:

This letter is to advise you that you are disqualified for a period of ——— from operating a commercial motor vehicle in intrastate, interstate, or foreign commerce. This action is taken based on information we have received in the course of an inspection or review of information received, dated ———, that you are disqualified from operating a commercial motor vehicle in accordance with 49 CFR Part 383. ——— of the Federal Motor Carrier Safety Regulations. The reason(s) you are disqualified is/are as follows:

Enclosed is a copy of all documentary evidence relied on in making this determination.

There are two courses you may follow if you want this disqualification overturned.

(1) You may ask me for a rescission of this letter. If you can show that you are qualified, you should send me a letter requesting a rescission of this disqualification letter. Your letter must set forth all the reasons you believe you are qualified to drive and must be accompanied by photocopies of any documents supporting your position that you are qualified. You have 30 days after the receipt of this letter to send me a request for rescission of this letter.

(2) You may petition the Associate Administrator for Motor Carriers for a review of this disqualification determination. If you disagree with the disqualification and desire a formal hearing on the matter, you must send a petition for review to the Associate Administrator for Motor Carriers. The address is: Associate Administrator for Motor Carriers, HMT-1, Federal Highway Administration, 400 Seventh Street SW., Washington, DC 20590. This petition must be sent in accordance with the procedures in 49 CFR 386.13(a). Your petition must include the reasons you feel you are not disqualified and any documents you are relying upon to support your position.

You have 60 days after receipt of this letter to send your petition for review to the Associate Administrator. Failure to submit a petition for review will result in a final determination that you are disqualified and may not operate a commercial motor vehicle in accordance with the terms of the Regulations.

If you request a rescission of this letter within 30 days, the deadline to petition the Associate Administrator for review will be suspended until a determination is rendered on your request for rescission. This and all future correspondence or pleadings in this matter must refer to the docket number shown at the beginning of this letter and copies must be sent to those shown on the enclosed service list.

Sincerely yours,

(Service list includes the driver, carrier, Regional Docket Clerk)

Appendix C—Model Letter (for Unqualified Drivers)

In reference to Docket No. R-_____ D, in the matter of _____, Driver Qualification.

Dear _____:

This letter is to advise you that you are not qualified to operate a commercial motor vehicle in interstate or foreign commerce until such time as you have complied with the single driver's license requirement contained in 49 CFR 383.21. It is also a violation of the law for you to operate a commercial motor vehicle in intrastate commerce, until you have complied with this requirement.

This action is taken based on information the Federal Highway Administration (FHWA) has received which indicates that you are a commercial motor vehicle driver and that you currently hold driver's licenses from more than one State. You are strongly urged to return any and all such driver's licenses, other than the license issued by your State of domicile, to the State of issuance, and provide proof to this office that you have done so within 45 days of the date of this letter. Acceptable proof that excess licenses have been returned will be either:

(1) A dated receipt from the issuing State agency containing your name, address, and your driver's license number, or (2) a letter, sent certified mail, return receipt issued by the United States Postal Service, showing your name and address, driver's license number, the State agency to which the license was mailed, and the date received by a representative of that agency.

Failure to furnish proof of return of excess licenses to issuing states or failure to return this letter with the completed verified statement could result in enforcement action being taken against you by this agency. Violators are subject, after an opportunity for a hearing, to civil penalties not to exceed $2,500 for each offense or criminal penalties not to exceed $5,000 or imprisonment for a term of 90 days, or both for those violations knowingly or willfully committed.

Enclosed are copies of all documentary evidence relied on in this matter.

If our records are incorrect and you are not a commercial motor vehicle driver or you do not hold multiple driver's licenses, please

read the statement below concerning the penalties for perjury and then check the appropriate box(es), sign your name and fill in the date. Return this letter to this office within 45 days so that we can reexamine our records and, if appropriate, amend them.

Sincerely yours,

Enclosure.

Verified Statement

I, _____, certify, under penalty of perjury under the laws of the United States of America, that the information submitted below is true and correct. Further, I certify that I know that willful misstatements or omissions of material constitute Federal criminal violations punishable under 49 U.S.C. 522(b) by fines up to $5,000. Additionally, I know that these misstatements may be punishable as perjury under 18 U.S.C. 1621, which provides for fines up to $2,000 or imprisonment up to 5 years for each offense.

I am not a commercial motor vehicle driver. ☐

I do not hold any driver's licenses other than the one from my State of domicile. ☐

Signature _____

Date _____

In consideration of the foregoing, the FHWA hereby amends Title 49, Code of Federal Regulations, Chapter III, Subchapter B as set forth below.

List of Subjects in 49 CFR Parts 383 and 391

Highway Safety Driver requirements, Licensing, Motor Carriers, and Reporting and Recordkeeping.

(Catalog of Federal Domestic Assistance Program Number 20.217, Motor Carrier Safety)

Issued on: May 28, 1987.

R.A. Barnhart,

Federal Highway Administrator.

1. Part 383 is added to read as follows:

PART 383—COMMERCIAL DRIVER'S LICENSE STANDARDS; REQUIREMENTS AND PENALTIES

Subpart A—General

Sec.

Authority: Title XII of Pub. L. 99-570, 100 Stat. 3207-170; 49 U.S.C. 3102; 49 U.S.C. App. 2505; 49 CFR 1.48.

Subpart A—General

§ 383.1 Purpose and scope.

(a) The purpose of this part is to help reduce or prevent truck and bus accidents, fatalities, and injuries by requiring drivers to have a single commercial motor vehicle driver's license and by disqualifying drivers who operate commercial motor vehicles in an unsafe manner.

(b) This part:

(1) Prohibits a commercial motor vehicle driver from having more than one commercial motor vehicle driver's license;

(2) Requires a driver to notify the driver's employer and the driver's State of domicile of certain violations and suspensions;

(3) Requires that a driver provide previous employment information when applying for employment as an operator of a commercial motor vehicle;

(4) Prohibits an employer from allowing a person with a suspended license to operate a commercial motor vehicle; and

(5) Sets forth penalties for various violations.

§ 383.3 Applicability.

The rules in this part apply to every person who operates a commercial motor vehicle in interstate, foreign, or intrastate commerce, and to all employers of such persons.

§ 383.5 Definitions.

As used in this part:

"*Administrator*" means the Federal Highway Administrator, the chief executive of the Federal Highway Administration, an agency within the Department of Transportation.

"*Alcohol*" or "alcoholic beverage" means: (a) Beer as defined in 26 U.S.C. 5052(a), of the Internal Revenue Code of 1954, (b) wine of not less than one-half of one per centum of alcohol by volume, or (c) distilled spirits as defined in section 5002(a)(8), of such Code.

"*Commerce*" means (a) any trade, traffic or transportation within the jurisdiction of the United States between a place in a State and a place outside of such State, including a place outside of the United States and (b) trade, traffic, and transportation in the United States which affects any trade, traffic, and transportation described in paragraph (a) of this definition.

"*Commercial driver's license*" means a license issued by a State to an individual which authorizes the individual to operate a class of a commercial motor vehicle.

"*Commercial motor vehicle*" means a motor vehicle used in commerce to transport passengers or property if the vehicle—

(a) Has a gross vehicle weight rating of 26,001 or more pounds;

(b) Is designed to transport more than 15 passengers, including the driver; or

(c) Is of any size and is used in the transportation of materials found to be hazardous for the purposes of the Hazardous Materials Transportation Act and which require the vehicle to be placarded.

"*Controlled substance*" has the meaning such term has under section 102(6), of the Controlled Substances Act (21 U.S.C. 802(6)) and includes all substances listed on Schedules I through V, of 21 CFR Part 1308, as they may be revised from time to time.

"*Conviction*" means the final judgment on a verdict of finding of guilty, a plea of guilty, or a forfeiture of bond or collateral upon a charge of a disqualifying offense, as a result of proceedings upon any violation of the requirements in this Part, or an implied admission of guilt in States with implied consent laws.

"*Driver's license*" means a license issued by a State to an individual which authorizes the individual to operate a motor vehicle on the highways.

"*Employee*" means an operator of a commercial motor vehicle (including an independent contractor while in the course of operating a commercial motor vehicle) who is employed by an employer.

"*Employer*" means any person (including the United States, a State, District of Columbia or a political subdivision of a State) who owns or leases a commercial motor vehicle or assigns employees to operate such a vehicle.

"*Felony*" means an offense under State or Federal law that is punishable by death or imprisonment for a term exceeding 1 year.

"*Gross combination weight rating (GCWR)*" means the value specified by the manufacturer as the loaded weight of a combination (articulated) vehicle. In the absence of a value specified by the manufacturer, GCWR will be determined by adding the GVWR of the power unit and the total weight of the towed unit and any load thereon.

"*Gross vehicle weight rating (GVWR)*" means the value specified by the manufacturer as the loaded weight of a single vehicle.

"*Hazardous materials*" has the meaning such term has under section

103 of the Hazardous Materials Transportation Act.

"Motor vehicle" means a vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power used on highways, except that such term does not include a vehicle, machine, tractor, trailer, semitrailer operated exclusively on a rail.

"Serious traffic violation" means conviction, when operating a commercial motor vehicle, of:

(a) Excessive speeding;

(b) Reckless driving, as defined under State or local law; or

(c) A violation of a State or local law relating to motor vehicle traffic control (other than a parking violation) and arising in connection with a fatal accident. (Serious traffic violations exclude vehicle weight and vehicle defect violations.)

"State" means a State of the United States and the District of Columbia.

"United States" the term United States means the 50 States and the District of Columbia.

§ 383.7 Waiver provisions.

(a) Any person subject to a requirement of this part may petition the Administrator for a waiver of compliance by a class of persons or a class of commercial motor vehicles with such requirement.

(b) Each petition for a waiver under this section shall be made in writing, preferably in triplicate, and shall:

(1) Include the name and complete address of petitioner;

(2) Identify the requirement the petitioner wants waived and any information in support of the request;

(3) Identify the class of persons or class of commercial motor vehicle for which the waiver is sought.

(4) Identify the type of operation addressed in the petition.

(5) Indicate what benefit would be derived from the issuance of a waiver.

(6) Indicate why the petition, if granted, would not diminish the safe operation of commercial motor vehicles.

(7) Include any other pertinent material the Administrator may require.

(c) If the Administrator determines that the petition is without merit, the Administrator may deny the petition. Notice of the denial, with the reasons therefor, will be provided to the petitioner in writing.

(d) If the Administrator determines that the petition may have merit, notice of the petition will be published in the **Federal Register**, and interested persons will be afforded an opportunity to comment thereon. After such notice and opportunity for comment, the Administrator may grant or deny the petition. Notice of the disposition of the petition, with the reasons therefor, will be published in the **Federal Register**.

Subpart B—Single License Requirement

§ 383.21 Number of drivers' licenses.

(a) No person who operates a commercial motor vehicle shall at any time have more than one driver's license.

(b) *Exception:*

(1) During the 10-day period beginning on the date such person is issued a driver's license, a person may hold more than one driver's license.

(2) A person may have more than one driver's license if a State law enacted before June 1, 1986, required the person to have more than one driver's license. After December 31, 1989, this exception shall not apply.

Subpart C—Notification Requirements and Employer Responsibilities

§ 383.31 Notification of convictions for driver violations.

(a) Each person who operates a commercial motor vehicle, who has a driver's license issued by a State, and who violates a State or local law relating to motor vehicle traffic control (other than a parking violation) in any other State shall notify a State official designated by the State which issued such license, of such violation. The notification must be made within 30 days after the date the person has been convicted or found to have committed the violation.

(b) Each person who operates a commercial motor vehicle, who has a driver's license issued by a State, and who violates a State or local law relating to motor vehicle traffic control (other than a parking violation), shall notify his/her employer of such violation. The notification must be made within 30 days after the date the person has been convicted or found to have committed a violation.

(c) *Notification.* The notification to the State official and employer must be made in writing and contain the following information:

(1) Driver's full name;

(2) Driver's license number;

(3) Date of conviction;

(4) Nature of violation of a State or local law relating to motor vehicle traffic control (other than parking);

(5) Indication whether the violation was in a commercial motor vehicle;

(6) Location of offense; and

(7) Driver's signature.

§ 383.33 Notification of driver's license suspensions.

Each employee who has a driver's license suspended, revoked, or canceled by a State, who loses the right to operate a commercial motor vehicle in a State for any period, or who is disqualified from operating a commercial motor vehicle for any period shall notify his/her employer of such suspension, revocation, cancellation, lost privilege, or disqualification. The notification must be made before the end of the business day following the day the employee received notice of suspension, revocation, cancellation, lost privilege, or disqualification.

§ 383.35 Notification of previous employment.

(a) Any person applying for employment as an operator of a commercial motor vehicle shall provide at the time of application for employment, the information specified in paragraph (c) of this section.

(b) All employers shall request the information specified in paragraph (c) of this section from all persons applying for employment as a commercial motor vehicle operator. The request shall be made at the time of application for employment.

(c) The following employment history information for the 10 years preceding the date the application is submitted shall be presented to the prospective employer by the applicant:

(1) A list of the names and addresses of the applicant's previous employers for which the applicant was an operator of a commercial motor vehicle;

(2) The dates the applicant was employed by these employers; and

(3) The reason for leaving such employment.

(d) The applicant shall certify that all information furnished is true and complete.

(e) An employer may require an applicant to provide additional information.

(f) Before an application is submitted, the employer shall inform the applicant that the information he/she provides in accordance with paragraph (c) of this section may be used, and the applicant's previous employers may be contacted for the purpose of investigating the applicant's work history.

§ 383.37 Employer responsibilities.

No employee shall knowingly allow, require, permit, or authorize an employee to operate a commercial motor vehicle in the United States during any period—

(a) In which the employee has a commercial motor vehicle driver's license suspended, revoked, or canceled by a State, has lost the right to operate a commercial motor vehicle in a State, or has been disqualified from operating a commercial motor vehicle; or

(b) In which the employee has more than one commercial motor vehicle driver's license, *except* during the 10-day period beginning on the date such employee is issued a driver's license and *except*, whenever a State law enacted on or before June 1, 1986, requires such employee to have more than one driver's license. The second exception shall not be effective after December 31, 1989.

Subpart D—Federal Disqualifications and Penalities

§ 383.51 Disqualification of drivers.

(a) *General.* A driver who is disqualified shall not drive a commercial motor vehicle. An employer shall not knowingly allow, require, permit, or authorize a driver who is disqualified to drive a commercial motor vehicle.

(b) *Disqualification for criminal offenses.*—(1) *General rule.* A driver who is convicted of a disqualifying offense specified in paragraph (b)(2) of this section, is disqualified for the time specified in paragraph (b)(3) of this section, if the offense was committed while operating a commercial motor vehicle.

(2) *Disqualifying offenses.* The following offenses are disqualifying offenses:

(i) Operating a commercial motor vehicle under the influence of alcohol or a controlled substance as defined under section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), including all substances listed in Schedules I through V of 21 CFR Part 1308, as they may be amended from time to time. Schedule I substances are identified in Appendix D of this subchapter and Schedules II through V are identified in Appendix E of this subchapter;

(ii) Leaving the scene of an accident involving a commercial motor vehicle;

(iii) A felony involving the use of a commercial motor vehicle, other than a felony described in paragraph (b)(2)(iv) of this section; or

(iv) The use of a commercial motor vehicle in the commission of a felony involving manufacturing, distributing, or dispensing a controlled substance when defined as any substance under section 102(6) of the Controlled Substances Act (21 U.S.C 802(6)) including all substances listed in Schedules I through V of 21 CFR Part 1308, as they may be amended from time to time. Schedule I substances are identified in Appendix D of this subchapter and Schedules II through V are identified in Appendix E of this subchapter.

(3) *Duration of disqualification for criminal misconduct.*—(i) *First offenders.* A driver is disqualified for 1 year after the date the driver is found to have committed an offense described in paragraphs (b)(2)(i) through (b)(2)(iii) of this section, provided the vehicle was not transporting hazardous materials required to be placarded under the Hazardous Materials Transportation Act (49 U.S.C. App. 1801–1813).

(ii) *First offenders transporting hazardous materials.* A driver is disqualified for 3 years after the date the driver is found to have committed an offense described in paragraphs (b)(2)(i) through (iii) of this section, if the vehicle was transporting hazardous materials required to be placarded under the Hazardous Materials Transporation Act (49 U.S.C. 1801–1813.

(iii) *First offenders of controlled substance felonies.* A driver is disqualified for life after the driver is found to have committed an offense described in paragraph (b)(2)(iv) of this section.

(iv) *Subsequent Offenders.* A driver is disqualified for life after the date the driver is found to have committed an offense described in paragraphs (b)(2)(i) through (b)(2)(iii) of this section, if the driver had been found to have committed once before any offense described in paragraphs (b)(2)(i) through (b)(2)(iii) of this section.

(c) *Disqualification for serious traffic violations.*—(1) *General rule.* A driver who is found to have committed a disqualifying offense specified in paragraph (c)(2) of this section, is disqualified for the period of time specified in paragraph (c)(3) of this section, if the offense was committed while operating a commercial motor vehicle.

(2) *Serious traffic violations.* The following violations are disqualifying offenses:

(i) Excessive speeding;

(ii) Reckless driving, as defined under State or local law; and

(iii) A violation of a State or local law relating to motor vehicle traffic control (other than a parking violation) arising in connection with a fatal traffic accident. (Serious traffic violations exclude vehicle weight and vehicle defect violations.)

(3) *Duration of disqualification for serious traffic violations*—(i) *Second violation.* A driver is disqualified for 60 days if, during any 3-year period, the driver is found to have committed two serious traffic violations.

(ii) *Third violation.* A driver is disqualified for 120 days if, during any 3-year period, the driver is found to have committed three serious traffic violations.

§ 383.53 Penalties.

Any person who violates the rules set forth in subparts B and C may be subject to civil or criminal penalties as provided for in 49 U.S.C. 521(b), as amended by section 12012 of Pub. L. 99–570.

Technical Amendments

Due to the addition of Part 383 to Title 49 CFR, Chapter IV, Subchapter B, the following technical amendments are necessary to correct citations found in other parts of Title 49 CFR and are set forth below.

PART 391—[AMENDED]

2. Section 391.11(b)(7) is revised to read as follows:

§ 391.11 Qualifications of drivers.

* * * * *

(b) * * *

(7) Has a currently valid commercial motor vehicle operator's license issued only from one State or jurisdiction, except whenever a State law enacted on or before June 1, 1986, requires such person to have more than one driver's license. This exception shall not be effective after December 31, 1989.

* * * * *

3. Section 391.21 is amended by removing the word "and" at the end of paragraph (b)(10), by redesignating (b)(11) as (b)(12), and by adding a new paragraph (b)(11) to read as follows:

§ 391.21 Application for employment.

* * * * *

(b) * * *

(11) For those drivers applying to operate a commercial motor vehicle as defined by Part 383 of this subchapter, a list of the names and addresses of the applicant's employers during the 7-year period preceding the 3 years contained in paragraph (b)(10) of this section for which the applicant was an operator of a commercial motor vehicle, together with the dates of employment and the reasons for leaving such employment.

* * * * *

4. Section 391.27 is amended by adding a new paragraph (e) as follows:

§ 391.27 Record of violations.

* * * * *

(e) Drivers who have provided information required by § 383.31 of this subchapter need not repeat that

information in the annual list of violations required by this section.

SUBCHAPTER B—[AMENDED]

APPENDIX D—[AMENDED]

5. Subchapter B is amended by revising the title of Appendix D to read "Table of Disqualifying Drugs and Other Substances, Schedule I."

APPENDIX E—[ADDED]

6. Subchapter B is amended by adding Appendix E to read as follows:

APPENDIX E TO SUBCHAPTER B—TABLES OF DISQUALIFYING DRUGS AND OTHER SUBSTANCES, SCHEDULES II THROUGH V

Schedules II through V of the drug classification system are adopted in whole from 21 CFR 1308.12 through 1308.15, Schedules of Controlled Substances.

[FR Doc. 87-12467 Filed 5-29-87; 8:45 am]

BILLING CODE 4910-22-M

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Monday, June 1, 1987

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Last List May 28, 1987

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H.R. 1157/Pub. L. 100-45

Farm Disaster Assistance Act of 1987. (May 27, 1987; 101 Stat. 318; 10 pages) Price: $1.00

CFR CHECKLIST

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4	14.00	Jan. 1, 1987
5 Parts:		
1–1199	25.00	Jan. 1, 1987
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7 Parts:		
0–45	25.00	Jan. 1, 1987
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1120–1199	11.00	Jan. 1, 1987
1200–1499	18.00	Jan. 1, 1987
1500–1899	9.50	Jan. 1, 1987
1900–1944	25.00	Jan. 1, 1987
1945–End	26.00	Jan. 1, 1987
8	9.50	Jan. 1, 1987
9 Parts:		
1–199	18.00	Jan. 1, 1987
200–End	16.00	Jan. 1, 1987
10 Parts:		
0–199	29.00	Jan. 1, 1987
200–399	13.00	Jan. 1, 1987
400–499	14.00	Jan. 1, 1987
500–End	24.00	Jan. 1, 1987
11	7.00	Jan. 1, 1986
12 Parts:		
1–199	11.00	Jan. 1, 1987
200–299	27.00	Jan. 1, 1987
300–499	13.00	Jan. 1, 1987
500–End	27.00	Jan. 1, 1987
13	19.00	Jan. 1, 1987
14 Parts:		
1–59	21.00	Jan. 1, 1987
60–139	19.00	Jan. 1, 1987
140–199	9.50	Jan. 1, 1987
200–1199	19.00	Jan. 1, 1987
1200–End	11.00	Jan. 1, 1987
15 Parts:		
0–299	10.00	Jan. 1, 1987
300–399	20.00	Jan. 1, 1987
400–End	14.00	Jan. 1, 1987
16 Parts:		
0–149	12.00	Jan. 1, 1987
150–999	13.00	Jan. 1, 1987
1000–End	19.00	Jan. 1, 1987
17 Parts:		
1–239	26.00	Apr. 1, 1986
240–End	19.00	Apr. 1, 1986
18 Parts:		
*1–149	15.00	Apr. 1, 1987
150–399	25.00	Apr. 1, 1986
400–End	8.50	Apr. 1, 1987
19	29.00	Apr. 1, 1986
20 Parts:		
1–399	10.00	Apr. 1, 1986
400–499	22.00	Apr. 1, 1986
*500–End	24.00	Apr. 1, 1987
21 Parts:		
1–99	12.00	Apr. 1, 1987
100–169	14.00	Apr. 1, 1987
170–199	16.00	Apr. 1, 1987
200–299	5.50	Apr. 1, 1987
300–499	26.00	Apr. 1, 1987
500–599	21.00	Apr. 1, 1986
600–799	7.00	Apr. 1, 1987
800–1299	13.00	Apr. 1, 1987
1300–End	6.00	Apr. 1, 1987
22	28.00	Apr. 1, 1986
23	16.00	Apr. 1, 1987
24 Parts:		
0–199	14.00	Apr. 1, 1987
200–499	24.00	Apr. 1, 1986
500–699	8.50	Apr. 1, 1986
700–1699	17.00	Apr. 1, 1986
1700–End	12.00	Apr. 1, 1987
25	24.00	Apr. 1, 1986
26 Parts:		
§§ 1.0–1.169	29.00	Apr. 1, 1986
§§ 1.170–1.300	16.00	Apr. 1, 1986
§§ 1.301–1.400	13.00	Apr. 1, 1986
§§ 1.401–1.500	20.00	Apr. 1, 1986
§§ 1.501–1.640	15.00	Apr. 1, 1986
§§ 1.641–1.850	16.00	Apr. 1, 1986
§§ 1.851–1.1200	29.00	Apr. 1, 1986
§§ 1.1201–End	29.00	Apr. 1, 1986
2–29	19.00	Apr. 1, 1986
30–39	13.00	Apr. 1, 1986
40–299	25.00	Apr. 1, 1986
300–499	14.00	Apr. 1, 1986
500–599	8.00	[2] Apr. 1, 1980
600–End	6.00	Apr. 1, 1987
27 Parts:		
1–199	20.00	Apr. 1, 1986
200–End	14.00	Apr. 1, 1986
28	21.00	July 1, 1986
29 Parts:		
0–99	16.00	July 1, 1986
100–499	7.00	July 1, 1986
500–899	24.00	July 1, 1986
900–1899	9.00	July 1, 1986
1900–1910	27.00	July 1, 1986
1911–1919	5.50	[3] July 1, 1984
1920–End	29.00	July 1, 1986
30 Parts:		
0–199	16.00	[4] July 1, 1985
200–699	8.50	July 1, 1986
700–End	17.00	July 1, 1986
31 Parts:		
0–199	11.00	July 1, 1986
200–End	16.00	July 1, 1986

Title	Price	Revision Date
32 Parts:		
1–39, Vol. I	15.00	[5] July 1, 1984
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1–39, Vol. III	18.00	[5] July 1, 1984
1–189	17.00	July 1, 1986
190–399	23.00	July 1, 1986
400–629	21.00	July 1, 1986
630–699	13.00	July 1, 1986
700–799	15.00	July 1, 1986
800–End	16.00	July 1, 1986
33 Parts:		
1–199	27.00	July 1, 1986
200–End	18.00	July 1, 1986
34 Parts:		
1–299	20.00	July 1, 1986
300–399	11.00	July 1, 1986
400–End	25.00	July 1, 1986
35	9.50	July 1, 1986
36 Parts:		
1–199	12.00	July 1, 1986
200–End	19.00	July 1, 1986
37	12.00	July 1, 1986
38 Parts:		
0–17	21.00	July 1, 1986
18–End	15.00	July 1, 1986
39	12.00	July 1, 1986
40 Parts:		
1–51	21.00	July 1, 1986
52	27.00	July 1, 1986
53–60	23.00	July 1, 1986
61–80	10.00	July 1, 1986
81–99	25.00	July 1, 1986
100–149	23.00	July 1, 1986
150–189	21.00	July 1, 1986
190–399	27.00	July 1, 1986
400–424	22.00	July 1, 1986
425–699	24.00	July 1, 1986
700–End	24.00	July 1, 1986
41 Chapters:		
1, 1–1 to 1–10	13.00	[6] July 1, 1984
1, 1–11 to Appendix, 2 (2 Reserved)	13.00	[6] July 1, 1984
3–6	14.00	[6] July 1, 1984
7	6.00	[6] July 1, 1984
8	4.50	[6] July 1, 1984
9	13.00	[6] July 1, 1984
10–17	9.50	[6] July 1, 1984
18, Vol. I, Parts 1–5	13.00	[6] July 1, 1984
18, Vol. II, Parts 6–19	13.00	[6] July 1, 1984
18, Vol. III, Parts 20–52	13.00	[6] July 1, 1984
19–100	13.00	[6] July 1, 1984
1–100	9.50	July 1, 1986
101	23.00	July 1, 1986
102–200	12.00	July 1, 1986
201–End	7.50	July 1, 1986
42 Parts:		
1–60	15.00	Oct. 1, 1986
61–399	10.00	Oct. 1, 1986
400–429	20.00	Oct. 1, 1986
430–End	15.00	Oct. 1, 1986
43 Parts:		
1–999	14.00	Oct. 1, 1986
1000–3999	24.00	Oct. 1, 1986
4000–End	11.00	Oct. 1, 1986
44	17.00	Oct. 1, 1986
45 Parts:		
1–199	13.00	Oct. 1, 1986
200–499	9.00	Oct. 1, 1986
500–1199	18.00	Oct. 1, 1986
1200–End	13.00	Oct. 1, 1986
46 Parts:		
1–40	13.00	Oct. 1, 1986
41–69	13.00	Oct. 1, 1986
70–89	7.00	Oct. 1, 1986
90–139	11.00	Oct. 1, 1986
140–155	8.50	[7] Oct. 1, 1985
156–165	14.00	Oct. 1, 1986
166–199	13.00	Oct. 1, 1986
200–499	19.00	Oct. 1, 1986
500–End	9.50	Oct. 1, 1986
47 Parts:		
0–19	17.00	Oct. 1, 1986
20–39	18.00	Oct. 1, 1986
40–69	11.00	Oct. 1, 1986
70–79	17.00	Oct. 1, 1986
80–End	20.00	Oct. 1, 1986
48 Chapters:		
1 (Parts 1–51)	21.00	Oct. 1, 1986
1 (Parts 52–99)	16.00	Oct. 1, 1986
2	27.00	Dec. 31, 1986
3–6	17.00	Oct. 1, 1986
7–14	23.00	Oct. 1, 1986
15–End	22.00	Oct. 1, 1986
49 Parts:		
1–99	10.00	Oct. 1, 1986
100–177	24.00	Oct. 1, 1986
178–199	19.00	Oct. 1, 1986
200–399	17.00	Oct. 1, 1986
400–999	21.00	Oct. 1, 1986
1000–1199	17.00	Oct. 1, 1986
1200–End	17.00	Oct. 1, 1986
50 Parts:		
1–199	15.00	Oct. 1, 1986
200–End	25.00	Oct. 1, 1986
CFR Index and Findings Aids	27.00	Jan. 1, 1987
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[1] Because Title 3 is an annual compilation, this volume and all previous volumes should be retained as a permanent reference source.

[2] No amendments to this volume were promulgated during the period Apr. 1, 1980 to March 31, 1986. The CFR volume issued as of Apr. 1, 1980, should be retained.

[3] No amendments to this volume were promulgated during the period July 1, 1984 to June 30, 1986. The CFR volume issued as of July 1, 1984, should be retained.

[4] No amendments to this volume were promulgated during the period July 1, 1985 to June 30, 1986. The CFR volume issued as of July 1, 1985 should be retained.

[5] The July 1, 1985 edition of 32 CFR Parts 1–189 contains a note only for Parts 1–39 inclusive. For the full text of the Defense Acquisition Regulations in Parts 1–39, consult the three CFR volumes issued as of July 1, 1984, containing those parts.

[6] The July 1, 1985 edition of 41 CFR Chapters 1–100 contains a note only for Chapters 1 to 49 inclusive. For the full text of procurement regulations in Chapters 1 to 49, consult the eleven CFR volumes issued as of July 1, 1984 containing those chapters.

[7] No amendments to this volume were promulgated during the period Oct. 1, 1985 to Sept. 30, 1986. The CFR volume issued as of Oct. 1, 1985 should be retained.

TABLE OF EFFECTIVE DATES AND TIME PERIODS—JUNE 1987

This table is used by the Office of the Federal Register to compute certain dates, such as effective dates and comment deadlines, which appear in agency documents. In computing these dates, the day after publication is counted as the first day.

When a date falls on a weekend or holiday, the next Federal business day is used. (See 1 CFR 18.17)

A new table will be published in the first issue of each month.

DATE OF FR PUBLICATION	15 DAYS AFTER PUBLICATION	30 DAYS AFTER PUBLICATION	45 DAYS AFTER PUBLICATION	60 DAYS AFTER PUBLICATION	90 DAYS AFTER PUBLICATION
June 1	June 16	July 1	July 16	July 31	August 31
June 2	June 17	July 2	July 17	August 3	August 31
June 3	June 18	July 6	July 20	August 3	September 1
June 4	June 19	July 6	July 20	August 3	September 2
June 5	June 22	July 6	July 20	August 4	September 3
June 8	June 23	July 8	July 23	August 7	September 8
June 9	June 24	July 9	July 24	August 10	September 8
June 10	June 25	July 10	July 27	August 10	September 8
June 11	June 26	July 13	July 27	August 10	September 9
June 12	June 29	July 13	July 27	August 11	September 10
June 15	June 30	July 15	July 30	August 14	September 14
June 16	July 1	July 16	July 31	August 17	September 14
June 17	July 2	July 17	August 3	August 17	September 15
June 18	July 6	July 20	August 3	August 17	September 16
June 19	July 6	July 20	August 3	August 18	September 17
June 22	July 7	July 22	August 6	August 21	September 21
June 23	July 8	July 23	August 7	August 24	September 21
June 24	July 9	July 24	August 10	August 24	September 22
June 25	July 10	July 27	August 10	August 24	September 23
June 26	July 13	July 27	August 10	August 25	September 24
June 29	July 14	July 29	August 13	August 28	September 28
June 30	July 15	July 30	August 14	August 31	September 28