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Federal Register
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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 890

Federal Employees Health Benefits Program; Medically Underserved Areas for 1988

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is adopting as final its interim regulations under the Federal Employees Health Benefits (FEHB) Program pertaining to benefits for individuals in Medically Underserved Areas. The interim regulations announced the states that qualify as Medically Underserved Areas under the FEHB Program for 1988.

EFFECTIVE DATE: January 1, 1988.

FOR FURTHER INFORMATION CONTACT: Barbara Myers (202) 632–4634.

SUPPLEMENTARY INFORMATION: On January 14, 1988, OPM published interim regulations in the **Federal Register** (53 FR 860) to announce the results of its annual determination of the states that qualify as Medically Underserved Areas for purposes of the FEHB Program. The interim regulations were effective January 1, 1988.

No comments were received during the comment period.

E.O. 12291, Federal Regulation

I have determined that this is not a major rule as defined under section 1(b) of E.O. 12291, Federal regulation.

Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they primarily affect Federal employees, annuitants, and former spouses.

List of Subjects in 5 CFR Part 890

Administrative practice and procedures, Government employees, Health insurance.

U.S. Office of Personnel Management.

Constance Horner,

Director.

1. The authority citation for 5 CFR Part 890 continues to read as follows:

Authority: 5 U.S.C. 8913; § 890.102 also issued under 5 U.S.C. 1104.

2. The interim regulations amending 5 CFR 890.701, that were published at 53 FR 860 on January 14, 1988, are adopted as final rules without change.

[FR Doc. 88–17314 Filed 8–1–88; 8:45 am]
BILLING CODE 6325–01–M

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR Part 1446

[Amdt. 2]

Peanut Warehouse Storage Loans and Handler Operations for the 1986 Through 1990 Crops

AGENCY: Commodity Credit Corporation, USDA.

ACTION: Final rule.

SUMMARY: This final rule adopts with clarifying revisions, a proposed rule published on June 1, 1988 (53 FR 19923), concerning, for the 1988 through 1990 crops of peanuts, the requirements for the furnishing of letters of credit by peanut handlers to insure their compliance with regulations governing the handling and use of additional peanuts. Also, this rule permits the Executive Vice President, Commodity Credit Corporation (CCC), to extend the deadline for the filing of letters of credit to permit handlers time to acquire adequate financing.

EFFECTIVE DATE: August 2, 1988.

FOR FURTHER INFORMATION CONTACT: David L. Kincannon, Peanut Operations Branch, Tobacco and Peanuts Division, ASCS, USDA, P.O. Box 2415, Washington, D.C. 20013, telephone 202–382–0152.

SUPPLEMENTARY INFORMATION: This final rule has been reviewed under USDA procedures, Executive Order 12291, and Secretary's Memorandum No. 1512–1, and has been classified "not major." It has been determined that this rule 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, industries, Federal, State or local government agencies, or geographical regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export makets. The information collection requirements contained in this regulation and information requests authorized by this regulation have been reviewed and approved by the Office of Management and Budget (OMB) under OMB Number 0560–0024.

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

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

It has been determined by an environmental evaluation that this action will have no significant impact on the quality of the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is needed.

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

Section 359(p) of the Agricultural Adjustment Act of 1938, as amended, requires that a peanut handler submit adequate financial guarantees to ensure the handler's compliance with the obligation to export "additional" peanuts. For this purpose, 7 CFR 1446.106 sets forth requirements for the submission by handlers of letter of credit, and includes a provision requiring higher letters of credit for handlers with a history of peanut program violations.

A rule published in the **Federal Register** (53 FR 19923), on June 1, 1988, proposed amendments to § 1446.106 which set forth rules for determining when such increases would be required.

Comments

A total of four comments were received by July 5, 1988, in response to the proposed rule.

One respondent favored the proposed rule as published. Two respondents generally supported the proposed rule but suggested modifications. One respondent supported the recommendations of another respondent but requested clarification of certain language contained in the proposed rule.

Two respondents suggested that the final rule make clear that the letter of credit shall be increased by 10 percent (or 5 percent under certain conditions) for *each* of the three preceding crop years with respect to which a handler has been assessed penalties for program violations. The rule has been clarified concerning this point.

One respondent requested clarification of the terms "related individual," or "related entity," or "associated with another handler" as used in the proposed rule. The final rule specifies that the Executive Vice President, CCC, shall determine if a handler is considered related to, or associated with, another individual, handler or other entity involved in a penalty assessment. These determinations will take into account such factors as deemed needed to prevent avoidance of letter of credit requirements through reorganizations as well as other situations where "relatedness" may have an effect on insuring compliance with additional peanut requirements.

One respondent felt that, as long as a penalty was being challenged administratively or in court, there should be no increase in the letter of credit based on the penalty. This suggestion was not adopted in the final rule. Such a provision would encourage a handler with a penalty assessment to challenge the assessment solely to delay an increase in the letter of credit amount.

One respondent contested the determination set out in the proposed rule that the rule would not have significant adverse effects on the ability of United States-based enterprises to compete with foreign-based enterprises in the export market. The final rule, which maintains the substantive provisions of the proposed rule, does not, as was the case with the proposed rule, adversely affect a handler's ability to compete in the export market. Increases in letter of credit requirements above minimum levels for nonphysical and physical supervision will apply only to handlers with a history of peanut program violations. Therefore, handlers themselves control whether an increased letter of credit is required.

One respondent requested clarification of the provision in the proposed rule that permitted the Executive Vice President, CCC, in his discretion, to permit waiver of the requirements that letter of credit determinations will be based on facts as they exist as of June 1 of the calendar year in which the letter of credit is to be supplied, if adequate security is presented. As indicated in the proposed rule's supplementary information, this was designed to cover the special letter of credit increase for unpaid penalties. The rule itself has been clarified in this respect.

One respondent asked whether a penalty reduction would effect the quantity of peanuts considered involved in a violation for letter of credit purposes. No clarification of the rule was deemed needed on this point. A reduction does not effect the quantity of peanuts involved in the violation unless such a recalculation of quantity was, itself, the basis of the reduction. However, the final rule, like the proposed rule, provides for lesser letter of credit increases where penalties have been reduced and paid. Also, like the proposed rule, the final rule provides, for violations involving paid penalties, that increases in the letter of credit will be required only with respect to certain types of violations. Hence, a penalty reduction could also affect the letter of credit amount if the penalty reduction involved a material redetermination of the nature of the violations themselves.

The final rule reorganizes the proposed rule and makes technical corrections in the rule as well as the other clarifying revisions indicated above. In addition, a provision has been added providing that the Executive Vice President, CCC, may extend the deadline for the filing of letters of credit by handlers. This authority is particularly necessary with respect to the current crop year as, otherwise, all initial financing would have to be complete by July 31, 1988.

List of Subjects in 7 CFR Part 1446

Loan programs—Agriculture, Peanuts, Price support programs, Warehouse.

Final Rule

Accordingly, Title 7, Subtitle B, Chapter XIV, Part 1446, Subpart-Peanut Warehouse Storage Loans and Handler Operations for the 1986 Through 1990 Crops, is amended as follows:

PART 1446—[AMENDED]

1. The authority citation for Subpart-Peanut Warehouse Storage Loans and Handler Operations for the 1986 Through 1990 Crops is revised to read as follows:

Authority: 15 U.S.C. 714b and c; 7 U.S.C. 1441, 1421 *et seq.*; 7 U.S.C. 1359, 1375.

2. Section 1446.106 is amended by revising paragraphs (b) and (c) to read as follows:

§ 1446.106 Letter of credit.

* * * * *

(b) *Increased letter of credit based on performance record.* For the 1988 through 1990 crop years, the amount of the letters of credit required to be submitted under paragraph (a) of this section by any handler who has a poor performance record, as evidenced by previous penalty assessment for violations of the provisions of this part, or who is associated with another handler who has such a record, shall be increased to an amount CCC determines necessary to assure compliance with this part, such amount of increase to be determined in accordance with the guidelines set forth in paragraph (c) of this section.

(c) *Guidelines for increasing letters of credit.* (1) With respect to the establishment of letters of credit for each of the 1988 through 1990 crop years, if the handler and/or related entity was assessed penalties for program violations for any of the previous three crop years, the percentage of the pounds of contracted peanuts to which the support differential specified in paragraph (a) of this section shall be applied, shall be increased by 10 percent for each and every year of the three-year period in which such a penalty was assessed, except that:

(i) The increase in the percentage of contracted peanuts to which the support differential is applied which is attributable to violations for a particular crop year shall be 5 percent rather than 10 percent if, for all violations for that crop year:

(A) The penalties were reduced by the Executive Vice President, CCC, and paid; or

(B) Less than 120 days, or such further period as established by the Executive Vice President, have passed since the penalty assessment was made by the CCC Contracting Officer.

(ii) Previous penalty assessments which have been paid shall not be considered as part of the violation history for any crop year if:

(A) The violations do not involve the importation of additional peanuts, or the failure to properly dispose of additional peanuts; and

(B) The total violations for any crop year by the handler, and related individuals or entities, involved less than 100,000 pounds of peanuts.

(iii) If there are penalties assessed against the handler and/or related individual or entity, as determined by the Executive Vice President, CCC, for any crop year for any violation of this part of any kind (including, but not limited to those identified in paragraph (c)(1)(ii) of this section) which remain unpaid more than 120 days after the assessment was made by the CCC Contracting Officer, the amount of the letter of credit otherwise required by this paragraph for any of the 1988 and subsequent crops shall be increased by the amount of the unpaid assessment.

(2) References to unpaid penalties in paragraph (c)(1) of this section shall include associated unpaid interest and unpaid late payment charges.

(3) Letter of credit determinations under this section for the 1988 and subsequent crop years shall be made based upon the facts as they exist on June 1 of the calendar year in which the letter of credit is to be supplied. However, the Executive Vice President, CCC, in his discretion, may waive the increase required under paragraph (c)(1)(iii) of this section upon the presentment of adequate security as determined acceptable by the Executive Vice President, CCC. Further, notwithstanding any other provision of this section, the Executive Vice President, CCC, may extent the time for filing of the required letter of credit if such an extension is deemed needed to allow handlers sufficient time to acquire the necessary financing.

* * * * *

Signed at Washington, DC on July 29, 1988.

Earle J. Bedenbaugh,

Acting Executive Vice President, Commodity Credit Corporation.

[FR Doc. 88-17495 Filed 7-29-88; 5:02 pm]

BILLING CODE 3410-05-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 88-NM-95-AD; Amdt. 39-5991]

Airworthiness Directives: McDonnell Douglas Model DC-10-30, -30F, -40, and KC-10A (Military) Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to McDonnell Douglas Model DC-10-30, -30F, -40, and KC-10A (Military) series airplanes, which requires all landing gear brakes be inspected for wear, and replaced if the wear limits prescribed in this AD are not met. This amendment is prompted by a recent report where a Model DC-10-30 series airplane executed a rejected takeoff and was unable to stop on the runway. Subsequent investigation has revealed that a majority of the brakes on the airplane were close to their wear limits, which may have contributed to the incident. This condition, if not corrected, could result in the failure of the landing gear brakes and overrun of the runway by the airplane.

DATES: Effective August 20, 1988.

ADDRESSES: There is no applicable service information.

FOR FURTHER INFORMATION CONTACT: Mr. E.S. Chalpin, Aerospace Engineer, Systems and Equipment Branch, ANM-130L, FAA, Northwest Mountain Region, Los Angeles Aircraft Certification Office, 3229 East Spring Street, Long Beach, California 90806; telephone (213) 988-5335.

SUPPLEMENTARY INFORMATION: Recently, a Model DC-10-30 series airplane executed a rejected takeoff (RTO) following a takeoff warning indication in the cockpit. The airplane stopped approximately 1,000 feet beyond the end of the runway. Prior to this incident, a maintenance inspection of the ten brakes on the airplane revealed that eight brakes were near wear limits. Subsequent to the incident, on these eight brakes, there were two failed pistons, one on each of the two hydraulic systems. O-rings in the pistons were damaged by the extension of the piston beyond its normal limits. After the loss of the O-rings, hydraulic fluid was released and braking action was ineffective.

The FAA has determined that the fact that the brakes were at or near their wear limits may have contributed to the incident. This condition, if not corrected, could result in the failure of the main landing gear brakes and overrun of the runway by the airplane.

In light of this, the FAA has determined that the brake wear limits prescribed in the McDonnell Douglas DC-10-30 Maintenance Manual are not acceptable.

Since this condition is likely to exist or develop on other airplanes of the same type design, this AD, applicable to all McDonnell Douglas Model DC-10-30, -30F, -40, and KC-10A (Military) airplanes, requires the inspection of main landing gear brakes to the wear limits set forth in this AD, and the replacement, prior to further flight, of any brakes which are determined not to be within these limits. Subsequently, these limitations must be utilized in lieu of those called out in the maintenance manual.

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

The regulations set forth in this amendment are promulgated pursuant to the authority in the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301, *et seq.*), which statute is construed to preempt state law regulating the same subject. Thus, in accordance with Executive Order 12612, it is determined that such regulations do not have federalism implications warranting the preparation of a Federalism Assessment.

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

List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft.

Adoption of the Amendment

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

PART 39—[AMENDED]

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

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

2. By adding the following new airworthiness directive:

McDonnell Douglas: Applies to McDonnell Douglas Model DC–10–30, –30F, –40, and KC–10A (Military) series airplanes, certificated in any category. Compliance required as indicated unless previously accomplished.

To prevent the loss of main landing gear brake effectiveness, accomplish the following:

A. Within 30 days after the effective date of this Airworthiness Directive (AD), inspect the brakes for wear. If the brake wear is greater than the following limits, replace the brake with one within limits prior to further flight. Thereafter, these limits must be maintained:

1. For Goodyear/Loral Systems part numbers 5000758–2, –3, and –5 the maximum brake wear limit is 1.50 inches.

2. For Goodyear/Loral Systems part numbers 5000758–4, –6, and –10 the maximum brake wear limit is 1.75 inches.

B. Within 30 days after the effective date of this AD, incorporate the wear limits listed in paragraph A., above., into the FAA-approved maintenance inspection program.

C. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Los Angeles Aircraft Certification Office, FAA, Northwest Mountain Region.

Note: The request should be forwarded through an FAA Principal Maintenance Inspector (PMI), who may add any comments and then send it to the Manager, Los Angeles Aircraft Certification Office, FAA, Northwest Mountain Region.

D. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base in order to comply with the requirements of this AD.

This Amendment becomes effective August 20, 1988.

Issued in Washington, DC, on July 26, 1988.

M.C. Beard,

Director, Office of Airworthiness.

[FR Doc. 88–17353 Filed 7–28–88; 2:42 pm]

BILLING CODE 4910–13–Ms

14 CFR Part 97

[Docket No. 25668; Amdt. No. 1379]

Standard Instrument Approach Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs) for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, addition of new obstacles, or changes in air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATE: *Effective:* An effective date for each SIAP is specified in the amendatory provisions.

Note: Incorporation by reference—approved by the Director of the Federal Register on December 31, 1980, and reapproved as of January 1, 1982.

ADDRESSES: Availability of matters incorporated by reference in the amendment is as follows:

For Examination—

1. FAA Rules Docket, FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591;

2. The FAA Regional Office of the region in which the affected airport is located; or

3. The Flight Inspection Field Office which originated the SIAP.

For Purchase—

Individual SIAP copies may be obtained from:

1. FAA Public Inquiry Center (APA–200), FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591; or

2. The FAA Regional Office of the region in which the affected airport is located.

By Subscription—

Copies of all SIAPs, mailed once every 2 weeks, are for sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

FOR FURTHER INFORMATION CONTACT: Donald K. Funai, Flight Procedures Standards Branch (AFS–230), Air Transportation Division, Office of Flight Standards, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267–8277.

SUPPLEMENTARY INFORMATION: This amendment to Part 97 of the Federal Aviation Regulations (14 CFR Part 97) prescribes new, amended, suspended, or revoked Standard Instrument Approach Procedures (SIAPs). The complete regulatory description of each SIAP is contained in official FAA form documents which are incorporated by reference in this amendment under 5 U.S.C. 552(a), 1 CFR Part 51, and § 97.20 of the Federal Aviation Regulations (FARs). The applicable FAA forms are identified as FAA forms 8260–3, 8260–4, and 8260–5. Materials incorporated by reference are available for examination or purchase as stated above.

The large number of SIAPs, their complex nature, and the need for a special format make their verbatim publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, but refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP contained in FAA form document is unnecessary. The provisions of this amendment state the affected CFR (and FAR) sections, with the types and effective dates of the SIAPs. This amendment also identifies the airport, its location, the procedure identification and the amendment number.

This amendment to Part 97 is effective on the date of publication and contains separate SIAPs which have compliance dates stated as effective dates based on related changes in the National Airspace System or the application of new or revised criteria. Some SIAP amendments may have been previously issued by the FAA in a National Flight Data Center (FDC) Notice to Airmen (NOTAM) as an emergency action of immediate flight safety relating directly to published aeronautical charts. The circumstances which created the need for some SIAP amendments may require making them effective in less than 30 days. For the remaining SIAPs, an effective date at least 30 days after publication is provided.

Further, the SIAPs contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Approach Procedures (TERPs). In developing these SIAPs, the TERPs criteria were applied

to the conditions existing or anticipated at the affected airports. Because of the close and immediate relationship between these SIAPs and safety in air commerce, I find that notice and public procedure before adopting these SIAPs is unnecessary, impracticable, and contrary to the public interest and, where applicable, that good cause exists for making some SIAPs effective in less than 30 days.

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

List of Subjects in 14 CFR Part 97

Approaches, Standard instrument, Incorporation by reference.

Issued in Washington, DC on July 22, 1988.

Robert L. Goodrich,

Director of Flight Standards.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, Part 97 of the Federal Aviation Regulations (14 CFR Part 97) is amended by establishing, amending, suspending, or revoking Standard Instrument Approach Procedures, effective at 0901 g.m.t. on the dates specified, as follows:

PART 97—[AMENDED]

1. The authority citation for Part 97 continues to read as follows:

Authority: 49 U.S.C. 1348, 1354(a), 1421, and 1510; 49 U.S.C. 106(g) (revised, Pub. L. 97-449, January 12, 1983; and 14 CFR 11.49(b)(2)).

By amending: § 97.23 VOR, VOR/DME, VOR or TACAN, and VOR/DME or TACAN; § 97.25 LOC, LOC/DME, LDA, LDA/DME, SDF, SDF/DME; § 97.27 NDB, NDB/DME; § 97.29 ILS, ILS/DME, ISMLS, MLS, MLS/DME, MLS/RNAV; § 97.31 RADAR SIAPs; § 97.33 RNAV SIAPs; and § 97.35 COPTER SIAPs, identified as follows:

** * * Effective October 20, 1988*

Anvik, AK—Anvik, NDB RWY 35, Orig.
Fresno, CA—Fresno Air Terminal, VOR or TACAN RWY 11L, Amdt. 10
Fresno, CA—Fresno Air Terminal, LOC BC RWY 11L, Amdt. 7
Fresno, CA—Fresno Air Terminal, NDB RWY 29R, Amdt. 22
Fresno, CA—Fresno Air Terminal, ILS RWY 29R, Amdt. 30
Corning, IA—Corning Muni, NDB RWY 17, Orig.
Athens/Albany, OH—Ohio University, LOC RWY 25, Amdt. 1
Athens/Albany, OH—Ohio University, NDB RWY 25, Amdt. 7
Milford, UT—Milford Muni, VOR-A, Amdt. 3

** * * Effective September 22, 1988*

Shishmaref, AK—New Shishmaref, NDB RWY 5, Orig.
Shishmaref, AK—New Shishmaref, NDB RWY 23, Orig.
Chicago, IL—Chicago-O Hare Intl, NDB RWY 27R, Amdt. 21
Chicago, IL—Chicago-O Hare Intl, ILS RWY 27R, Amdt. 23
Council Bluffs, IA—Council Bluffs Muni, VOR-A, Amdt. 3
Dension, IA—Denison Muni, NDB RWY 30, Amdt. 3
Shenandoah, IA—Shenandoah Muni, VOR/DME RWY 12, Amdt. 2
Shenandoah, IA—Shenandoah Muni, NDB RWY 30, Amdt. 10
Covington/Cincinnati, OH, KY—Greater Cincinnati Intl, ILS RWY 27L, Amdt. 9
Covington/Cincinnati, OH, KY—Greater Cincinnati Intl, ILS RWY 36, Amdt. 33
Great Barrington, MA—Great Barrington, NDB-A, Amdt. 4
Marthas Vineyard, MA—Marthas Vineyard, VOR RWY 6, Amdt. 5
Marthas Vineyard, MA—Marthas Vineyard, ILS RWY 24, Amdt. 8
Nantucket, MA—Nantucket Memorial, VOR RWY 24, Amdt. 11
Nantucket, MA—Nantucket Memorial, NDB RWY 24, Amdt. 9
Nantucket, MA—Nantucket Memorial, ILS RWY 24, Amdt.13
Hutchinson, MN—Hutchinson Muni-Butler Field, NDB RWY 15, Amdt. 2
Grand Island, NE—Central Nebraska Regional, VOR RWY 13, Amdt. 17
Grand Island, NE—Central Nebraska Regional, VOR RWY 17, Amdt. 21
Grand Island, NE—Central Nebraska Regional, VOR/DME RWY 31, Amdt. 5
Grand Island, NE—Central Nebraska Regional, VOR/DME RWY 35, Amdt. 13
Grand Island, NE—Central Nebraska Regional, LOC/DME BC RWY 17, Amdt. 7
Grand Island, NE—Central Nebraska Regional, NDB RWY 35, Amdt. 6
Grand Island, NE—Central Nebraska Regional, ILS RWY 35, Amdt. 7
O'Neill, NE—The O'Neill Municipal Airport—John L. Baker Field, VOR RWY 13, Amdt. 4
O'Neill, NE—The O'Neill Municipal Airport—John L. Baker Field, VOR RWY 31, Orig.
Buffalo, NY—Greater Buffalo Intl, NDB RWY 23, Amdt. 15
Buffalo, NY—Greater Buffalo Intl, ILS RWY 23, Amdt. 28
Greenville, NC—Pitt-Greenville, SDF RWY 19, Amdt. 5
Greenville, NC—Pitt-Greenville, NDB RWY 19, Amdt. 11
Columbus, OH—Port Columbus Intl, LOC BC RWY 28R, Amdt. 5
Columbus, OH—Port Columbus Intl, NDB RWY 10L, Amdt. 5
Columbus, OH—Port Columbus Intl, NDB RWY 10R, Amdt. 5
Columbus, OH—Port Columbus Intl, ILS RWY 10L, Amdt. 13
Columbus, OH—Port Columbus Intl, ILS RWY 10R, Amdt. 4
Clemson, SC—Clemson-Oconee County, NDB-A, Amdt. 5
Lancaster, TX—Lancaster, NDB RWY 31, Orig., CANCELLED
Bryce Canyon, UT—Bryce Canyon, VOR-A, Amdt. 6
Monroe, WI—Monroe Muni, VOR/DME RWY 30, Amdt. 6
Monroe, WI—Monroe Muni, RNAV RWY 12, Amdt. 3
Laramie, WY—General Brees Field, VOR or TACAN RWY 12, Amdt. 5
Laramie, WY—General Brees Field, VOR/DME or TACAN RWY 30, Amdt. 6

** * * Effective August 25, 1988*

Eufaula, AL—Weedon Field, VOR RWY 18, Amdt. 7
Chicago IL—Chicago-O Hare Intl, NDB RWY 32R, Amdt. 19
Chicago IL—Chicago-O Hare Intl, ILS RWY 32R, Amdt. 19
Fort Wayne, IN—Fort Wayne Muni/Baer Fld/, VOR RWY 9, Amdt. 12, CANCELLED
Fort Wayne, IN—Fort Wayne Muni/Baer Fld/, RADAR-1, Amdt. 23
Henderson, KY—Henderson City-County, NDB RWY 9, Amdt. 2
Roxboro, NC—Person County, NDB RWY 6, Orig.
Gruver, TX—Gruver Muni, NDB RWY 20, Amdt. 1, CANCELLED

** * * Effective July 19, 1988*

Greenville, ME—Greenville Muni, NDB RWY 14, Amdt. 3
Greenville, ME—Greenville Seaplane Base, NDB-A, Amdt. 3

** * * Effective July 18, 1988*

Harlan, IA—Harlan Muni, NDB RWY 33, Amdt. 2

** * * Effective July 15, 1988*

Meriden, CT—Meriden Markham Muni, VOR RWY 36, Amdt. 2
Meriden, CT—Meriden Markham Muni, NDB RWY 36, Amdt. 6

** * * Effective July 13, 1988*

Miami, FL—Miami Intl, VOR RWY 12, Amdt. 28
Miami, FL—Miami Intl, ILS RWY 12, Amdt. 2

** * * Effective July 8, 1988*

Lake Charles, LA—Chennault Industrial Airpark, ILS RWY 15R, Amdt. 1
Augusta, ME—Augusta State, VOR/DME RWY 17, Amdt. 4
Augusta, ME—Augusta State, ILS RWY 17, Amdt. 1

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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 157

[Order No. 490-A; Docket No. RM87-16-001]

Abandonment of Sales and Purchases of Natural Gas Under Expired, Terminated, or Modified Contracts

Issued July 22, 1988.

AGENCY: Federal Energy Regulatory Commission; DOE.

ACTION: Order denying rehearing and clarifying final rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is denying rehearing of Order No. 490, 53 FR 4121 (Feb. 12, 1988), FERC Statutes & Regulations, Regulations Preambles ¶ 30,797 (1988), and clarifying the final rule. The final rule, which became effective April 12, 1988, permits abandonment of certain sales and purchases under the Natural Gas Act by both sellers and purchasers where the underlying contract term has expired, or the contract has been terminated or modified with respect to the sales obligations by mutual agreement of the parties. Similarly, where the sales or purchase obligation has been unilaterally reduced, suspended or terminated by the exercise of a contractual provision, abandonment is authorized to the extent of the contractually authorized adjustment of takes or deliveries. The order makes no substantive change in the final rule, but addresses a number of questions concerning the operation of the rule and its relations to existing limited term abandonments.

EFFECTIVE DATE: July 22, 1988.

FOR FURTHER INFORMATION CONTACT: Jacob Silverman Office of the General Counsel, Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, Telephone: (202) 357-8315.

SUPPLEMENTARY INFORMATION: In addition to publishing the full text of this document in the **Federal Register**, the Commission also provides all interested persons an opportunity to inspect or copy the contents of this document during normal business hours in Room 1000 at the Commission's Headquarters, 825 North Capitol Street NE., Washington, DC 20426.

The Commission Issuance Posting System (CIPS), an electronic bulletin board service, provides access to the texts of formal documents issued by the Commission. CIPS is available at no charge to the user and may be accessed using a personal computer with a modem by dialing (202) 357-8997. The full text of this Order Denying Rehearing is available on CIPS for 10 days from the date of issuance. The complete text on diskette in WordPerfect format may also be purchased from the Commission's copy contractor, La Dorn Systems Corporation, also located in Room 1000, 825 North Capitol Street NE., Washington, DC 20426.

Before Commissioners: Martha O. Hesse, Chairman; Anthony G. Sousa, Charles G. Stalon and Charles A. Trabandt.

Order Denying Rehearing and Clarifying Final Rule

I. Introduction

On February 5, 1988, the Commission issued the final rule in this docket, Order No. 490 (the rule), which became effective April 12, 1988.[1] This order amended the Commission's regulations to provide for abandonment, on a generic basis, of certain sales and purchases under section 7(b) of the Natural Gas Act (NGA). The Commission received thirty-six timely requests for rehearing listed in Appendix A.[2] One party, American Public Gas Association, also sought a stay of Order No. 490.

On April 4, 1988, the Commission issued an order granting rehearing solely for the purpose of further consideration of the rehearing requests and denying the motion for a stay.[3]

II. Background

The rule authorizes abandonment by both sellers and purchasers where the underlying contract term has expired, or where the sales and purchase obligations have been terminated or modified by mutual agreement of the parties.[4] Similarly, where the sales or purchase obligation has been unilaterally reduced, suspended or terminated by the exercise of a contractual provision, abandonment is authorized to the extent of the contractually authorized adjustment of takes or deliveries. When a contract has expired or been terminated, either party to the contract may, upon thirty (30) days written notice, abandon its service obligation to sell or purchase the gas. The abandonment is automatically effective in accordance with the notice given. If the parties agree to terminate the contract or to modify their sales and purchase obligations under the contract, the abandonment is effective in accordance with the parties' agreement. Where there is unilateral abandonment, the abandoning party must notify the Commission of the abandonment within thirty (30) days of the effective date of abandonment. When abandonment occurs by mutual agreement, the former purchaser must notify the Commission within thirty (30) days of the effective date of abandonment.

The rule differs from the proposed rule in two respects,[5] and clarifies that the rule will apply where the contract permits one party to the contract to reduce, suspend or terminate its purchase or sales obligation, such as by the exercise of a "market out" clause. First, the rule provides that it will be applicable to all first sales, including first sales to local distribution companies (LDC's).[6] The Commission

[1] 53 FR 4121 (Feb. 12, 1988), FERC Statutes & Regulations, Regulations Preambles ¶ 30,797 (1988).

[2] On April 5, 1988, as amended April 25, 1988, the Producer-Marketer Transportation Group (PMTG) filed a Motion for Clarification. In addition, a number of requests for rehearing state they also seek clarification. However, only the requests of Anadarko Petroleum Corp. and Indicated Producers (IP) actually seek clarification. The others actually seek modification of the rule.

[3] 43 FERC ¶ 61,010, 53 FR 11,845 (April 11, 1988).

[4] We should again note that the rule also applies to arrangements for less than permanent abandonment.

[5] Notice of Proposed Rulemaking (NOPR), 52 FR 18,703 (May 19, 1988), FERC Statutes & Regulations [Proposed Regulations 1982-1987] ¶ 32,441 (1987).

[6] The rule is also applicable to purchases under contracts between pipelines.

explained that if sales to LDC's were excluded, producers might be deterred from entering into new contracts with LDC's because they would require specific Commission approval to abandon such sales, and LDC's might be deprived of the benefit of the released supplies of gas. The Commission noted that most sales by producers to LDC's are of recent origin, and thus it is unlikely that many such contracts would be terminating in the near future, nor would they likely involve the sale of relatively low-priced gas. None of the requests for rehearing raise any issue with respect to this change.

Second, under the proposed rule, abandonment of purchases by a pipeline from a producer would be conditioned upon that pipeline providing transportation of the abandoned gas. However, in the final rule the Commission decided that only pipelines that have accepted a blanket certificate of public convenience and necessity authorizing transportation of gas under § 284.221 of the Commission's regulations [7] may unilaterally abandon purchases under expired contracts. The Commission reasoned that allowing only Part 284 blanket carriers to abandon unilaterally will help assure that the pipelines' customers will have access to the abandoned gas supplies. As Part 284 carriers, the pipelines will be subject to the nondiscriminatory access condition in §§ 284.8 and 284.9 of the regulations, and will not be able to discontinue transportation without the Commission's authorization. Moreover, because the rule does not mandate transportation when the producer initiates abandonment, to ensure that the rule does not act as a disincentive to pipelines' becoming Part 284 transporters, only pipelines that have accepted blanket certificates under Part 284 will be eligible to exercise the right to abandon purchases unilaterally.

III. The Rationale for the Rule

The Commission concluded that under the conditions created by the Natural Gas Policy Act of 1978 (NGPA), the Commission's former approach to abandonment required modification. The Commission found that continuation of the service obligation after the contract has expired is no longer required by the public convenience and necessity because it prevents market forces from operating efficiently. When either a producer or a purchaser concludes that it is no longer economically efficient to continue sales or purchases under an expired contract, Congress' NGPA policies are thwarted by policies that prevent that gas from entering the marketplace.

The rule must be viewed in the context of the Congressional and Commission policy of permitting market forces to determine the allocation of the nation's gas reserves to the greatest extent possible. By encouraging open access on the pipelines in other proceedings,[8] and thereby more competitive markets, the Commission is seeking to permit the market itself to determine where the gas should flow and at what price. This rule is an integral part of that overall strategy. It allows gas to move where it is needed, rather than tying it indefinitely to the dedicated purchaser who may have no current need for the gas.

At the same time the Commission seeks to ensure that the rule is consistent with other important policy considerations. The constituent elements of the rule reflect these factors.

In light of the court's concerns with respect to the potential for aggravating a pipeline's take-or-pay problems, as expressed in *Con Ed* [9] and *AGD* [10], the Commission has not imposed a transportation requirement upon the pipeline when the producer unilaterally abandons sales. Thus, where a pipeline does not provide open-access transportation, a producer that abandons sales will be required to negotiate with the pipeline for the transportation of the gas. The rule is not intended to enhance the pipeline's bargaining position, nor does it grant the pipeline any rights it did not have previously, but merely continues the *status quo* except for the abandonment right.

The Commission recognizes that in the event a carrier elects to take advantage of the regulations promulgated under Order No. 500 to become an open-access carrier, it would be required to transport the gas that a producer abandons under the rule. This follows not from the rule, but because of the pipeline's status as a Part 284 carrier. The Order No. 500 series constitutes a comprehensive treatment to date of the take-or-pay problem, where the Commission, after making a thorough examination of all aspects of that problem, carefully balanced the various competing interests in light of the public interest.[11] Under these orders no take-or-pay credits are required for transportation of gas that the producer formerly sold to the transporting pipeline under a terminated take-or-pay contract and that is not currently subject to a gas purchase contract between the parties. The Commission concluded in Order No. 490 that it would not modify the provisions of Order No. 500 when a producer terminates its sales obligations under this rule because it could upset the delicate balance crafted in Order No. 500.

The rule also provides that only Part 284 blanket carriers may abandon purchases unilaterally under expired contracts. This provision serves two purposes. It will assure that when a pipeline unilaterally abandons purchases, the pipeline's customers will have access to the abandoned gas and be in a position to purchase it.[12] The Commission recognizes that permitting abandonment by producers when the contract has expired may exacerbate the take-or-pay problems of Part 284 blanket carriers, because they will be required to transport the gas that is being abandoned. However, such pipelines will enjoy the benefits of a right to abandon purchases unilaterally under the rule. To ensure that the rule does not act as a disincentive to pipelines accepting Part 284 blanket certificates, the rule permits only such carriers to unilaterally abandon the purchase of gas. Thus the benefits of the rule are balanced not only between sellers and purchasers, but also between purchasers that have accepted a blanket

[7] 18 CFR 284.221 (1987).

[8] *See, e.g.* Order Nos. 436 and 500, Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 50 FR 42,408 (October 18, 1985), FERC Statutes & Regulations [Regulations Preambles 1982–1985] ¶ 30,665 (October 9, 1985). In the Order No. 500 series, 52 FR 30,334 (August 14, 1987), FERC Statutes & Regulations ¶ 30,761 (August 7, 1987) the Commission promulgated interim regulations in response to the decision of the United States Court of Appeals for the District of Columbia Circuit in Associated Gas Distributors v. FERC, 824 F.2d 981 (DC Cir. 1987) which vacated Order No. 436 and remanded the matter to the Commission for further proceedings. On December 1, 1987, that court denied motions to enforce the mandate. On April 18, 1988, the Supreme Court denied certiorari, No. 87–1091, 108 S.Ct. 1469 (1988). The Commission has not as yet issued the final regulations in response to the court's remand.

[9] Consolidated Edison Co. of New York v. FERC, 823 F.2d 630 (DC Cir. 1987). On April 26, 1988, the court denied the motion of intervenor Associated Gas Distributors for an order directing the Commission to comply with the court's mandate.

[10] Associated Gas Distributors v. FERC, 824 F.2d 981 (DC Cir. 1987), *cert. denied sub. nom.*, Southern California Gas Company v FERC, No. 87–1091, 108 S.Ct. 1469 (1988).

[11] As noted above, *supra* n.8, the Commission has not issued the final regulations under Order No. 500.

[12] The Commission also determined that it would not provide a right of first refusal to the firm sales customers of the pipeline purchaser. The Commission stated that the concern about security of supply that such right seeks to assure will be provided by permitting gas to move more freely to those who need it, rather than restricting it to those whose pipeline may have initially dealt with the producer

certificate under Part 284 and those that have not.

IV. Discussion

We will first discuss contentions relating to the authority of the Commission to adopt the rule, and then to the specific issues raised in the requests for rehearing.

A. Validity of Rulemaking

Various parties question the Commission's authority to adopt the rule, arguing in essence that NGA section 7(b) requires a case specific approach to abandonment.[13] The Commission has concluded that the goal of the NGA, of affording "consumers * * * protection from excessive rates and charges",[14] including the assurance of an adequate and reliable supply of natural gas,[15] is promoted by permitting abandonment under the criteria of the rule, without case-by-case examination that may have been necessary under the pre-NGPA conditions.

In adopting the rule the Commission found that, consistent with NGA section 7(b), the present or future public convenience or necessity permits abandonment under the circumstance provided therein, and that the *Con Ed* and *AGD* decisions support the Commission authority to adopt such policy, providing the policy is adequately explained and based on reasoned decision-making. To hold otherwise would bind the Commission to outmoded policies no longer suited to the existing regulatory climate of promoting competition to the greatest extent practicable.[16]

In *AGD* the court specifically upheld the automatic abandonment provisions in Order No. 436 and rejected the argument that section 7(b) always mandates a case-by-case determination. The court stated that the Commission has:

> identified circumstances under which pipelines are automatically entitled to abandonment of service—namely, when the customer exercises the election provided. In support of this it has made the necessary finding under section 7(b) that such abandonment serves the "public convenience or necessity." [17]

We note that under the Commission's prior abandonment policy, where abandonment was contested, the Commission weighed the comparative needs of the competing pipelines and their customers and thus a hearing was usually necessary. There is no need for such hearing under the rule because the Commission has determined that the "public convenience or necessity" is served by permitting abandonments when contracts terminate or the parties otherwise meet the requirements. Moreover in *Wisconsin Gas Co.* v. *FERC* [18] the court held that rulemaking is appropriate for determination of policies of general applicability such as those determined herein.[19]

A number of parties argue that NGPA section 601(a) of the Natural Gas Policy Act of 1978 (NGPA),[20] which in essence provides that gas dedicated before enactment of the NGPA remains dedicated unless removed from the Commission's NGA jurisdiction by the NGPA, indicates Congress' intent to continue the Commission's jurisdiction over dedicated gas, and that the rule is in direct conflict with this Congressional intent. This argument is flawed. The Commission is not removing its jurisdiction over the dedicated gas, but exercising that jurisdiction to authorize abandonment when it is in the public interest. The Commission has made the necessary finding that the NGA section 7(b) requirements for abandonment authorization are satisfied when a contract is terminated, or the parties agree to the termination or modification of a contract's sales or purchase obligation. Thus abandonment is permitted by the public convenience or necessity.

In the Commission's judgment the rule presents a balanced approach for all segments of the industry. Producers will be able to market their gas upon the termination of their contracts without the fear of being shut-in. Part 284 blanket certificate pipelines will be permitted to abandon purchases upon contract termination, and transportation will not be required of pipelines that are not entitled to unilaterally abandon purchases under the rule. Finally, consumers will benefit from the greater availability of gas, and where their pipeline supplier is an open-access carrier, will be assured of access to abandoned gas.

Finally, the validity of the rule is challenged on the grounds that the rule is in direct conflict with NGPA section 315.[21] That section requires that a first seller of any gas that is removed from the Commission's NGA jurisdiction by NGPA section 601(a)(1)(B) give the purchaser two opportunities to continue purchases when the contract expires. The seller must first make a bona fide offer to continue sales, and then give the purchaser a right of first refusal of any offer to a third party. It is asserted that this section demonstrates Congress' intention to assure that purchasers of gas continue to have a right to purchase gas upon a contract's termination. The rule, it is argued, is directly contrary to this expressed intent because it cuts off the purchaser's right to continue purchasing when the contract terminates.

The argument is unpersuasive for a number of reasons. First, the rule only applies to gas still within the Commission's NGA jurisdiction, and not to gas removed from the Commission's NGA jurisdiction to which section 315 is related. Moreover, section 315 was directed to a different concern. At the time of passage of the NGPA in 1978, Congress was concerned that purchasers of any gas that was being removed from the Commission's NGA jurisdiction, and thus would no longer have the protection afforded by NGA section 7(b), continue to have that protection at the contract's termination. Thus Congress provided that upon contract termination, the purchaser has the option of continuing to purchase from the seller,[22] in lieu of the protection of NGA section 7(b), which required Commission approval before the seller could terminate its obligation to the purchaser.

What Congress determined in 1978 with respect to gas covered by section 315, and not subject to the Commission's NGA jurisdiction, continues to govern that gas. However, that determination has no relevance to the Commission's determination in 1988, based upon current circumstances, that the public convenience and necessity is served by permitting abandonment as provided under the rule.

Moreover, as a result of the rule, additional supplies of gas will be available to all segments of the market. This will provide ample opportunities for purchasers to secure supply in the event their previous arrangements for gas supply are affected by this rule.

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[13] See e.g. Michigan at 2–6; Williams at 2–10 and LDC's in general.

[14] Atlantic Refining Co. v. Public Service Commission, 360 U.S. 378, 388 (1959).

[15] California *et al.* v. Southland Royalty Co., *et al.*, 436 U.S. 519, 523 (1978).

[16] In *Con Ed* the court stated:

> [B]y delegating abandonment power in such broad terms, Congress expected that the Commission would develop an appropriate test to fit the regulatory climate. 823 F.2d at 636.

[17] 824 F.2d at 1015.

[18] 770 F.2d 1144 (DC Cir. 1985), *cert. denied* 476 U.S. 114 (1986).

[19] *Id.* at 1166.

[20] 15 U.S.C. 3431(a) (1982).

[21] See Williams at 13–11.

[22] For a full exposition, *see* Order No. 95–A, Refusal of Bona Fide Offers, 51 FR 7923 (Mar. 7, 1986), FERC Statutes & Regulations, Regulations Preambles 1982–1985 ¶30,690 (1986).

B. Take-or-Pay and Mandatory Transportation

Most of the requests for rehearing address the issues of take-or-pay and mandatory transportation. On the one hand, the requests urge that we modify the rule and require a pipeline to transport gas that is being abandoned by a producer under the rule.[23] Some proponents of this position also submit that the firm sales customers of pipelines should be afforded the right of first refusal when gas is being abandoned under the rule.[24] It is argued that unless mandatory transportation is required, pipelines may limit the effectiveness of the rule by imposing unreasonable conditions on the transportation of abandoned gas. Proponents of the right of first refusal assert that such a right is necessary to assure firm sales customers the ability to purchase the released gas. The two modifications are related because, absent transportation, the right of first refusal may be of no consequence.

On the other hand, the Commission is urged to modify the rule to address "head on," as discussed by the court in *Con Ed* and *AGD*, the impact on the pipelines' take-or-pay liability that Order No. 490 would have.[25] These parties argue that the rule will enable producers to terminate the sale of low-priced gas, thereby raising the pipelines' weighted average cost of gas (WACOG), and adversely affect the pipelines' ability to sell gas. Moreover, the pipelines will now be competing with the lower-priced gas which they will be forced to release by virtue of the provisions of Order No. 490.[26] The Commission is urged to modify the rule to extinguish all existing take-or-pay claims, and to require refunds of outstanding take-or-pay payments or prepayments.[27]

Some parties argue that without affording some take-or-pay relief, the rule will undermine Order No. 500.[28] They note that under Order No. 500, take-or-pay relief is not available for terminated contracts. Since abandonments may be accomplished by unilateral action of gas producers, transportation of the abandoned gas will be exempt from crediting under Order No. 500. According to these petitioners, the effect of Order No. 490 will be to weaken the take-or-pay relief provided under Order No. 500 and exacerbate the take-or-pay problem. Thus, they urge that Order No. 490 be modified to include a crediting mechanism like that found in Order No. 500.

In evaluating the consequences of permitting unilateral abandonment by procedures, the Commission took into consideration the effect that the rule would have on pipelines and their customers. If we modified the rule to require mandatory transportation there would be greater assurance that the gas would be available to all. Nevertheless, the Commission concluded that to do so might run afoul of the concerns expressed by the court in *Con Ed* because it might exacerbate the pipelines' take-or-pay positions. The Commission is satisfied that the rule as constituted will further the Commission's objectives while it is also consistent with *Con Ed.*

The rule represents a balanced approach toward advancing the Commission's long-term goals. It is one aspect of the Commission's overall policy of moving toward a more competitive market. The Commission has determined that the prior abandonment policy was designed to achieve objectives under different market and regulatory conditions. We recently stated the reason for the need to change that policy:

> Prior to enactment of the NGPA, natural gas prices in the interstate market were regulated at artificially low levels under the NGA. Much higher prices generally existed in the unregulated intrastate market. As a result, producers had greater incentive to sell gas in the intrastate, rather than the interstate, market. The old abandonment policy was intended, as least in part, as a brake on the movement of gas from the interstate to the intrastate market.
>
> However, under the NGPA most price controls and certificate requirements on new gas have been removed. Accordingly, interstate and intrastate gas purchasers now have equal access to new gas production without substantial price differences. The move to deregulated prices for new gas has eliminated gas shortages in the interstate market. Accordingly, the concerns underlying the Commission's previous abandonment policy do not currently have the force they once did.

The Commission believes that modification of the old abandonment test is necessary to address the different problems arising under today's market conditions. The particular problem observed by the Commission in Opinion No. 245 is that many pipelines unable to market all the gas under contract to them have shut-in low priced cost supplies of gas in favor of higher takes of more expensive gas subject to take-or-pay requirements. Pipelines have an incentive to do this since they must pay for the high-cost gas even if they do not take it.

Release of this gas to the spot market would, as the Court found, allow those purchasers able to purchase that gas to switch from higher priced supplies to these lower priced supplies. Furthermore, the increase in supplies available to the spot market will lower overall prices in that market.

We believe that these unquestioned benefits of Opinion No. 245's change in abandonment policy for natural gas consumers outweigh any detriment resulting from that change.[29]

The same reasoning applies here. The rule must be viewed in the context of the Commission's overall policy, including Order No. 500. By limiting unilateral abandonment of purchases to pipelines that have accepted Part 284 certificates, the rule assures that firm sales customers will benefit from the abandonment of purchases by pipelines. On the other hand, by not mandating transportation when the producer unilaterally abandons, the pipelines' take-or-pay problem will not be exacerbated by the rule.

The Commission recognizes that permitting producers to initiate abandonment where the contract terminates will permit the producer in any subsequent sales agreement to seek the alternative ceiling price for the gas under Order No. 451.[30] However, the rule will also permit pipelines to abandon purchases, enabling them to cease purchasing high-priced gas. Moreover, the reasons set forth in Order No. 451 for permitting the alternative ceiling price demonstrate the soundness of allowing the producer to seek that price when it exercise its right to abandon sales under this rule.

The Commission reaffirms its position that Order No. 500 represents a balanced position on the take-or-pay

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[23] See, *e.g.*, Producers Associations, Amoco, Anadarko and IP.

[24] See, *e.g.*, PG&E, SoCal and APGA.

[25] See, *e.g.*, INGAA, ANR and CIG, Columbia, Texas, El Paso, NG, PG&E, SoCal, and MPC.

[26] See ANR and CIG.

[27] *See* ANR and CIG at 8–9; El Paso at 2; INGAA at 3; National Fuel at 23–24; Panhandle and Trunkline at 2; Transco at 1; and Williston at 1. Comments submitted in response to the NOPR had suggested a variety of proposals for take-or-pay relief, including refund of pre-payments, waiver of outstanding take-or-pay claims relating to the gas being abandoned, and credits against take-or-pay obligations for all volumes of abandoned gas sold to others.

[28] INGAA, ANR and CIG, El Paso, Columbia, Enron and Transco.

[29] Felmont Oil Corp. and Essex Offshore, Inc., Order on Remand Reaffirming Prior Determination, 42 FERC ¶ 61,172 at 61,615–16 (February 8, 1988). On April 26, 1988, the court denied the motion of Associated Gas Distributors for an order directing compliance with its mandate in *Con Ed*, No. 86–1168 (DC Cir.).

[30] Ceiling prices; Old Gas Pricing Structure, Order No. 451, 51 FR 22,168 (June 18, 1986), FERC Statutes and Regulations, Regulations Preambles, ¶ 30,701 (1986); *order on rehearing*, Order No. 451–A, 51 FR 46,762 (Dec. 24, 1986). *Appeal pending sub nom.* Mobil Oil Exploration, *et al.* v. FERC, No. 86–4940 (5th Cir.).

problem. That balance would be upset by imposing the modifications requested, and the effectiveness of this rule would be limited.[31] Accordingly, we shall deny the requests for rehearing concerning mandatory transportation and take-or-pay relief.

C. Effect of Rule on Consumers

As noted previously, several petitioners argue that absent mandatory transportation, there is no assurance that consumers will benefit from the rule. We have already discussed the reasons not to impose mandatory transportation upon the pipeline purchaser when a producer unilaterally abandons sales. Thus, to the extent that pipelines have not accepted blanket certificates,[32] there is no guarantee that the pipelines' captive customers will be able to purchase the abandoned gas. Nevertheless, on the whole, the rule will benefit the pipelines' customers. If they are on a pipeline that has accepted a blanket certificate, the gas will be available to all customers, whenever gas is released under the rule. Moreover, pipelines that have not accepted such a certificate will not be able to abandon purchases unilaterally. Nor would they be required to provide transportation. Consequently, captive customers on those systems would have no access to alternative supplies in any event. In this instance, the rule maintains the *status quo*.

The Commission pointed out in Order No. 490 that granting pipelines the right to abandon purchases will enable them to terminate their obligations under expired high-priced contracts. The abandonment of these contracts will also benefit the pipelines' customers. The Commission further noted that the rule merely authorizes pipelines to abandon purchases but does not mandate it. The exercise of that right and the release of gas constitutes a purchasing practice which is subject to a prudence review in the pipelines' rate proceedings.[33] The request of various pipelines [34] that the rule be modified so that pipelines would no longer be subject to the applicable prudence test is denied. Current customers are entitled to be protected from any imprudent release of gas by the pipeline that serves them.

The Commission is also satisfied that the immediate price impact of the rule upon consumers is not likely to be significant and none of the requests for rehearing present any argument that undermines this finding. Although the rule may have price consequences in certain situations, on balance the rule will benefit the market as a whole, and will be in the public interest.[35]

D. Contractually Authorized Adjustment of Takes or Deliveries

A number of parties request that the Commission modify or clarify what it intended under the provision of the rule that permits abandonment when the sales or purchase obligation has been unilaterally suspended or terminated by the exercise of a contractual right under an unexpired contract.[36] To the extent that the contract permits a party to reduce or cease its sales or purchases of gas, the rule grants automatic abandonment and permits the gas to be sold to another party. Specific reference was made to the situation where a purchaser exercises its rights under a "market-out" clause. In that instance, the rule enables the seller to sell the gas to any other party during the period when the purchaser exercises its contract market-out right with regard to reducing, suspending, or terminating purchases. That period is determined by the contract, not by the rule. The rule does not authorize abandonment as a result of any other modifications (such as delivery point, pressure etc.), but only in conjunction with modification of the obligation to purchase or sell gas under the contract. Any disputes over whether a right to modify sales or purchase obligations has been properly exercised is to be determined, like other contractual disputes, by a court of competent jurisdiction.[37] We see no need to further clarify the rule.

The effect of this feature of the rule on the cost impact analysis set forth in the rule has been questioned.[38] We believe that this feature of the rule will be used most frequently in "market-out" situations. Thus it would be used where purchasers were exercising their rights to cease purchasing high-priced gas. The seller would then be free to sell the gas to another. Since the purchaser would exercise the market-out clause only when it could purchase other supplies of gas at a lower cost, this feature of the rule is unlikely to cause any increase in the cost of gas to customers of the pipeline exercising its contractual right to reduce its purchases.

E. Pipeline Abandonment of Purchases

The Commission concluded after considering the comments, and *AGD* and *Con Ed*, that only pipelines that have accepted blanket certificates under Part 284 will be granted the right to abandon purchases unilaterally under expired contracts. This condition will help to assure that consumers have meaningful long-term access to gas supplies released under this rule. In addition since the Commission has not imposed mandatory transportation when producers unilaterally abandon, the positive benefits from abandonment of purchases is limited to Part 284 carriers to ensure that the rule does not act as a disincentive to pipelines becoming such carriers.

A number of petitioners challenge the validity of this condition, contending that the Commission adopted the provision without notice in violation of the Administrative Procedure Act,[39] and second, that it is not sound policy.[40] We find no merit in these contentions. First, the relationship between the rule and a pipeline's acceptance of transportation authority under Part 284 was one of the concerns raised by Commissioner Stalon in the NOPR. The NOPR specifically

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[31] We note that various petitioners urge that unless the take-or-pay modification is adopted, permitting the producer to abandon gas as to which it has a take-or-pay claim may lead to the producer's receiving a price in violation of maximum lawful price in Title I of the NGPA as well as a violation of sections 4 and 5 of the NGA. These arguments raise issues that are pending in other proceedings, and are more appropriately addressed in those proceedings. See *e.g.*, ANR Pipeline Co. v. Wagner and Brown, GP86-57-000; Colorado Interstate Gas Co. v. Chemco, *et al.*, GP88-16-000.

[32] We note that as of the issuance of this order, more than half of the major pipelines (12 out of 23), as well as several smaller pipelines, have accepted blanket certificates. Gas transported on behalf of others accounts for more than half of the gas currently flowing through the interstate pipelines.

[33] The same reasoning may not necessarily apply when the producer unilaterally abandons.

[34] See, *e.g.*, ANR and CIG, INGAA, Panhandle and Transco.

[35] The price impact of the rule is also discussed *infra*, part D.

[36] See, *e.g.*, Producers Association, Anadarko.

[37] In dismissing certain applications for abandonment as moot in light of Order No. 490, the Commission noted one applicant's claim that the contract had been terminated by the exercise of a contractual right because of the purchaser's breach of certain provisions. The Commission stated:

The abandonment application is based on the applicant's claim that the contract between the applicant and its purchaser is void due to the purchaser's failure to perform its take-or-pay obligation under the subject contract. The Commission is not deciding whether each application has satisfied the criteria for authorization under Order No. 490. As the Commission stated in Order No. 490, "[T]he nature of the rights granted [under the contract] and whether the right was properly exercised are contractual issues to be determined by a court of competent jurisdiction." Arco Oil and Gas Company, *et al.*, 43 FERC ¶ 61,072 at 61,222, n.2 (1988).

[38] See concurring opinion of Commissioner Trabandt, FERC Statutes & Regulations ¶ 30,797 at 31,055-56.

[39] See *e.g.*, Mountain Fuel, National Fuel and United Gas.

[40] See, *e.g.*, ANR and CIG, El Paso and Transco.

requested comments "on modifying the proposed rule to condition the blanket abandonment authorized under the rule on the pipeline purchaser providing Order No. 436 transportation."[41] We fail to see how any party could claim lack of notice when the NOPR directed parties to comment on the modification which we have adopted. The courts have repeatedly stated that an agency has the authority to promulgate a final rule that differs in some particulars from its proposed rule because "[a] contrary rule would lead to the absurdity that * * * the agency can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary."[42] Moreover, as long as the final rule is a "logical outgrowth" of the proposed rule, the agency can make changes in the final rule that may not have been clearly presaged in the NOPR.[43] Here the rule's limitation on pipelines' eligibility to abandon purchases unilaterally is a logical outgrowth of the NOPR. Thus, the Commission properly adopted it.

None of the arguments raised warrants a change of the policy adopted. Various petitioners argue that limiting the rule to Part 284 carriers will worsen the carriers' take-or-pay problems. As noted above, limiting abandonment of purchases to Part 284 carriers assures that consumers will have access to gas that is abandoned by the pipeline. Moreover, the Commission is concerned that the rule not act as a disincentive to carriers accepting blanket certificates. Since the Commission is not imposing a transportation obligation when a producer unilaterally abandons sales, carriers might be inclined to refrain from becoming Part 284 carriers if they could obtain the benefit of abandonment of purchases and at the same time deny market access to producers who exercised their abandonment rights under the rule. Accordingly, only if the carrier is a Part 284 carrier will it be able to abandon purchases unilaterally. This limitation on abandonment of purchases will not therefore worsen pipelines' take-or-pay problems, but assures that the rule is balanced not only between sellers and purchasers, but also between pipelines that have accepted blanket certificates under Part 284 and those that have not.

Several parties object to the rule's applicability to only the abandonment of purchases by pipelines under expired contracts with other pipelines and not to the abandonment of sales by upstream pipelines.[44] The Commission's rationale for so limiting the rule was to ensure continuity of service between pipelines where necessary. The rule permits downstream pipelines to abandon purchases if the pipeline has accepted an open-access blanket certificate. Granting such right will not disrupt the continuity of service to downstream customers because the downstream pipelines are in a position to determine their gas requirements upon expiration of a contract, and their customers are in a position to obtain any needed gas from other sources and have it transported through their pipeline. Such protection could not be guaranteed to captive customers of downstream pipelines if the rule were broadened to permit upstream pipelines to abandon sales, because the security of supply would depend upon the open or closed-access status of the pipeline that was not abandoning, *i.e.*, the downstream pipeline.

We find no merit in the contention that the rule may worsen the take-or-pay situation of the upstream pipelines due to loss of sales when a downstream pipeline exercises its right to abandon purchases. The Commission recognized that the rule might have an adverse impact on a particular upstream pipeline. However, the overall impact on the take-or-pay problem of pipelines as a class should be neutral, because any adverse impact on the upstream pipeline is matched by the beneficial effect on the downstream pipeline. The Commission's policy considers the effect of the rule upon the take-or-pay position of pipelines as a class, not whether the rule may have negative consequences for a particular pipeline.

Finally, a number of petitioners urge the Commission to modify the rule so that pipelines that transport under NGPA section 311[45] be permitted to abandon purchases. The Commission has concluded that authorizations under NGPA section 311 do not provide sufficient guarantee of access by consumers because the pipeline may unilaterally terminate that type of transportation without Commission approval.[46] Such a pipeline could obtain the benefits of the rule, and then cease providing transportation, thereby frustrating the purpose of the requirement. Accordingly, only pipelines that have accepted a blanket certificate under Part 284 will be permitted to unilaterally abandon purchases.

F. Miscellaneous Issues

In view of certain questions that have been raised over operation of the rule, both in the requests for rehearing and other requests or application to the Commission, the Commission makes the following clarifications of the rule.

1. Certain parties request that the Commission clarify that the rule grants blanket sales certificates where the abandonment is the result of mutual agreement.[47] This aspect of the rule was inadvertently omitted from the regulatory text, but was corrected by notice issued on March 7, 1988, 53 FR 8176 (March 14, 1988), making technical corrections to § 157.30 and 157.301 to cross reference paragraphs (c) and (d) of § 157.30.

2. The Commission also wishes to clarify that abandonment of purchases requires only one thirty-day notice, and that the seller does not have to send its own notice to obtain authority to abandon sales of the same gas and resell it under the § 157.301 blanket certificate. Thus, if a purchaser gives the producer a thirty-day notice of its abandonment of purchases, the producer is granted authority to abandon the sale and to sell the gas to any other purchaser at the end of the notice period. Sections 157.21(a) and 157.30(c) are amended to insert after the words "upon 30-days written notice to" the words "(or from)" to clarify this provision of the rule. In this connection the Commission notes that where a contract has not expired, the thirty-day notice or contractual termination notice required, invokes the rule, and that no additional notice is required.

3. A question has been raised as to whether the rule applies to company-owned production. Where the rule's criteria are satisfied, it does. The rule's rationale applies to this type of production, and accordingly, there is no reason why abandonment should not be permitted.[48] The release of company-

[41] 52 FR at 18,710.

[42] International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 632 n.51 (DC Cir. 1973).

[43] South Terminal Corp. v. EPA, 504 F.2d 646, 659 (1st Cir. 1974).

[44] See *e.g.*, United, Tennessee and Enron.

[45] 15 U.S.C. 3371 (1982).

[46] See Texas Eastern Transmission Corp., 41 FERC ¶ 61,015 at 61,022 (1987).

[47] See *e.g.*, Anadarko.

[48] The Commission notes that limited-term abandonment has been granted to pipelines for company-owned production. See Northwest Pipeline Corp. and Northwest Marketing Company, 38 FERC ¶ 61,046 at 61, 132 (1987); El Paso Natural Gas Co, 42 FERC ¶ 61,155 at 61,578 (1988) ("Precisely the same policy considerations that support limited-term abandonment authority for El Paso's other NGA gas supplies apply equally to El Paso's own production"). Moreover, in Public Service Comm'n of the State of New York v. Mid-Louisiana Gas Co., 463 U.S. 319 (1983), the Supreme Court held that NGPA pricing provisions are applicable to pipeline production. Accordingly, the Commission has applied the principle that producer and pipeline production should receive "parity treatment". Order No. 391–A, First Sales of Pipeline Production under section 2(21) of the Natural Gas Policy Act of 1978, 31 FERC ¶ 61,036 at 61,066 (1985).

owned production would be subject to the same "prudence" test as the release of any other gas, and subject to the same notice[49] and reporting requirements.

4. Where the parties' agreement requires abandonment before the gas may be released and all other conditions are satisfied the rule provides the necessary authorization because the agreement is a mutual termination under the rule. Thus, if the parties agree that the gas may be released once abandonment authorization is secured, the necessary authorization is granted automatically and concurrently under the rule, and the gas is released as provided in the parties' agreement.

5. Any seller who has properly permanently terminated sales under a contract is, after the effective date of the rule, entitled to permanent abandonment and a permanent blanket certificate with pregranted abandonment to sell the abandoned gas. Thus where a party has previously received Commission authorization to abandon for a limited term, after the effective date of the rule, the rule's self implementing abandonment authorization permits abandonment to the extent the parties have agreed, including permanent abandonment.[50]

6. In any instance where a party has been granted permanent abandonment by the Commission but with a limited-term certificate of sale,[51] that party is granted a blanket certificate under 157.301 to make sales of such gas with pregranted abandonment.

7. The Indicated Producers (IP) seek clarification of the applicability of Order No. 490 to authorize abandonment of sales for resale to gatherers, processors or resellers where the seller receives a percentage of the proceeds realized by the reseller. IP seeks assurance that such percentage-of-proceeds sales are eligible for abandonment under the provisions of Order No. 490, even if they are not treated as "first sales" under the Commission's regulations.[52]

The Commission grants IP's requested clarification. The Commission intends for sales to resellers (or purchases by resellers) on a percentage-of-proceeds basis to be eligible for abandonment authority under Order No. 490. Such sales are encompassed by the NGPS's definition of "first sale." The Commission's decision not to treat such sales as first sales for purposes of determining maximum lawful prices (MLP's) under Title I was based on other considerations not relevant to abandonment.[53] Furthermore, the eligibility of such sales for abandonment authority is in no way inconsistent with the purposes of Order No. 490.

8. IP also seeks clarification that the abandonment rule is applicable to all sales that qualify as "independent producer sales" under § 154.91(a) of the Commission's regulations by amending Order No. 490's definition of "first seller" to include those engaged in transactions that are treated as first sales under the Commission's orders or regulations as well as "first sales" as defined by the NGPA. Although it is not entirely clear, IP appears to be concerned that some sales by gatherers, processors, or resellers that are affiliates of interstate or intrastate pipelines, or local distribution companies may not be eligible for abandonment under the rule because of the exclusion of certain sales from the definition of "first sale" under NGPA section 2(21)(B).[54] However, as IP notes, the Commission has exercised its authority under NGPA section 2(21)(A)(v) to define sales by affiliates of interstate or intrastate pipelines, or of local distribution companies as first sales. Thus sales by affiliated gatherers, processors or resellers have already been included within the Commission's implementation of the NGPA's definition of first sale.[55] The Commission concludes, therefore, that sales by affiliated gatherers, processors, or resellers are eligible for abandonment under the rule without amending the regulatory text of the rule as suggested by IP.

9. PMTG moved for clarification, requesting that the Commission define the term contract to include an "implied contract". PMTG notes that the Commission specifically referred to implied contracts in the regulations governing NGPA section 315, namely in 18 CFR 277.203(g) (1987). However, in that case the Commission concluded that it was necessary to deal specifically with that matter because certain conduct is required under section 315 before a contract's termination, and under the regulations, implied contracts arise at the end of the contract term because of the service obligation under the NGA. Thus, implied contracts were specifically excluded from the requirement that a bona fide offer must be made 18 months before the contract's expiration in order to make compliance with section 315 more certain.[56] The same dilemma does not apply under this rule. The rule applies when a contract has terminated. As noted *supra*, pp. 20 and 21, the rule states that contractual issues are to be determined by a court of competent jurisdiction. Whether or not an implied contract has arisen, and under what circumstances it may be terminated, are issues for a court to determine if the parties cannot reach an agreement. Accordingly, the motion for clarification will be denied.

List of Subjects in 18 CFR part 157

Administrative practice and procedure, Natural gas, Reporting and recordkeeping requirements.

In consideration of the foregoing, the Commission amends Part 157, Chapter 1, Title 18, *Code of Federal Regulations*, as set forth below.

By the Commission. Commissioner Sousa concurred in part and dissented in part with a separate statement attached.

Commissioner Stalon concurred with a separate statement attached.

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[49] Since there is no contract, the Commission will consider the notice to the Commission as the necessary indication of mutual agreement.

[50] *See e.g.*, Arco Oil and Gas Company, *et al.*, 43 FERC ¶ 61,072 (1988).

[51] *See e.g.*, Conoco, Inc., 41 FERC ¶ 61,064 (1987).

[52] IP notes that the regulations promulgated in Order No. 490, § 157.21 (abandonment of purchases) and § 157.30 (c)–(f) (abandonment of service), authorize abandonment by "first sellers" and by purchasers from first sellers defined by reference to the NGPA's definition of "first sale." However, § 270.202(h)(1) of the Commission's regulations provides that if a reseller determines its maximum lawful price as if the sale were in fact a "first" sale (using the ordinary sense of the phrase, not the NGPA's technical definition) rather than a resale, any percentage-of-proceeds sale to such reseller is not treated as a "first sale" for purposes of applying the ceiling price provisions of Title I of the NGPA.

[53] The Commission was concerned with the practical difficulties of determining the applicable MLP's for percentage-of-proceeds sales to resellers in intrastate commerce under sections 105 (existing intrastate contracts) and 106(b) (intrastate rollover contracts). The wording of these sections assumes the existence of a specific price stipulated by terms of a contract, and do not appear to contemplate intrastate percentage-of-proceeds-sale contracts. However, the Commission's decision not to regulate directly the price of such sales under the regulations implementing Title I of the NGPA, for the reasons explained in Order No. 68, does not remove percentage-of-proceeds sales from the NGPA's definition of "first sale". Rules Generally Applicable to Regulated Sales of Natural Gas and Ceiling Prices; Final Regulations, 45 FR 5678 (Jan. 24, 1980); FERC Stats. and Regs. [Regulations Preambles 1977–1981] ¶ 30, 125 at 30,857–859 (Order No. 68).

[54] CERTAIN SALES NOT INCLUDED.—Clauses (i), (ii), (iii), or (iv) of subparagraph (A) shall not include the sale of any volume of natural gas by any interstate pipeline, intrastate pipeline, or any affiliate thereof, unless such sale is attributable to volumes of natural gas produced by such interstate pipeline, intrastate pipeline, or local distribution company, or affiliate thereof.

[55] 18 CFR 270.203(c) (1987). The Commission has also decided to treat sales of affiliated marketers as first sales. See Order No. 497, Inquiry Into Alleged Anticompetitive Practices Related to Marketing Affiliates of Interstate Pipelines, 43 FERC ¶ 61,420 (June 1, 1988).

[56] *See* Order No. 95–A, FERC Statutes & Regulations ¶ 30,690 at 30,162–63 (1981).

Commissioner Trabandt dissented in part with a separate statement attached.

Lois D. Cashell,

Acting Secretary.

PART 157—APPLICATIONS FOR CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY AND FOR ORDERS PERMITTING AND APPROVING ABANDONMENT UNDER SECTION 7 OF THE NATURAL GAS ACT

1. The authority citation for Part 157 continues to read as follows:

Authority: Natural Gas Act, 15 U.S.C. 717–717w (1982); Natural Gas Policy Act of 1978, 15 U.S.C. 3301–3432 (1982); Department of Energy Organization Act, 42 U.S.C. 7101–7352 (1982); E.O. No. 12009, 3 CFR 1978 Comp. p. 142.

2. Section 157.21 is amended by revising paragraph (a) to read as follows:

§ 157.21 Abandonment of purchases.

(a) Except as provided in paragraph (c) of this section, a purchaser subject to the Commission's jurisdiction under the Natural Gas Act is authorized, upon 30-days written notice to (or from) the seller, or any longer notice period required by contract, to abandon purchases of natural gas from any first seller or pipeline:

(1) Permanently, under a contract that has expired, or

(2) To the extent that the obligation of the purchaser to take or pay for gas (or both), or of the seller to deliver gas, is unilaterally reduced, suspended or terminated by either party in accordance with a provision of an unexpired contract.

* * * * *

3. Section 157.30 is amended by revising paragraph (c) to read as follows:

§ 157.30 Abandonment of service.

* * * * *

(c) A first seller is authorized, upon 30-days written notice to (or from) the purchaser, or any longer notice period required by contract, to abandon sales of gas to any purchaser:

(1) Permanently, under a contract that has expired, or

(2) To the extent that the obligation of the purchaser to take or pay for gas (or both), or of the seller to deliver gas, is unilaterally reduced, suspended or terminated by either party in accordance with a provision of an unexpired contract

* * * * *

Note.—*This appendix will not be published in the Code of Federal Regulations*

Appendix A

Requests For Rehearing

American Gas Association (AGA)
American Public Gas Association (APGA)
Amoco Production Co. (Amoco)
ANR Pipeline Co. & CIG (ANR and CIG)
Anadarko Petroleum Corporation (Anadarko)
Arkla, Inc.
Association Gas Distributors (AGD)
Columbia Gas Transmission Corp. (Columbia)
El Paso Natural Gas Co. (EL Paso)
Enron Interstate Pipeline Group (Enron)
Indicated Producers (IP)
Interstate Natural Gas Assoc. of America (INGAA)
Maryland People's Counsel (MPC)
State of Michigan and Michigan PSC (Michigan)
Michigan Consolidated Gas Company (Michigan)
Minnesota Department of Public Services (Minnesota)
Mountain Fuel Resources (Mountain Fuel)
National Fuel Gas Supply Corporation (National Fuel)
Northern Illinois Gas Company (NI)
Pacific Gas and Electric Company (PG&E)
Panhandle Eastern Pipeline Company and Trunkline Gas Company (Panhandle and Trunkline)
Peoples Gas Light and Coke Company and North Shore Gas Company (Peoples Gas and North Shore)
Peoples Natural Gas Company (Peoples Natural)
Process Gas Consumers Group, Georgia Industrial Group, Am. Front Steel Institute (Process Gas)
PSC of State of New York (New York)
Producers Associations
Southern California Gas Company (SoCal)
Tennessee Gas Pipe Line Company (Tennessee)
Texas Gas Transmission Corp.
Transcontinental Gas Pipe Line Corp. (Transco)
UGI Corporation
United Distribution Companies (UDC)
United Gas Pipeline Co. (United Gas)
Valero Interstate Transmission Co. (Vitco)
Williams Natural Gas Company (Williams)
Williston Basin Interstate Pipeline Company (Williston)

Abandonment of Sales and Purchases of Natural Gas Under Expired, Terminated, or Modified Contracts.

Issued: July 22, 1988.

Sousa, Anthony G., Commissioner, *concurring in part and dissenting in part:*

I continue to concur with and support the overall objectives of Order No. 490. However, I am disappointed that this rehearing order doesn't reflect any reconsideration of the issues of take-or-pay relief in cases of unilateral producer abandonment and pipeline eligibility to initiate abandonment pursuant to the regulations adopted by Order No. 490. I must continue to dissent on these aspects of the final rule for the reasons stated in my initial partial dissent.[1]

Anthony G. Sousa,

Commissioner.

Abandonment of Sales and Purchases of Natural Gas Under Expired, Terminated, or Modified Contracts.

Issued February 5, 1988.

Sousa, Anthony G., Commissioner, *concurring in part and dissenting in part:*

I concur with and support fully the overall policy objectives of the abandonment rule approved by the Commission today. This rule is another step in the direction the Commission is taking towards lessening regulation so long as it is in the public interest.

However, I dissent from that part of the rule where the Commission fails to provide for take-or-pay relief where unilateral producer abandonment is permitted. I also dissent from that part of the rule which limits a pipeline's eligibility to initiate abandonment only if it is an Order No. 500 blanket certificate holder. This is a significant departure from the Notice of Proposed Rulemaking which had no such qualifying limitation. To ignore take-or-pay relief and refund of prepayments on the one hand and then to condition pipeline abandonment on enforced acceptance of a blanket certificate under section 7 appears to me to be grossly unfair. I would not object to conditioning unilateral pipeline abandonment on acceptance of a blanket certificate if take-or-pay relief is also granted on unilateral producer abandonment. The effect of the majority decision is that it will inevitably exacerbate the take-or-pay problem.

Anthony G. Sousa,

Commissioner.

Abandonment of Sales and Purchases of Natural Gas Under Expired, Terminated, or Modified Contracts.

Issued July 22, 1988.

Stalon, Commissioner, *concurring:*

I am displeased that the Commission has not taken action to alleviate the effect of a producer's unilateral abandonment on a pipeline's take-or-pay liability. As I stated in my concurrence to the rule,[1] this problem

[1] FERC Statutes and Regulations, Regulation Preambles ¶ 30,797 at p. 31,043 (1988). For convenience, I have attached a copy of my statement as an appendix.

[1] FERC Statutes & Regulations, Regulations Preambles ¶ 30,787 (1988).

could be alleviated by conditioning unilateral producer abandonment on the producer's agreement to refund all prepayments or to allow the purchaser to make up the gas for which it has made prepayments. However, on balance, I am still convinced that the benefits of this rule outweigh this short-term problem. Therefore, I shall concur with this order.

Charles G. Stalon,

Commissioner.

Abandonment of Sales and Purchases of Natural Gas Under Expired, Terminated or Modified Contracts, Final Rule.

Issued: July 22, 1988.

Opinion of Commissioner Charles A. Trabandt, Dissenting in Part:

While I concur generally with the direction of the new abandonment policy adopted in the final rule on rehearing, I set forth my specific concerns about the final rule in my concurring opinion issued February 17, 1988, which I briefly summarize below. I recommended that the Commission adopt a right of first refusal for firm customers and mandatory transportation for released gas, where the pipeline is not providing open access transportation services. These additional protections for firm customers are very important, since the rule has made eligible immediately for abandonment at least 22.3 percent of current section 104 gas supplies and another 21.1 percent by 1990. That gas today has an average price of $0.99 and under the rule would be eligible for the higher, Order No. 451 Maximum Lawful Price of $2.70. Also, there would be no offsetting price effect from the pipeline's abandonment of higher price expired contracts, where the pipeline is not an open access transporter, because it does not have unilateal abandonment authority under the rule. In addition, while I support allowing parties to agree to partial or limited term abandonments (LTA) for gas not taken under existing contracts, this order has not fully analyzed the price impact of these arrangements if most of the gas released under current LTAs becomes subject to unilateral abandonment under the final rule.

I also believe that the authority granted under the rule may exceed the Commission's legal authority under section 7(b) of the Natural Gas Act (NGA) and disregard the court's concerns in *Consolidated Edison Company of New York v. FERC*, 823 F.2d, 630 (DC Cir. 1987) (*Con Ed*) which remanded the Commission's orders in *Felmont Oil Corporation and Essex Offshore, Inc.*, 33 FERC ¶ 61,3331 (1985) rehearing denied, 34 FERC ¶ 61,296 (1986) (*Felmont*). The Commission does not fully consider the impact of the final rule on captive customers, especially where the pipeline does not hold a blanket certificate for open access transportation. In reviewing comments in the petitions for rehearing, I find that there was extensive support for the right of first refusal and mandatory transportation of released gas. In particular, the petitions of almost all state public service commissions and local distribution companies express serious concern about the effects of the final rule in this regard and very strong support for these two requirements, along with the possible additional requirement for a prior notice procedure before the abandonment becomes effective.

On balance, this order on rehearing largely ignores completely, or unceremoniously dismisses out of hand, the extensive discussion of my concerns in my concurring opinion to Order No. 490, as well as the numerous comments in the rehearing petitions. For example, concern in my concurring opinion about the potential cost impacts of one feature of the final rule on customers is superficially afforded a four sentence rebuttal based wholly on unsupported speculation. See text associated with Footnote 38, at page 21 of the slip opinion. There is no analytical response to that very serious concern discussed at some length in my concurring opinion and the rehearing petitions of many parties.

The order, beginning at page 9 of the slip opinion, summarily rejects the legal challenges raised in my concurring opinion and the rehearing petitions on the scope of the Commission's discretion under NGA section 7(b), under *ConEd* as to the substantive standard and under *Associated Gas Distributors v. FERC*, 824 F.2d 981 (DC Cir. 1987). *cert. denied sub. nom.*, as to the automatic abandonment procedures of the final rule. The summary rejection is based solely on a reiteration of the unsupported assertion "that the *ConEd* and *AGD* decisions support the Commission authority to adopt such policy." without any response to the extensive legal analysis in the concurring opinion and the rehearing petitions, which lead to directly contrary conclusions. The majority, it seems, has adopted the analytical approach of merely saying it so must make it so. Others, I would hope, will not be quite so easily persuaded of the majority's conclusory statements and will demand a rebuttal response to the arguments and conclusions to the contrary.

The U.S. Court of Appeals for the District of Columbia Circuit has just addressed the new policy under section 7(b) in an L.T.A. case decided this week. *Kansas Power and Light Company v. FERC* No. 87–1422, decided July 19, 1988. In affirming the Commission's approval of four L.T.A. authorizations, the court concluded that the approval was valid even though the Commission rejected KPL's request for an evidentiary hearing. The court upheld our determination, "that KPL's allegations of possible future harm were too speculative to warrant a pre-authorized adjudicative hearing and that any challenges to the LTAs would most logically be conducted in the pipelines' rate proceeding." (Slip opinion at page 12, Footnote omitted). The court in Footnote 3 agreed with the Commission that KPL had not been persuasive in merely asserting without more that a prudence review after the fact is a poor substitute for prior scrutiny of the proposed abandonment. I will be interested in the court's inevitable review of this order as to the adequacy for captive customers of after the fact prudence reviews, where the old gas producer-supplier of a pipeline not providing open access transportation services unilaterally abandons upon expiration of the contract under this rule.

My concurring opinion and many rehearing petitions argued that later prudence review would be inadequate under such circumstances.

The KPL court also concluded, "that the Commission did not act in violation of its own (abandonment) policies in granting the latest round of LTA applications." (Slip opinion at page 15). In reaching that conclusion, the court noted that the Commission had found that the LTAs provide benefits to all segments of the natural gas industry, including consumers, consistent with the new test under *Felmont*. The court also saw the LTA orders "as a natural extension of the Commission's evolving abandonment policy." (Slip opinion at page 13). Lastly, the court believed "that the Commission adequately addressed the impact of the LTA authorizations on existing pipeline customers," because (1) we specified that the LTA authority does not alter pipelines' existing obligations to their customers and is not intended to affect contractual claims and defenses arising under a pipeline's gas purchase contracts, and (2) we made clear that the pipelines would ultimately be responsible to its customers for any consequent effects of the LTAs on adequacy of gas supplies and reasonableness of gas costs in

subsequent rate proceedings. (Slip opinion at page 14 and 15).

The court expressly stated that the Commission's conclusion on the adequacy of review in subsequent rate proceedings was a reasonable exercise of the Commission's discretion. Again, I will be very interested in the court's eventual review of this order and the final rule in the context of whether the Commission, in fact, has adequately addressed the impact of the rule on existing captive customers of pipelines not providing open access transportation. For example, will the reviewing court be similarly impressed here with the pipelines existing obligations to their customers, contractual claims and defenses arising under a pipeline's gas purchase contracts, or the badly, if not fatally, flawed cost impact analysis conducted by the Commission staff. I simply am not satisfied here that the Commission has adequately addressed the impacts and effects on such captive customers, nor provided any meaningful protection for them beyond general market theory on the operations of the national market as a whole.

The net effect of this order, then, is to sanction the broadest possible generic abandonment in the context of expired contracts and create vast new eligibility for the alternate MLP pursuant to Order No. 451, with virtually no provision for protection of captive customers of pipelines not providing open access transportation. Captive customers have no direct access to the national market for natural gas and cannot benefit directly from the unilateral abandonment by producer-suppliers of their pipeline. Consequently, the test adopted in *Felmont* effectively has been emasculated for those customers, because any objective comparison of the needs of those current customers against the benefit that would accrue to the natural gas market as a whole must conclude that the needs of such captive customers have been totally ignored. They are left with no access to lower priced gas, on the one hand, while their pipeline supplier has lost previously dedicated, low price gas deliverability and reserves, or in the alternative, must repurchase the old gas supplies at prices pursuant to the Order No. 451 higher MLP (but without the various offsetting protections available under Order No. 451 Good Faith Negotiation provisions). I cannot support that result as to captive customers of pipelines not providing open access transportation services, as a matter of law and policy under NGA section 7(b).

Let me conclude by restating again my general support for the broadest abandonment policy, which is fully legal and protects the captive customers of pipelines not providing open access transportation services. I am prepared to support some form of expedited or generic abandonment based on contract expiration or termination to the extent of our available legal authority and such protection for those captive customers. Since the instant order fails to dispose of the concerns on those points, I am not persuaded that the final rule is acceptable.

Therefore, I dissent in part.

Charles A. Trabandt,

Commissioner.

[FR Doc. 88-17317 Filed 8-1-88; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Social Security Administration

20 CFR Part 404 and 416

[Regulations No. 4 and No. 16]

Federal Old-Age, Survivors, and Disability Insurance Benefits; Supplemental Security Income for the Aged, Blind, and Disabled; Continued Payment of Benefits During Appeal

AGENCY: Social Security Administration, HHS.

ACTION: Final rule.

SUMMARY: These final regulations implement section 223(g) of the Social Security Act (the Act) as added by section 2 of Pub. L. 97-455 and amended by section 7 of the Social Security Disability Benefits Reform Act of 1984 (Pub. L. 98-460 enacted in October 1984) and section 9009 of Pub. L. 100-203. These regulations also implement section 1631 of the Act, as amended by section 7 of Pub. L. 98-460. These statutory provisions provide that the Secretary of Health and Human Services shall by regulations prescribe the manner, form, and time limit within which an individual may elect continued payment of disability/blindness benefits and/or Medicare pending the outcome of his or her appeal of a determination by the Social Security Administration (SSA) that his or her physical or mental impairment(s) for which benefits were payable has ceased, never existed, or is no longer disabling. These final regulations provide the rules for electing continuation of benefits under these statutory provisions.

Under these final regulations, the option to elect to continue receiving benefits pending the outcome of a request for reconsideration or hearing before an administrative law judge on a medical cessation will be provided to the following:

—Recipients of disability insurance benefits (and their auxiliary dependents receiving benefits on the recipient's wage record).

—Recipients of disabled adult child's benefits.

—Recipients of disabled widow's and disabled widower's benefits.

—Mothers and fathers having in care a disabled adult child.

—Mothers and fathers having in care a child, under age 18 but over age 15, who is disabled and receiving child's benefits.

—Recipients of Supplemental Security Income (SSI) benefits based on disability or blindness.

DATES: These rules are effective August 2, 1988.

FOR FURTHER INFORMATION CONTACT: Lawrence V. Dudar, Legal Assistant, Office of Regulations, Social Security Administration, 3-B-4 Operations Building, 6401 Security Boulevard, Baltimore, MD 21235, telephone (301) 965-1795.

SUPPLEMENTARY INFORMATION: These rules implement sections 223(g) and 1631 of the Act, as amended by section 7 of Pub. L. 98-460 and section 9009 of Pub. L. 100-203 which temporarily extend the title II benefit continuation provisions of prior laws and permanently create a statutory benefit continuation provision for title XVI medical cessation cases.

Section 223(a)(1) of the Act provides that a Social Security title II disability insurance beneficiary found to be not disabled under the provisions of the Act will receive benefits for two months after the month in which his or her disability ceased. Disability is ordinarily considered to have ceased in the month the cessation determination is made. Similarly, section 202(d)(1)(G) of the Act provides that a title II disabled child beneficiary (as defined by the Act) found to be not disabled under the provisions of the Act will receive benefits for two months after the month in which his or her disability ceased. Disability is ordinarily considered to have ceased in the month the cessation determination is made. The regulations at 20 CFR 404.900 *et seq.* give these title II beneficiaries the right to appeal a determination of medical cessation through the administrative process. Prior to Pub. L. 97-455, title II beneficiaries were not eligible for payment of continued benefits during an appeal of a determination that they were no longer

medically disabled. However, if the initial cessation determination was reversed on appeal, benefits were paid retroactively to the first month for which benefits were not paid as a result of the determination of disability cessation.

Section 1631(a)(5) of the Act similarly provides that a title XVI recipient of disability or blindness benefits will receive benefits for two months after the month in which his or her disability/blindness ceased. Disability is ordinarily considered to have ceased in the month the cessation determination is made. Revised regulations at 20 CFR 416.1413(d), 51 FR 288 (January 3, 1986) provide for an opportunity for a disability hearing at the reconsideration level when title XVI or concurrent title II/XVI individuals appeal a determination, based on medical factors, that he or she is not blind or disabled (a medical cessation). These individuals retain the right to appeal this reconsideration determination through a hearing before an administrative law judge.

Prior to the enactment of Pub. L. 98–460, benefit continuation was provided in title XVI and concurrent title II/title XVI cases bases on the U.S. Supreme Court decision in *Goldberg v. Kelly*, 397 U.S. 254 (1970). Prior to the publication of these rules, regulations at 20 CFR 416.1336 provided that title XVI recipients found to be no longer disabled or blind could have their benefits continued through the first step of appeal.

Section 2 of Pub. L. 97–455

Section 2 of Pub. L. 97–455, enacted in January 1983, added a new subsection (g) to section 223 of the Act. Under this provision, a title II disability insurance beneficiary or a child, widow, or widower entitled to benefits based on disability, who receives a determination that the physical or mental impairment(s) on the basis of which such benefits are payable is found to have ceased, not to have existed, or to no longer be disabling may elect to have benefits continued during appeal of the cessation determination through the reconsideration level, and/or until a hearing decision or order of dismissal is issued by an administrative law judge. Section 2 of Pub. L. 97–455 also permits the beneficiary to elect continuation of any other benefits that are based on his or her wages and self-employment income, including benefits under title XVIII of the Act (Medicare). Any continued benefits paid under this provision, except for those made under title XVIII, are subject to recovery as overpayments, subject to the same waiver provisions in current law (section 204 of the Act) and regulations (20 CFR 404.501 *et seq.*), where the medical cessation determination is upheld, on appeal, by the final decision of the Secretary. However, waiver of recovery of such an overpayment is considered only if the cessation determination was appealed in good faith.

This temporary provision allows continued payment of title II disability insurance benefits for months beginning in February 1983 for January 1983 or, if later, the first month for which benefits were no longer otherwise payable under the most recent medical cessation determination or order of remand.

This provision was originally effective for medical cessation determinations made after January 11, 1983, pending administrative review, and prior to October 1, 1983.

Section 2 of Pub. L. 98–118

This provision extended the sunset date of section of Pub. L. 97–455 for continued payment of title II disability benefits during appeal to include medical cessation determinations made prior to December 7, 1983.

Section 7 of Pub. L. 98–460 and Section 9009 of Pub. L. 100–203

Section 7 of Pub. L. 98–460 (which amends section 223(g) of the Act) extended the effective date of the provisions of Pub. L. 97–455 for title II cases to include determinations that the physical or mental impairment(s) on the basis of which such benefits are payable is found to have ceased, not to have existed or to no longer be disabling made prior to January 1, 1988. (Extended to January 1, 1989 by section 9009 of Pub. L. 100–203.) Because this provision remains temporary, in no case can title II disability benefit payments be made for months after June 1989. Section 7 also provides for the continuation of payment of benefits under title II and benefits under title XVIII to a father or mother who has in his or her care a child, over age 15, who is disabled and receiving child's benefits, based on such disability.

Section 7 of Pub. L. 98–460 also amends section 1631(a) of the Act to add a new paragraph (7). Under this permanent provision, a recipient of supplemental security income benefits based on disability or blindness, who receives a determination that the physical or mental impairment(s) on the basis of which such benefits are payable is found to have ceased, not to have existed or to no longer be disabling may elect to have benefits continued during appeal of this determination. If elected, these benefits would be paid until the month before the month a decision is issued after an administrative law judge hearing or the month before the month no appeal for a review or hearing is pending, whichever is earlier. Supplemental security income benefits paid under this provision are subject to recovery as overpayments and to the waiver of recovery provisions pursuant to section 1631(b) of the Act if the initial medical cessation determination is affirmed by a final decision of the Secretary. However, waiver of recovery of such an overpayment will be considered only if the determination was appealed in good faith.

Regulatory Provisions

Title II

These regulations at § 404.1597(b) explain that after we have made a determination that an individual's physical or mental impairment(s) has ceased, never existed, or is no longer disabling, the individual's title II benefits based on disability will be stopped. We will send the individual written notice of our determination that explains it, the right to appeal and the right to request continued benefits pending reconsideration and/or a hearing on the disability cessation determination.

For the purpose of the regulations of § 404.1597(b) and 404.1597a only, "benefits" means disability case payments and/or Medicare, if applicable. "Election of benefits" means the election of disability case payments and/or Medicare, if applicable.

Under section 7 of Pub. L. 98–460 and these implementing regulations, title II individuals who receive a closed period of disability determination do not have the right to request continuation of benefits during appeal. A closed period of disability determination is a determination on an application for benefits that establishes a period of disability for only a specified period of time in the past. In a closed period of disability, there is no determination that would reach current status. Continuation of benefits during appeal is available only if current entitlement is in question. Also, under these regulations, title II individuals who receive an unfavorable determination on their initial disability claim (that is their application for benefits based on disability) do not have the right to request continuation of benefits during appeal since continued benefits are only available to claimants who were already receiving benefits.

The regulations at § 404.1597a (a) and (b) explain that title II individuals who

receive a medical cessation determination may elect to have benefits continued during appeal of that determination. Title II benefits may be continued only if the determination that the individual's physical or mental impairment(s) has ceased, has never existed, or is no longer disabling is made on or after January 12, 1983 (or before January 12, 1983, and a timely request for reconsideration or a hearing before an ALJ was pending on that date) and before January 1, 1989. If elected, title II benefits may be continued beginning with the month of January 1983 or the first month for which benefits are no longer otherwise payable following a medical cessation determination or the month of election, whichever is later.

The payments to a title II individual who has elected to have benefits continued will continue until the earlier of the month before the month a decision is issued after the ALJ hearing or the month before the month a new decision is issued by the ALJ (or final action is taken by the Appeals Council on the ALJ's recommended decision) if the individual's case was sent back to an ALJ for further action, or until the month before the month no timely request for appeal is pending after notification of an unfavorable title II reconsideration determination, or June 1989.

To clarify our policy on cessation appeals filed under both title II and title XVI (a concurrent claim), we added new language to these final regulations at § 404.1597a(a). This new language does not represent a change in the concurrent claim policy announced in the Notice of Proposed Rulemaking (NPRM). Although we stated in the NPRM preamble how concurrent appeals would be processed, we had no statement on concurrent appeals in the rules themselves. We explained in the preamble to the NPRM that in a concurrent claim, the title II appeal is processed under the title II rules and the title XVI appeal is processed under the title XVI rules. In this final regulation, we have explicitly stated this policy in the regulatory text at § 404.1597a(a).

The regulations at § 404.1597a(c) explain that a title II primary beneficiary may also elect to have benefits continued for any title II auxiliary beneficiaries (e.g., eligible spouse or children) during this appeal. If elected, continued benefits for the auxiliaries will be continued for the same time periods provided for the title II primary beneficiary. Under these regulations, auxiliary beneficiaries may also elect whether they wish to receive continued payment of benefits, but the title II primary beneficiary must also elect to have their benefits continued in order for the auxiliary beneficiaries to be paid. The right also to elect continued payment of benefits is given to title II auxiliary beneficiaries because these beneficiaries will be asked to repay any overpayment resulting from benefits continued pending the outcome of the appeal. Since the auxiliary beneficiaries may not be aware of the primary beneficiary's election of continued benefits on their behalf, they will be required to make a separate election to have their benefits continue.

The regulations at § 404.1597a(d) explain that we will notify the title II individual of his or her right to elect continued benefits if he or she requests reconsideration or a hearing on our disability cessation determination. If the individual requests reconsideration or a hearing, we will request a written statement of choice from the title II individual as to whether or not he or she wants benefits to continue during appeal, and whether or not he or she also wants title II benefits to continue to anyone else who is receiving benefits based on the title II individual's wages and self-employment income.

Title II beneficiaries may elect continuation of benefits at the time reconsideration is requested and again at the time a hearing before an administrative law judge is requested. In title II cases, a separate election must be made at each level of appeal.

If the title II beneficiary does not elect continuation of benefits at the time reconsideration is requested, but requests it at the time the administrative law judge hearing is requested, we will reinstate continued benefits effective with the month of the latest medical cessation determination rather than the first month of nonpayment after the initial medical cessation determination. The written statement of choice, which must be completed by the primary beneficiary, explains this provision.

The regulations at § 404.1597a(e) explain that we also will contact the spouse and/or children of a title II individual, and obtain a statement in writing from them as to whether or not they wish to receive continued benefits. However, for the auxiliary beneficiaries (spouse or children) to receive continued benefits, the title II individual must also request that benefits be continued for them. Under these regulations, title II auxiliary beneficiaries (spouse or children) who are living in a separate household and those in the same household will be asked to repay any overpayment resulting from benefits continued pending the outcome of the appeal. Since auxiliaries (spouse or children) may not be aware of the title II primary beneficiary's election of continued benefits on their behalf, these regulations provide that a separate statement of choice to receive or not to receive continued benefits will also be required from auxiliary beneficiaries.

The regulations at § 404.1597a(f), (g), (h) and (i) explain that a title II individual must request continued benefits: (1) Within 10 days after he or she receives notice of our initial cessation determination along with requesting reconsideration of that initial determination (The 60-day period for requesting reconsideration is not affected by this provision.); (2) within 10 days after receiving notice of our reconsideration cessation determination along with requesting a hearing before an administrative law judge (The 60-day period for requesting a hearing is not affected by this provision.); or (3) within 10 days after receiving a notice of the option for continued benefits in connection with a decision (including court remand cases except those court remands which carry special benefit continuation rights explained in section 2(e) of Pub. L. 98–460) that has been vacated and sent back (remanded) by the Appeals Council to an administrative law judge for further action.

Our experience with benefit continuation under Pub. L. 97–455 and 98–118, which utilized a 10-day time frame, showed that most eligible title II individuals made an election within the 10 days. Under these regulations, these individuals are given the same period (10 days) for making such election. This 10-day time limit is consistent with longstanding title XVI continued payments policy based on *Goldberg v. Kelly*.

If the election for continued benefits is requested after the 10-day period, we will use the standards in current regulations, 20 CFR 404.911, to determine whether good cause exists for failing to request benefit continuation within the 10-day period. If the election for continued benefits is made after this 10-day period, continued benefits can only be paid if good cause is established for the delayed request. We apply a good cause exception with regard to other time limits in the appeals process. For consistency and recognizing that certain justifiable factors may prevent timely requests in this situation, we are using the same good cause considerations here.

The regulations at § 404.1597a(h)(2) also explain that if the primary beneficiary requests continued title II

benefits for a spouse or child, the spouse or child must also request continued benefits within 10 days after receipt of the notification of our determination. The standards in § 404.911 will be used to determine if good cause exists for the spouse's or child's request for continuation of benefits made after the 10-day period. We will consider their request to be timely and will pay the title II spouse or child continued benefits only if good cause for delay is found.

Under the regulations at § 404.1597a(i), in decisions (including court remand cases except those court remands with special benefit continuation rights under section 2(e) of Pub. L. 98–460) vacated and sent back (remanded) by the Appeals Council to an administrative law judge for further action, benefit continuation is available effective with the first month of nonpayment based on the prior administrative law judge decision if continued benefits were previously elected at the administrative law judge level.

In such remanded cases, the prior administrative law judge's decision or dismissal order is vacated as having no force or effect, and accordingly benefit continuation is again available for these title II beneficiaries. In these remanded cases, continued benefits will be reinstated without a new election if continued benefits were previously elected at the administrative law judge level. In these remanded cases reaching the administrative law judge, if the title II beneficiary did not previously elect benefit continuation at the administrative law judge level, continuation of benefits is available upon a new election by the beneficiary and effective for the month of the Appeals Council remand order.

If benefit continuation was previously elected at the administrative law judge level, we will automatically reinstate these same continued benefits and then update our records regarding events that may affect the right to receive benefits. If any of these events have occurred, then continued benefits will be stopped or adjusted accordingly. If benefit continuation was *not* previously elected at the administrative law judge level, we will verify whether all requirements are met *before* paying title II continued benefits. This updating of our records before payment is necessary because benefit continuation is intended to replace *only* those benefits received prior to the medical cessation, i.e., benefits for *only* those individuals who were entitled at the time of the cessation. If any events that may affect the right to receive benefits have occurred, then necessary adjustments to the benefits will be made before reinstatement. Individuals who did *not* previously elect benefit continuation did not have to report any of these events to us, since they were not receiving any benefits.

The regulations at § 404.1597a(j) explain that any title II continued benefits received during appeal (with the exception of Medicare benefits) are subject to the overpayment recovery and waiver provisions of regulations at 20 CFR Part 404, Subpart F, if the determination that the title II individual is no longer disabled is not changed by the final decision of the Secretary. The title II individuals who received continued benefits would then be asked to pay back these benefits. However, recovery of the continued benefits would be subject to the waiver provisions of regulations at 20 CFR Part 404, Subpart F, only if the appeal was made in good faith. We will assume that an appeal was made in good faith *unless* an individual fails to cooperate in connection with an appeals, e.g., if he or she fails (without a good reason) to give us medical or other evidence, or to go for a physical or mental examination when requested.

If an individual has an appeal on a medical cessation pending under both title II and title XVI (that is, a concurrent case), the title II claim will be handled in accordance with the title II regulations, while the title XVI claim will be handled in accordance with the title XVI regulations.

Title XVI

The regulations at § 416.995 explain that after we have made a determination that an individual's physical or mental impairment(s) has ceased, never existed, or is no longer disabling, the individual's title XVI benefits based on disability or blindness will be stopped. We will send the title XVI individual written notice of our determination that explains it, the right to appeal and the right to request continued benefits pending reconsideration and/or a hearing on the disability/blindness cessation determination.

Under these regulations, title XVI individuals who receive determinations on their applications for benefits based on disability or blindness that they were disabled or blind for only a specified period of time (i.e., a closed period) do not have the right to request continuation of benefits during appeal. When disability has been established for only a specified period of time, there is no determination that would reach current status. Continuation of benefits during appeal is available only if current entitlement is in question. Also, under these regulations, title XVI individuals who receive an unfavorable determination on their application for benefits based on disability or blindness do not have the right to request continuation of benefits during appeal since continued benefits are only available to individuals who were already receiving benefits.

The regulations at § 416.996(a) explain that title XVI individuals who receive a medical cessation determination may elect to have benefits continued during appeal of that determination. We have added language in these final rules to show that these benefits include the special cash benefits or special Supplemental Security Income (SSI) eligibility status of Medicaid under §§ 416.261 and 416.264. Section 416.996(a) applies to determinations that the individual's physical or mental impairment(s) has ceased, has never existed, or is no longer disabling made after October 1984. The payments to a title XVI individual who has elected to have benefits continued will continue until the earlier of the month before the month a decision is issued after the administrative law judge hearing or the month before the month a new decision is issued by the ALJ (or final action is taken by the Appeals Council on the ALJ's recommended decision) if the individual's case was sent back to an ALJ for further action, or until the month before the month no timely request for reconsideration or a hearing before an administrative law judge is pending after notification of an unfavorable title XVI initial or reconsideration cessation determination.

Regulations at 20 CFR 416.1413(d), 51 FR 288 (January 3, 1986), which are effective for reconsideration requests filed on or after January 3, 1986, provide a title XVI or concurrent title II/XVI beneficiary an opportunity for a disability hearing at the reconsideration level when the beneficiary appeals an initial medical cessation determination. Before January 3, 1986, the first level of appeal for title XVI or concurrent title II/XVI medical cessations was a hearing before an administrative law judge. The disability hearing regulations result in similar treatment of title II and title XVI beneficiaries in the appeals process, including the payment of continued benefits.

Individuals electing continuation of title XVI benefits, in States where Medicaid eligibility is based on receipt of title XVI benefits and for which SSA does Medicaid eligibility determinations, will also have Medicaid

eligibility continued. In other States, they will be referred to the State Medicaid agency.

To clarify our policy on cessation appeals filed under both title II and title XVI (a concurrent claim), we added new language to these final regulations at § 416.996(a). This new language does not represent a change in the concurrent claim policy which was announced in the NPRM. Although we stated in the NPRM preamble how concurrent appeals would be processed, we had no statement on concurrent appeals in the rules themselves. We explained in the preamble to the NPRM that in a concurrent claim, the title II appeal is processed under the II rules and the title XVI appeal is processed under the title XVI rules. In this final regulations, we have explicitly stated this policy in the regulatory text at § 416.996(a).

The regulations at § 416.996(b) explain that we will notify the title XVI individual of his or her right to elect continued benefits if he or she requests a reconsideration or hearing before an administrative law judge on our disability/blindness cessation determination. If the individual requests a reconsideration or hearing, we will request a written statement of election as to whether or not he or she wants benefits to continue during appeal.

Title XVI individuals may elect continuation of benefits at the time reconsideration is requested and again at the time a hearing before an administrative law judge is requested. A separate election must be made at each level of appeal.

It the title XVI individual does not elect continuation of benefits at the time reconsideration is requested, but requests it at the time the administrative law judge hearing is requested, we will reinstate continued benefits effective with the month of the latest medical cessation determination rather than the first month of nonpayment after the initial medical cessation determination. The written statement of choice, which must be completed by the individual, explains this provision.

The regulations at § 416.996(c) explain that a title XVI individual must request continued benefits within 10 days after receiving notice of an initial medical cessation determination along with requesting a reconsideration. The 60-day period for requesting a reconsideration is not affect by this provision.

The new section 1631(a)(7) of the Act, as added by section 7 of Pub. L. 98–460, requires that title XVI individuals now make an affirmative request to have benefits continued. The existing title XVI regulation (20 CFR 416.1336(b)), which is based on the U.S. Supreme Court decision in the case of *Goldberg v. Kelly*, provides that unless waived title XVI benefits would continue to be paid until a decision (or order of dismissal) was issued at the initial level of appeal if the appeal is filed within 10 days after receipt of the notice of planned action to stop benefits. The new statutory authority for title XVI benefit continuation differs from the *Goldberg v. Kelly* approach by requiring that the individual affirmatively elect benefit continuation rather than assuming that the individual wants continued benefits if an appeal is requested within 10 days unless such benefits are waived. Under these regulations, title XVI individuals are given the same period (per current regulations) of 10 days from receipt of notice for making such election.

Our experience with providing the 10-day time frame for filing a request for hearing and receiving benefit continuation in title XVI cases under the *Goldberg v. Kelly* procedures, which has been in effect since 1974, has proven that this is an adequate time frame for most individuals.

The title XVI regulations at § 416.996(c) also explain that if continued benefits are requested after the 10-day period, we will use the standards in current regulations, 20 CFR 416.1411, to determine whether good cause exists for failing to request benefit continuation within the 10-day period. If the election for continued benefits is made late, we will consider the request to be timely and will pay continued benefits only if good cause for delay is found. We apply a good cause exception with regard to other time limits in the appeals process. For consistency and recognizing that certain justifiable factors may prevent timely requests in this situation, we are using the same good cause considerations here.

The regulations at § 416.996(d) explain that a title XVI individual must request continued benefits within 10 days after receiving notice of our reconsideration cessation determination along with requesting a hearing before an administrative law judge. The 60-day period for requesting a hearing is not affected by this provision.

If the request for continued benefits is made after the 10-day period, we will use the standards in current regulations, 20 CFR 416.1411, to determine whether good cause exists for failing to request benefit continuation timely. If the election for continued benefits is made late, we will consider the request to be timely only if good cause for delay is found.

The regulations at § 416.996(e) explain that in title XVI decisions (including court remand cases, except those court remands with special benefit continuation rights under section 2(e) of Pub. L. 98–460) vacated and sent back (remanded) by the Appeals Council to an administrative law judge for further action, benefit continuation may be available, without a new election, effective with the first month of nonpayment based on the prior administrative law judge decision if benefits were previously elected at the administrative law judge level. In such title XVI remanded cases, the prior administrative law judge's decision or dismissal order is vacated, having no force or effect, and accordingly benefit continuation may be available again for these title XVI beneficiaries.

If the title XVI beneficiary did not previously elect benefit continuation at the administrative law judge level, continuation of benefits may be available upon a new election by the beneficiary and effective for the month of the Appeals Council remand order.

Before reinstating benefits in any remand case (including court remand cases, except those court remands with special benefit continuation rights under section 2(e) of Pub. L. 98–460), we will contact the title XVI individual to update our records regarding events that affect the right to receive, and the amount of, benefits, such as work activity, living arrangements, income and resources. Before reinstatement, we will review and redetermine eligibility in all cases, whether or not benefits were previously elected at the administrative law judge level. This policy to do a redetermination before reinstatement is consistent with our responsibility to redetermine eligibility contained in section 1611(c)(1) of the Act and the regulations at 20 CFR 416.204. The redetermination is necessary because we have not had recent contact with the individual during the period of nonpayment since the individual was not under any obligation to report changes in circumstances that could affect eligibility or payment amount. Since the title XVI program is a program based on current needs, it is essential that a determination be made that the individual's current needs support the payment, as well as the amount, of title XVI benefits. Upon redetermination, if all eligiblity factors are not met (other than disability or blindness or, in certain cases, not engaging in substantial gainful activity), we will not reinstate benefits. (Effective July 1, 1987, a title XVI individual will no longer be subject to a trail work period or cessation based on engaging in substantial gainful activity in order to be eligible for special benefits under § 416.261 or special

status under § 416.264). Any retroactive continued benefits paid to concurrent title II and title XVI beneficiaries will be subject to the provisions of section 1127 of the Social Security Act, as amended. That section provides that, effective February 1985, benefits paid after a period of suspension or termination will be adjusted to reflect the title XVI benefits that would not be paid if the title II benefits were paid when due.

Prior to November 1984, in concurrent title II/title XVI medical cessation cases, under the provisions in 20 CFR 416.1336, an individual who had filed for a hearing within 10 days of receipt of the cessation notice could waive his or her right to receive continued benefits pending the hearing decision. He or she could also restrict this waiver to either title II *or* title XVI benefits only. Therefore the claimant could continue to receive benefits under both titles or choose to receive benefits under only one title. This policy will be continued.

For clarification, we added a new § 416.996(f) to these final rules. This added regulation at § 416.996(f) explains that title XVI recipients of disability/blindness benefits whose benefits are suspended, reduced or terminated for reasons *not* connected with their medical condition still will be covered under the existing procedures (20 CFR 416.1336(b)) based on the decision in *Goldberg* v. *Kelly*, which provides for the continuation of benefits through the first level of appeal when the appeal is requested within 10 days of receipt of the notice of suspension, reduction or termination.

The regulations at § 416.996(g) explain that any continued title XVI benefits received during appeal are subject to the overpayment recovery and waiver provisions of Regulations 20 CFR Part 416, Subpart E, if the determination that the title XVI individual is no longer disabled or blind is not changed by the final decision of the Secretary. The title XVI individuals who received continued benefits would then be asked to pay back these benefits. However, the continued benefits would be subject to the waiver provisions of Regulations 20 CFR Part 416, Subpart E, only if the appeal was made in good faith. We will assume that an appeal was made in good faith *unless* an individual fails to cooperate in connection with an appeal, e.g., if he or she fails (without a good reason) to give us medical or other evidence or to go for a physical or mental examination when requested.

If an individual has an appeal on a medical cessation pending under both title XVI and title II (that is, a concurrent case), the title XVI claim will be handled in accordance with the title XVI regulations while the title II claim will be handled in accordance with the title II regulations.

Conforming changes will be made later in 20 CFR 416.1336.

Comments

These rules were published as a Notice of Proposed Rulemaking at 51 FR 18611 on May 21, 1986. We received comments from 13 respondents.

Language and Format of Notices

Comment: Several commenters expressed concern about the quality and tone of our notices and forms used in the benefit continuation process and the attitudes of SSA employees responsible for presenting benefit continuation information to claimants. It was suggested that both written and oral information be presented in as simple a manner as possible. These commenters remarked that the language and format of the cessation notices can be critical in the lives of people who are disabled, particularly those with mental disabilities.

Response: We believe that the improvements we have made in the language and format of our notices satisfies the concern about our written communications. A major initiative of SSA is to issue clear and understandable notices to claimants and other parties. As a part of this important initiative, we have developed new, improved standards for all SSA notices. In developing these standards, SSA consulted with and adopted concepts from nongovernmental authorities on readability and communication. These standards reflect a tone which we believe is personalized, courteous and nonthreatening.

The notices of disability cessation have been revised to conform to the clear notice standards. The improved cessation notices consist of a streamlined format with clearer language. These notices contain explicit language about appeal rights *and* the right to elect continued benefits. The appeal paragraph includes a sentence which reads "Come to one of our offices if you want help." Further, each notice concludes with a paragraph which encourages the claimant to contact any Social Security office if he or she has questions about his or her claim.

In developing the language for the paragraph to explain the benefit continuation provision, we avoided language that overemphasizes the beneficiary's obligation to repay continued benefits in the event of an unfavorable decision on appeal. The paragraph reads "If you lose your appeal, you might have to pay back some or all of this money." The notices use the word "might" because overpayments which result from the election of continued benefits are subject to the waiver consideration provisions of the Social Security Act if the appeal was made in good faith.

In addition to the improvements in our written communications, we have provided training for Social Security office employees to improve their interviews and oral communication with claimants. Further, Social Security office employees have been provided extensive training for more effective interviewing of mentally impaired claimaints to ensure that their disability claims are fully developed and that the process is understandable.

Comment: Two commenters suggested that the form for requesting reconsideration or hearing have a check-off box for requesting continuation of benefits. This would assure that Social Security office employees do not fail to present the option to elect continued benefits to the beneficiary at the time he or she makes the request for appeal.

Response: It is not necessary to revise the forms for requesting reconsideration or hearing to include benefit continuation boxes to ensure that the option to elect continued benefits is presented to the beneficiary when he or she makes the request for appeal. The notice of the disability/blindness cessation determination as well as the reconsideration determination informs a beneficiary of the right to have benefits continued during appeal if he or she disagrees with the determination and requests appeal. This informs the beneficiary regarding his or her rights and also serves to put the beneficiary at ease regarding possible financial hardship. Cessation cases are held in Social Security offices specifically to await the beneficiary's response regarding continuation of benefits. Employees are instructed to explain the continuation of benefits provision when a medical cessation appeal is requested. Finally, training is provided to Social Security office employees on how to explain the right to elect continued benefits to beneficiaries appealing cessation determinations as part of our continuing effort to provide quality service to the public.

Therefore, we do not believe that it is necessary to revise the forms for requesting reconsideration or hearing to ensure that this option will be explained to the claimant.

10-Day Time Limit To Request Benefit Continuation

Comment: Eight of the 13 commenters were especially critical of the rule that a beneficiary whose disability or blindness has been found to have ceased has only 10 days from receipt of the cessation notice to request or elect to receive continued benefits while appealing the cessation. It was indicated that the 10-day time limit is too rigorous, burdensome and is not required by the statute. The commenters believe that the 10-day rule places a particular burden on mentally impaired individuals, and some suggested that a provision be added to this rule to make it clear that beneficiaries with mental disabilities should receive extra consideration and be given more time to request continuation of benefits. Some thought a 30-day time limit would be better, while others proposed a time limit of 60 days, the same amount of time allowed for requesting appeal.

More specifically, in connection with the objection to this 10-day rule, several commenters recommended that these rules and the rules at 20 CFR 404.911 and 416.1411 be amended to include specific language stating that the "good cause" for lateness provisions will be applied liberally for mentally impaired beneficiaries. The commenters believe that such regulatory language would accommodate the special circumstances which many mentally impaired beneficiaries experience which include difficulty in responding to written communications, thus assuring that these individuals have the full opportunity for having their benefits continued during appeal. These commenters stated the SSA's flexibility in applying good cause is not readily apparent in these rules.

Response: Although many commenters voiced strong objection to the 10-day rule, we did not amend the final rule to change this time limit. We believe, as we stated in the preamble to the Notice of Proposed Rulemaking, that the 10-day time limit is adequate time for beneficiaries to make an election. In addition, as we also previously stated, we recognize that certain justifiable causes may prevent a beneficiary from making a timely request for continued benefits, and therefore, in these situations we will apply the good cause exception applicable to other time limits in the appeals process.

Section 2 of Pub. L. 97–455 and section 7 of Pub. L. 98–460 provide that the Secretary "shall by regulations prescribe" the manner, form, *and time* within which an individual may elect continued disability benefits during appeal.

For consistent program administration between title II and title XVI cases, these regulations provide the same 10-day period for having benefits continued in connection with an appeal already provided by 20 CFR 416.1336(b) for title XVI suspension, reduction or termination cases. This 10-day time limit is a longstanding policy which began with the policy and procedures we provided for benefit continuation in title XVI cases, based on the principles in the Supreme Court's decision in *Goldberg v. Kelly*. Under these procedures, as provided in 20 CFR 416.1336(b), an individual who appealed an adverse action within the 10-day time limit automatically received benefit continuation unless such benefits were waived. We also followed a 10-day time limit policy in implementing continued benefits under title II, in accordance with section 2 of Pub. L. 97–455 which was enacted in 1983.

Since we implemented this 10-day rule in title II cases under Pub. L. 97–455, the vast majority of the beneficiaries appealing a cessation have requested the continuation of benefits within 10 days. Therefore, we do not believe that the 10-day time limt, or our application of the good cause exception, has represented a disadvantage or disincentive for individuals whose benefits have been ceased. In addition, we have had no indication that the use of a 10-day rule has been a problem for claimants in title XVI cases, where it has been used since 1974.

We did not amend these rules to add specific language to give extra consideration to mentally impaired beneficiaries who miss the time limit for requesting continuation of benefits, because we believe that our current rules on "good cause" for missing the deadline to request review provide for such special consideration. Our regulations at 20 CFR 404.911 and 416.1411 provide that the deadline or time limit can be extended if the individual had "good cause" for missing the deadline. These regulations cite examples of circumstances when good cause may exist but state that the examples listed are not exclusive. One such example reads that good cause may be found if an individual "were seriously ill and were prevented from contacting us in person, in writing, or through a friend, relative, or other person." Another example reads that "good cause" may be found if "unusual or unavoidable circumstances exist which show that you could not have known of the need to file timely or which prevented you from filing timely." Although a mental disability is not specifically mentioned in these regulations, we believe the language of 20 CFR 404.911 and 416.1411 covers a variety of circumstances including those which may be associated with mentally impaired individuals.

"Closed Period" Cases Should Be Included for Benefit Continuation

Comment: Six commenters indicated that claimants who are simultaneously awarded disability benefits for a prior period and whose entitlement or eligibility for benefits ceased at the end of such period, i.e., granted a closed period of disability, should be given the opportunity to elect continuation of benefits during appeal of such closed period decisions. Several of these commenters pointed out that several medical improvement class action court orders have required that "closed period" cases be regarded as *cessation* cases and accordingly be afforded the right to elect continued benefits on appeal. The commenters also pointed out that "closed period" cases are adjudicted under the medical improvement review standard and, therefore, in this context should be recognized as medical cessation cases eligible for continued benefits.

Response: We considered this comment and reexamined the rule to exclude "closed period" cases from benefit continuation. Upon reexamination, we concluded that this rule is consistent with the statute. Sections 223(g) and 1631(a)(7) as added by section 7 provide for benefit continuation to "recipients" of title II or tile XVI benefits. The intent of section 7 is to prevent disruption to those individuals who are currently recipients of benefits and who then receive medical cessation determinations. Because individuals granted a closed period were not already recipients of disability benefits when their disabilities ceased, they are not eligible for benefit continuation. Further, a closed period of disability determination is a determination on an application for benefits that establishes a period of disability for only a specified period of time in the past. In a closed period of disability, there is no determination that would reach current status. Continuation of benefits during appeal is available only if current entitlement is in question. Thus, we have not changed this rule. The medical improvement class actions referred to by the commenter are governed by section 2(d) of Pub. L. 98–460. Section 2(d) provided for remand to the Secretary and review

under the medical improvement review standard of certain cases pending in Federal courts. These final regulations do not apply to title II and XVI cases remanded under section 2(d). The special benefit provisions of section 2(e) apply to those cases.

Claimant's Obligation To Repay Benefits Received During Cessation Appeal

Comment: Several commenters questioned the procedures for collecting overpayments resulting from an unfavorable decision on appeal. Specifically, the commenters believe that these rules do not go far enough to assure that beneficiaries whose disability/blindness has been found to have ceased feel free to exercise their right to receive benefits during appeal without being intimidated by an overemphasis on the obligation to repay benefits if the medical cessation is affirmed on appeal.

Response: Currently the vast majority of those individuals who appeal a cessation elect to receive continued benefits. There is no credible evidence that beneficiaries are intimidated from electing benefits.

Since the Act requires that continued benefits will be considered overpayments if the medical cessation is affirmed on appeal, we must inform the beneficiary about this requirement. We believe that the cessation determination notice which explains the determination and the benefit continuation provision does not overemphasize this requirement, moreover, the notice explains that any resulting overpayment may receive waiver consideration.

Social Security office employees are instructed to advise beneficiaries of their right to continued benefit payments and when the payments will end, as well as the consequences if more than the correct amount of payment is made. This is standard procedure for all types of payments and not just "continued benefits" payments. In addition, in contacts with beneficiaries, Social Security office employees provide information and assitance and are instructed not to intimidate or influence an individual.

In conclusion, the policies and procedures for benefit continuation overpayment cases are the same as those procedures for all overpayment cases. We are confident that Social Security office employees will continue to provide quality service in a courteous and nonthreatening manner.

Comment: One commenter proposed that these rules be amended to indicate that in addition to being eligible for regular overpayment waiver provisions, that beneficiaries whose disability/blindness has been found to have ceased also be eligible for a long-term repayment plan.

Response: Although beneficiaries whose disability/blindness has been found to have ceased may be eligible for a long-term repayment plan, it would not be appropriate to include rules on overpayments and collection of overpayments in these benefit continuation rules.

The regulations on overpayments and recovery and/or waiver of overpayments are found in 20 CFR 404.501 through 404.515 and 416.535 through 416.570. Processing and recovery of any overpayments due to continuation of benefits will be made under procedures already in place.

In addition to the above regulations, the Federal Claims Collection (FCC) standards, based on the Debt Collection Act of 1982 and issued jointly by the General Accounting Office and the Department of Justice, set forth the national standards for the collection of debts owed the United States and its agencies. The FCC standards (4 CFR 102.1 through 120.20) provide that an agency discuss alternative methods of repayment with the debtor. FCC standards are contained in Department of Health and Human Services regulations, 45 CFR Part 30, the revised version of which is set forth at 52 FR 260 (January 5, 1987).

The Social Security Administration follows the FCC standards for debt collection, and the overpayment notice(s) SSA sends complies with these standards. Our initial notice requesting repayment not only asks for refund, but advises the debtor if he or she cannot repay in a lump sum, to submit a plan for repayment.

Since debt collection standards are in 4 CFR 102.1 through 102.20, there is no need to duplicate the repayment provisions in 20 CFR 404.501 through 404.515 and 416.535 through 416.570.

Comment: Several commenters indicated that these rules do not sufficiently discuss when SSA will begin collection of any resulting overpayment. It was suggested that "these rules should state that SSA will not act to collect any funds alleged to be owed until such time as the individual has exhausted his/her appeal rights." This would include deferring overpayment collection through the judicial (court) level of appeal.

Response: As we stated earlier in response to the preceding comment, these regulations on the continuation of benefits during the appeal of a medical cessation determination refer to the current overpayment rules and the standards and procedures contained in these rules.

In benefit continuation cases, our policy is that the notice of overpayment on the amount of continued benefits paid will not be issued until any judicial appeal of the Secretary's final decision is completed. Therefore, the overpayment collection process is deferred to take into consideration possible judicial review and reversal of the Secretary's decision. If the claimant does not seek judicial review of the cessation determination, we will issue the overpayment notice and begin the collection process.

Comment: One commenter recommended that these rules be modified to also allow recovery of Medicaid expenditures whenever State money was expended and the cessation determination was upheld on appeal. This commenter believes that since recovery of disability benefits is allowed when the claimant loses the appeal, then States also should be allowed to recover Medicaid expenditures when a title XVI cessation appeal is lost and a retroactive determination of ineligibility is made.

Response: Section 1902(a)(10(A) of the Social Security Act requires that title-XVI-criteria States provide Medicaid to individuals receiving title XVI payments. In this regard, Medicaid eligibility is conditional based on the receipt of title XVI *payments*, not title XVI *eligibility*. As long as a title XVI payment is made, the State is acting appropriately when it provides Medicaid to a title XVI recipient.

When a title XVI recipient is determined retroactively ineligible for benefits under title XVI, his or her eligibility for Medicaid during that retroactive period is not at issue as long as a title XVI payment was made. Regardless of why the individual has remained in payment status (e.g., *Goldberg* v. *Kelly* payment continuation or continuation of benefits during disability/blindness cessation appeal), if SSA provided a title XVI payment, the State's providing Medicaid was proper and is unaffected by a retroactive title XVI disallowance.

However, an exception to this may apply in cases involving retroactive ineligibility determinations. Medicaid recovery is not allowed *unless* Medicaid eligibility was established by fraud or similar fault on the part of the individual. If Medicaid eligibility was established fraudulently, then the State must attempt to collect or recover medical expenditures from the individual.

Election of Continued Benefits for Title II Auxiliary Beneficiaries (Spouse or Children)

Comment: Five commenters objected to the requirement that auxiliary beneficiaries also make a separate written election to receive continuation of benefits during the wage earner's appeal. These commenters believe that the statute does not permit or require a separate election from auxiliary beneficiaries. Hence, it was suggested that these rules require only the wage earner's election, without an additional obstacle and more paperwork.

Response: We have decided not to eliminate the rule for obtaining separate elections from auxiliary beneficiaries. As we previously explained in the NPRM, title II auxiliary beneficiaries who are living in a separate household and those in the wage earner's household will be asked to repay any overpayment resulting from an unfavorable decision on appeal. Since these beneficiaries may not be aware of the wage earner's election of continued benefits on their behalf, a separate statement of choice is required. Having to make a separate election does not place any added liability on the auxiliaries, rather it serves to give the auxiliaries the chance to choose for themselves whether or not they wish to receive continued benefits. Although the statute does not specifically mention auxiliary beneficiaries' electing to receive continued benefits, we believe our policy reflects a reasonable interpretation of the statute and is consistent with its intent which is to prevent disruption to recipients of benefits during appeal of a medical cessation determination.

Election of Continued Benefits on Behalf of New Auxiliary Beneficiaries

Comment: Two commenters requested that we clarify these rules with respect to the right of new auxiliary beneficiaries to receive continued benefits. In this context, new auxiliaries or "after-acquired auxiliaries" refers to those auxiliary beneficiaries who were not entitled and receiving benefits when the wage earner's benefits were initially ceased, but subsequently filed for benefits during the wage earner's appeal of the cessation. The commenters indicated that these rules incorrectly excluded new auxiliary beneficiaries, violating congressional intent and the "spirit" of the statute.

Response: We can appreciate this comment and the concern for these individuals. However, these rules do not extend the right to receive continued benefits to new (after-acquired) auxiliaries. "Benefit continuation," as provided by law, is intended to replace only those benefits received prior to the medical cessation. In other words, benefits would be *continued* for only those individuals who were recipients at the time of the cessation determination. After-acquired auxiliaries were not recipients of benefits at the time of the cessation determination.

Making a New Written Election at Each Level of Appeal

Comment: Two commenters objected to the rule to require a new election for continued benefits at each level of appeal. The commenters stated that this was an unnecessary burden for the wage earner and auxiliary beneficiaries, and proposed that we *automatically* continue benefits with the option to *decline* continued benefits on appeals, as 20 CFR 416.1336(b) currently provides during an appeal of an adverse title XVI action.

Response: The Act provides that the beneficiary may elect (i.e., choose) to receive continued benefits while pursuing an appeal of a medical cessation decision. To provide for automatic continuation of benefits without such election would be inconsistent with this statutory provision.

Administratively, we require a separate election at each level of appeal rather than have the claimant's first choice (election or waiver) remain in effect for all subsequent levels of appeal. This requirement affords a second chance to elect continued benefits to each claimant who waived or declined continued benefits when the reconsideration was requested, if he or she should lose the reconsideration appeal. Also, this provides another opportunity for us to discuss the nature of continued benefits and the claimant's responsibility to report changes that could affect payment of these benefits. This may be necessary since the claimant may believe that since he or she was sent a notice of cessation, he or she may not be under any obligation to report changes in circumstances that affect receipt of benefits. Further, this review is consistent with our responsibility to periodically advise the claimant of his or her rights and responsibilities.

Finally, submitting a new election at each level of appeal is not significantly burdensome, since the claimant must contact us if he or she wishes to request an appeal. Therefore, we have retained the provision to require that the claimant renew his or her election each time a new appeal is requested.

Statement To Decline or Waive Continued Benefits

Comment: One commenter objected to the rule to require a statement to waive or decline receipt of continued benefits during appeal. The commenter suggested that we delete all references to securing a waiver statement as the statute requires only an *election* statement.

Response: Although the statute provides for the right to *elect* continued benefits, we have also required that the beneficiary and/or auxiliary beneficiaries indicate in writing when they do not wish to receive continued benefits pending a decision on the medical cessation appeal. It is important that the beneficiary fully understand the effect of this action and remember the choice made, since a waiver of continued benefits is binding through that particular level of appeal.

Benefit Continuation for Title XVI "Blindness" Cessations

Comment: One commenter indicated that these rules do not specifically mention "blindness" cessations. Title XVI disability recipients are categorized as *blind* or *disabled*. It was suggested that these rules ensure that blind beneficiaries be able to elect continuation of benefits during cessation appeal.

Response: In the preamble to the NPRM for title XVI, we explained that under these rules title XVI beneficiaries whose benefits based on disability or blindness are stopped because of a medical cessation would be eligible to elect continued benefits during appeal of the cessation. However, we agree with this suggestion and we have made the appropriate changes. We amended the final rules in §§ 416.995 and 416.996 to read "disability or blindness" benefits based on a physical or mental impairment, rather than "benefits" based on a physical or mental impairment.

Regulatory Procedures

Executive Order 12291

The Secretary has determined that this is not a major rule under Executive Order 12291 because it will not have an annual effect on the economy of $100 million and will not cause increases in costs or prices. The program cost associated with these final regulations is estimated to be $60 million in fiscal year 1988. Therefore, a regulatory impact analysis is not required.

Paperwork Reduction Act

These regulations impose no new reporting or recordkeeping requirements

requiring Office of Management and Budget clearance.

Regulatory Flexibility Act

We certify that these regulations will not have a significant economic impact on a substantial number of small entities because they affect only individuals. Therefore, a regulatory flexibility analysis as provided in Pub. L. 96–354, the Regulatory Flexibility Act, is not required.

(Catalog of Federal Domestic Assistance Programs: No. 13.803 Social Security Retirement Insurance)

List of Subjects

20 CFR Part 404

Administrative practice and procedure; Death benefits; Disability benefits; Old-age, survivors and disability insurance.

20 CFR Part 416

Administrative practice and procedure, Aged, Blind, Disability benefits, Public assistance programs, Supplemental Security Income (SSI).

Dated: April 28, 1988.

Dorcas R. Hardy,

Commissioner of Social Security.

Approved: June 20, 1988.

Otis R. Bowen,

Secretary of Health and Human Services.

Subpart P of Part 404 of Chapter III of Title 20 of the Code of Federal Regulations is amended to read as follows:

PART 404—[AMENDED]

1. The authority citation for Subpart P is revised to read as follows:

Authority: Secs. 202, 205 (a), (b), and (d)-(h), 216(i), 221 (a) and (i), 222(c), 223, 225, and 1102 of the Social Security Act; 42 U.S.C. 402, 405 (a), (b), and (d)-(h), 416(i), 421(a) and (i), 422(c), 423, 425, and 1302; Sec. 505 (a) of Pub. L. 96–265, 94 Stat. 473, Secs. 2(d)(2), 5, 6, and 15 of Pub. L. 98–460, 98 Stat. 1797, 1801, 1802, and 1808, Sec. 9009 of Pub. L. 100–203, 100 Stat.

2. The text of existing § 404.1597 is redesignated paragraph (a) *General* and a new paragraph (b) is added to read as follows:

§ 404.1597 After we make a determination that you are not now disabled.

(a) *General.* * * *

(b) *If we make a determination that your physical or mental impairment(s) has ceased, did not exist, or is no longer disabling (Medical Cessation Determination).* If we make a determination that the physical or mental impairment(s) on the basis of which benefits were payable has ceased, did not exist, or is no longer disabling (a medical cessation determination, your benefits will stop. As described in paragraph (a) of this section, you will receive a written notice explaining this determination and the month your benefits will stop. The written notice will also explain your right to appeal if you disagree with our determination and your right to request that your benefits and the benefits, if any, of your spouse or children, be continued under § 404.1597a. For the purpose of this section, "benefits" means disability cash payments and/or Medicare, if applicable. The continued benefit provisions of this section do not apply to an initial determination on an application for disability benefits, or to a determination that you were disabled only for a specified period of time.

3. In Part 404, Subpart P, a new § 404.1597a is added to read as follows:

§ 404.1597a Continued benefits pending appeal of a medical cessation determination.

(a) *General.* If we determine that you are not entitled to benefits because the physical or mental impairment(s) on the basis of which such benefits were payable is found to have ceased, not to have existed, or to no longer be disabling, and you appeal that determination, you may choose to have your benefits continued pending reconsideration and/or a hearing before an administrative law judge on the disability cessation determination. For the purpose of this entire section, the election of "continued benefits" means the election of disability cash payments and/or Medicare, if applicable. You can also choose to have the benefits continued for anyone else receiving benefits based on your wages and self-employment income (and anyone else receiving benefits because of your entitlement to benefits based on disability). If you appeal a medical cessation under both title II and title XVI (a concurrent case), the title II claim will be handled in accordance with title II regulations while the title XVI claim will be handled in accordance with the title XVI regulations.

(b) *The provisions of this section are available for a limited time only.* (1) Benefits may be continued under this section only if the determination that your physical or mental impairment(s) has ceased, has never existed, or is no longer disabling is made on or after January 12, 1983 (or before January 12, 1983, and a timely request for reconsideration or a hearing before an administrative law judge is pending on that date), and before January 1, 1989.

(2) Benefits may be continued under this section only for months beginning with January 1983, or the first month for which benefits are no longer otherwise payable following our determination that your physical or mental impairment(s) has ceased, has never existed, or is no longer disabling, whichever is later.

(3) Continued payment of benefits under this section will stop effective with the earlier of: (i) The month before the month in which an administrative law judge's hearing decision finds that your physical or mental impairment(s) has ceased, has never existed, or is no longer disabling or the month before the month of a new administrative law judge decision (or final action by the Appeals Council on the administrative law judge's recommended decision) if your case was sent back to an administrative law judge for further action; or (ii) the month before the month no timely request for a reconsideration or a hearing before an administrative law judge is pending; or (iii) June 1989. These continued benefits may be stopped or adjusted because of certain events (such as work and earning or receipt of worker's compensation) which occur while you are receiving these continued benefits and affect your right to receive continued benefits.

(c) *Continuation of benefits for anyone else pending your appeal.* (1) When you file a request for reconsideration or hearing before an administrative law judge on our determination that your physical or mental impairment(s) has ceased, has never existed, or is no longer disabling, or your case has been sent back (remanded) to an administrative law judge for further action, you may also choose to have benefits continue for anyone else who is receiving benefits based on your wages and self-employment income (and for anyone else receiving benefits because of your entitlement to benefits based on disability), pending the outcome of your appeal.

(2) If anyone else is receiving benefits based on your wages and self-employment income, we will notify him or her of the right to choose to have his or her benefits continue pending the outcome of your appeal. Such benefits can be continued for the time period in paragraph (b) of this section only if he or she chooses to have benefits continued and you also choose to have his or her benefits continued.

(d) *Statement of choice.* When you or another party request reconsideration under § 404.908(a) or a hearing before an administrative law judge under § 404.932(a) on our determination that your physical or mental impairment(s)

has ceased, has never existed, or is no longer disabling, or if your case is sent back (remanded) to an administrative law judge for further action, we will explain your right to receive continued benefits and ask you to complete a statement specifying which benefits you wish to have continued pending the outcome of the reconsideration or hearing before an administrative law judge. You may elect to receive only Medicare benefits during appeal even if you do not want to receive continued disability benefits. if anyone else is receiving benefits based on your wages and self-employment income (or because of your entitlement to benefits based on disability), we will ask you to complete a statement specifying which benefits you wish to have continued for them, pending the outcome of the request for reconsideration or hearing before an administrative law judge. If you request appeal but you do not want to receive continued benefits, we will ask you to complete a statement declining continued benefits indicating that you do not want to have your benefits and those of your family, if any, continued during the appeal.

(e) *Your spouse's or children's statement of choice.* If you request, in accordance with paragraph (d) of this section, that benefits also be continued for anyone who had been receiving benefits based on your wages and self-employment, we will send them a written notice. The notice will explain their rights and ask them to complete a statement either declining continued benefits, or specifying which benefits they wish to have continued, pending the outcome of the request for reconsideration or a hearing before an administrative law judge.

(f) *What you must do to receive continued benefits pending notice of our reconsideration determination.* (1) If you want to receive continued benefits pending the outcome of your request for reconsideration, you must request reconsideration and continuation of benefits no later than 10 days after the date you receive the notice of our initial determination that your physical or mental impairment(s) has ceased, has never existed, or is no longer disabling. Reconsideration must be requested as provided in § 404.909, and you must request continued benefits using a statement in accordance with paragraph (d) of this section.

(2) If you fail to request reconsideration and continued benefits within the 10-day period required by paragraph (f)(1) of this section, but later ask that we continue your benefits pending a reconsidered determination, we will use the rules in § 404.911 to determine whether good cause exists for your failing to request benefit continuation within 10 days after receipt of the notice of the initial cessation determination. If you request continued benefits after the 10-day period, we will consider the request to be timely and will pay continued benefits only if good cause for delay is established.

(g) *What you must do to receive continued benefits pending an administrative law judge's decision.* (1) To receive continued benefits pending an administrative law judge's decision on our reconsideration determination, you must request a hearing and continuation of benefits no later than 10 days after the date you receive the notice of our reconsideration determination that your physical or mental impairment(s) has ceased, has never existed, or is no longer disabling. A hearing must be requested as provided in § 404.933, and you must request continued benefits using a statement in accordance with paragraph (d) of this section.

(2) If you request continued benefits pending an administrative law judge's decision but did not request continued benefits while we were reconsidering the initial cessation determination, your benefits will begin effective the month of the reconsideration determination.

(3) If you fail to request continued payment of benefits within the 10-day period required by paragraph (g)(1) of this section, but you later ask that we continue your benefits pending an administrative law judge's decision on our reconsidered determination, we will use the rules as provided in § 404.911 to determine whether good cause exists for your failing to request benefit continuation within 10 days after receipt of the reconsideration determination. If you request continued benefits after the 10-day period, we will consider the request to be timely and will pay continued benefits only if good cause for delay is established.

(h) *What anyone else must do to receive continued benefits pending our reconsideration determination or an administrative law judge's decision.* (1) When you or another party (see §§ 404.908(a) and 404.932(a)) request a reconsideration or a hearing before an administrative law judge on our medical cessation determination or when your case is sent back (remanded) to an administrative law judge for further action, you may choose to have benefits continue for anyone else who is receiving benefits based on your wages and self-employment income. An eligible individual must also choose whether or not to have his or her benefits continue pending your appeal by completing a separate statement of election as described in paragraph (e) of this section.

(2) He or she must request continuation of benefits no later than 10 days after the date he or she receives notice of termination of benefits. He or she will then receive continued benefits beginning with the later of January 1983, or the first month for which benefits are no longer otherwise payable following our initial or reconsideration determination that your physical or mental impairment(s) has ceased, has never existed, or is no longer disabling. Continued benefits will continue until the earlier of: (i) The month before the month in which an administrative law judge's hearing decision finds that your physical or mental impairment(s) has ceased, has never existed, or is no longer disabling or the month before the month of the new administrative law judge decision (or final action is taken by the Appeals Council on the administrative law judge's recommended decision) if your case was sent back to an administrative law judge for further action; or (ii) the month before the month no timely request for a reconsideration or a hearing before an administrative law judge is pending; or (iii) June 1989. These continued benefits may be stopped or adjusted because of certain events (such as work and earnings or payment of workers compensation) which occur while an eligible individual is receiving continued benefits and affect his or her right to receive continued benefits.

(3) If he or she fails to request continuation of benefits within the 10-day period required by this paragraph, but requests continuation of benefits at a later date, we will use the rules as provided in § 404.911 to determine whether good cause exists for his or her failure to request continuation of benefits within 10 days after receipt of the notice of termination of his or her benefits. His or her late request will be considered to be timely and we will pay him or her continued benefits only if good cause for delay is established.

(4) If you choose not to have benefits continued for anyone else who is receiving benefits based on your wages and self-employment income, pending the appeal on our determination, we will not continue benefits to him or her.

(i) *What you must do when you case is remanded to an administrative law judge.* If we send back (remand) your case to an administrative law judge for futher action under the rules provided in § 404.977, and the administrative law

judge's decision or dismissal order issued on you medical cessation appeal is vacated and is no longer in effect, continued benefits are payable pending a new decision by the administrative law judge or final action is taken by the Appeals Council on the administrative law judge's recommended decision.

(1) If you (and anyone else receiving benefits based on your wages and self-employment income or because of your disability) previously elected to receive continued benefits pending the administrative law judge's decision, we will automatically start these same continued benefits again. We will send you a notice telling you this, and that you do not have to do anything to have these same benefits continued until the month before the month the new decision of order of dismissal is issued by the administrative law judge or until the month before the month the Appeals Council takes final action on the administrative law judge's recommended decision. These benefits will begin again with the first month of nonpayment based on the prior administrative law judge hearing decision or dismissal order. Our notice explaining reinstatement of continued benefits will also tell you to report to us any changes or events that affect your receipt of benefits.

(2) After we automatically reinstate your continued benefits as described in paragraph (h)(1) of this section, we will contact you to determine if any adjustment is required to the amount of continued benefits payable due to events that affect the right to receive benefits involving you, your spouse and/or children. If you have returned to work, we will request additional information about this work activity. If you are working, your continued benefits will not be stopped while your appeal of the medical cessation of disability is still pending unless you have completed a trial work period and are engaging in substantial gainful activity. In this event, we will suspend your continued benefits. If any other changes have occurred which would require a reduction in benefits amounts, or nonpayment of benefits, we will send an advance notice to advise of any adverse change before the adjustment action is taken. The notice will also advise you of the right to explain why these benefits should not be adjusted or stopped. You will also receive a witten notice of our determination. The notice will also explain your right to reconsideration if you disagree with this determination.

(3) If the final decision on your appeal of your medical cessation is a favorable one, we will send you a written notice in which we will advise you of your right to benefits, if any, before you engaged in substantial gainful activity and to reentitlement should you stop performing substantial gainful activity. If you disagree with our determination, you will have the right to appeal this decision.

(4) If the final decision on your appeal of your medical cessation is an unfavorable one (the cessation is affirmed), you will also be sent a written notice advising you of our determination, and your right to appeal if you think we are wrong.

(5) If you (or the others receiving benefits based on your wages and self-employment income or because of your disability) did not previously elect to have benefits continued pending an administrative law judge decision, and you now want to elect continued benefits, you must request to do so no later than 10 days after you receive our notice telling you about continued benefits. If you fail to request continued benefits within the 10-day period required by paragraph (f)(1) of this section, but later ask that we continue your benefits pending an administrative law judge remand decision, we will use the rules in § 404.911 to determine whether good cause exists for your failing to request benefit continuation within 10 days after receipt of the notice telling you about benefit continuation. We will consider the request to be timely and will pay continued benefits only if good cause for delay is established. If you make this new election, benefits may begin with the month of the order sending (remanding) your case back to the administrative law judge. Before we begin to pay you continued benefits as described in paragraph (h)(1) of this section we will contact you to determine if any adjustment is required to the amount of continued benefits payable due to events which may affect your right to benefits. If you have returned to work, we will request additional information about this work activity. If you are working, continued benefits may be started and will not be stopped because of your work while your appeal of the medical cessation of your disability is still pending unless you have completed a trial work period and are engaging in substantial gainful activity. If any changes have occurred which establish a basis for not paying continued benefits or a reduction in benefit amount, we will send you a notice explaining the adjustment or the reason why we cannot pay continued benefits. The notice will also explain your right to reconsideration if you disagree with this determination. If the final decision on your appeal of your medical cessation is a favorable one, we will send you a written notice in which we will advise you of your right to benefits, if any, before you engaged in substantial gainful activity and to reentitlement should you stop performing substantial gainful activity. If you disagree with our determination, you will have the right to appeal this decision. If the final decision on your appeal of your medical cessation is an unfavorable one (the cessation is affirmed), you will also be sent a written notice advising you of our determination, and your right to appeal if you think we are wrong.

(6) If a court orders that your case be sent back to us (remanded) and your case is sent to an administrative law judge for further action under the rules provided in § 404.983, the administrative law judge's decision or dismissal order on your medical cessation appeal is vacated and is no longer in effect. Continued benefits are payable to you and anyone else receiving benefits based on your wages and self-employment income or because of your disability pending a new decision by the administrative law jduge or final action is taken by the Appeals Council on the administrative law judge's recommended decision. In these court-remanded cases reaching the administrative law judge, we will follow the same rules provided in paragraphs (i) (1), (2), (3), (4) and (5) of this section.

(j) *Responsibility to pay back continued benefits.* (1) If the final decision of the Secretary affirms the determination that you are not entitled to benefits, you will be asked to pay back any continued benefits you receive. However, as described in the overpayment recovery and waiver provisions of Subpart F of this Part, you will have the right to ask that you not be required to pay back the benefits. You will not be asked to pay back any Medicare benefits you received during the appeal.

(2) Anyone else receiving benefits based on your wages and self-employment income (or because of your disability) will be asked to pay back any continued benefits he or she received if the determination that your physical or mental impairment(s) has ceased, has never existed, or is no longer disabling, is not changed by the final decision of the Secretary. However, he or she will have the right to ask that he or she not be required to pay them back, as described in the overpayment recovery and waiver provisions of Subpart F of this Part. He or she will not be asked to

pay back any Medicare benefits he or she received during the appeal.

(3) Waiver of recovery of an overpayment resulting from the continued benefits paid to you or anyone else receiving benefits based on your wages and self-employment income (or because of your disability) may be considered as long as the determination was appealed in good faith. It will be assumed that such appeal is made in good faith and, therefore, any overpaid individual has the right to waiver consideration *unless* such individual fails to cooperate in connection with the appeal, e.g., if the individual fails (without good reason) to give us medical or other evidence we request, or to go for a physical or mental examination when requested by us, in connection with the appeal.

Subpart I of Part 416 of Title 20 of the Code of Federal Regulations is amended to read as follows:

PART 416—[AMENDED]

1. The authority citation for Subpart I is revised to read as follows:

Authority: Secs. 1102, 1614(a), 1619, and 1631(a) and (d)(1), and 1633 of the Social Security Act; 42 U.S.C. 1302, 1382c(2), 1382h, 1383(2) and (d)(1), and 1383b; Secs. 2, 5, 6, and 15 of Pub. L. 98-460, 98 Stat. 1794, 1801, 1802, and 1808.

2. Section 416.995 is added to read as follows:

§ 416.995 If we make a determination that your physical or mental impairment(s) has ceased, did not exist or is no longer disabling (Medical Cessation Determination).

If we make a determination that the physical or mental impairment(s) on the basis of which disability or blindness benefits were payable has ceased, did not exist or is no longer disabling (a medical cessation determination), your benefits will stop. You will receive a written notice explaining this determination and the month your benefits will stop. The written notice will also explain your right to appeal if you disagree with our determination and your right to request that your disability or blindness benefits be continued under § 416.996. The continued benefit provisions of this section do not apply to an initial determination on an application for disability or blindness benefits or to a determination that you were disabled or blind only for a specified period of time.

3. In Part 416, Subpart I, a new § 416.996 is added to read as follows:

§ 416.996 Continued disability or blindness benefits pending appeal of a medical cessation determination.

(a) *General.* If we determine that you are not eligible for disability or blindness benefits because the physical or mental impairment(s) on the basis of which such benefits were payable is found to have ceased, not to have existed, or to no longer be disabling, and you appeal that determination, you may choose to have your disability or blindness benefits, including special cash benefits or special SSI eligibility status under §§ 416.261 and 416.264, continued pending reconsideration and/or a hearing before an administrative law judge on the disability/blindness cessation determination.

If you appeal a medical cessation under both title II and title XVI (a concurrent case), the title II claim will be handled in accordance with title II regulations while the title XVI claim will be handled in accordance with the title XVI regulations.

(1) Benefits may be continued under this section only if the determination that your physical or mental impairment(s) has ceased, has never existed, or is no longer disabling is made after October 1984.

(2) Continued benefits under this section will stop effective with the earlier of: (i) The month before the month in which an administrative law judge's hearing decision finds that your physical or mental impairment(s) has ceased, has never existed, or is no longer disabling or the month before the month of a new administrative law judge decision (or final action is taken by the Appeals Council on the administrative law judge's recommended decision) if your case was sent back to an administrative law judge for further action; or (ii) the month before the month in which no timely request for reconsideration or administrative law judge hearing is pending after notification of our initial or reconsideration cessation determination. These benefits may be stopped or adjusted because of certain events (such as, change in income or resources or your living arrangements) which may occur while you are receiving these continued benefits, in accordance with § 416.1336(b).

(b) *Statement of choice.* If you or another party (see § 416.1432(a)) request reconsideration under § 416.1409 or a hearing before an administrative law judge in accordance with § 416.1433 on our determination that your physical or mental impairment(s) has ceased, has never existed, or is no longer disabling, or if your case is sent back (remanded) to an administrative law judge for further action, we will explain your right to receive continued benefits and ask you to complete a statement indicating that you wish to have benefits continued pending the outcome of the reconsideration or administrative law judge hearing. If you request reconsideration and/or hearing but you do not want to receive continued benefits, we will ask you to complete a statement declining continued benefits indicating that you do not want to have your benefits continued during the appeal. A separate election must be made at each level of appeal.

(c) *What you must do to receive continued benefits pending notice of our reconsideration determination.* (1) If you want to receive continued benefits pending the outcome of your request for reconsideration, you must request reconsideration and continuation of benefits no later than 10 days after the date you receive the notice of our initial determination that your physical or mental impairment(s) has ceased, has never existed, or is no longer disabling. Reconsideration must be requested as provided in § 416.1409, and you must request continued benefits using a statement in accordance with paragraph (b) of this section.

(2) If you fail to request reconsideration and continued benefits within the 10-day period required by paragraph (c)(1) of this section, but later ask that we continue your benefits pending a reconsidered determination, we will use the rules in § 416.1411 to determine whether good cause exists for your failing to request benefit continuation within 10 days after receipt of the notice of the initial cessation determination. If you request continued benefits after the 10-day period, we will consider the request to be timely and will pay continued benefits only if good cause for delay is established.

(d) *What you must do to receive continued benefits pending an administrative law judge's decision.* (1) To receive continued benefits pending an administrative law judge's decision on our reconsideration determination, you must request a hearing and continuation of benefits no later than 10 days after the date you receive the notice of our reconsideration determination that your physical or mental impairment(s) has ceased, has never existed, or is no longer disabling. A hearing must be requested as provided in § 416.1433, and you must request continued benefits using a statement in accordance with paragraph (b) of this section.

(2) If you fail to request a hearing and continued benefits within the 10-day period required under paragraph (d)(1) of this section, but you later ask that we continue your benefits pending an administrative law judge's decision, we will use the rules as provided in

§ 416.1411 to determine whether good cause exists for your failing to request benefit continuation within 10 days after receipt of the reconsideration determination. If you request continued benefits after the 10-day period, we will consider the delayed request to be timely and will pay continued benefits only if good cause for delay is established.

(e) *What you must do when your case is remanded to an administrative law judge.* If we send back (remand) your case to an administrative law judge for further action under the rules provided in § 416.1477, and the administrative law judge's decision or dismissal order issued on your medical cessation appeal is vacated and is no longer in effect, you may be eligible for continued benefits pending a new decision by the administrative law judge or final action by the Appeals Council on the administrative law judge's recommended decision.

(1) When your case is remanded to an administrative law judge, and you have elected to receive continued benefits, we will contact you to update our file to verify that you continue to meet the nonmedical requirements to receive benefits based on disability or blindness. To determine your correct payment amount, we will ask you to provide information about events such as changes in living arrangements, income, or resources since our last contact with you. If you have returned to work, we will request additional information about this work activity. Unless your earnings cause your income to be too much to receive benefits, your continued benefits will be paid while your appeal of the medical cessation of your disability/blindness is still pending, unless you have completed a trial work period and are engaging in substantial gainful activity. If you have completed a trial work period and previously received continued benefits you may still be eligible for special cash benefits under § 416.261 or special SSI eligibility status under § 416.264. (Effective July 1, 1987, a title XVI individual is no longer subject to a trial work period or cessation based on engaging in substantial gainful activity in order to be eligible for special benefits under § 416.261 or special status under § 416.264.) If we determine that you no longer meet a requirement to receive benefits, we will send you a written notice. The written notice will explain why your continued benefits will not be reinstated or will be for an amount less than you received before the prior administrative law judge's decision. The notice will also explain your right to reconsideration under § 416.1407, if you disagree. If you request a reconsideration, you will have the chance to explain why you believe your benefits whould be reinstated or should be at a higher amount. If the final decision on your appeal of your medical cessation is a favorable one, we will send you a written notice in which we will advise you of any right to reentitlement to benefits including special benefits under § 416.261 or special status under § 416.264. If you disagree with our determination on your appeal, you will have the right to appeal this decision.

(2) After we verify that you meet all the nonmedical requirements to receive benefits as stated in paragraph (e)(1) of this section, and if you previously elected to receive continued benefits pending the administrative law judge's decision, we will start continued benefits again. We will send you a notice telling you this. You do not have to complete a request to have these same benefits continued through the month before the month the new decision or order of dismissal is issued by the administrative law judge or through the month before the month the Appeals Council takes final action on the administrative law judge's recommended decision. These continued benefits will begin again with the first month of nonpayment based on the prior administrative law judge hearing decision or dismissal order. Our notice explaining continued benefits will also tell you to report to us any changes or events that affect your receipt of benefits.

(3) When your case is remanded to an administrative law judge, and if you did *not* previously elect to have benefits continued pending an administrative law judge decision, we will send you a notice telling you that if you want to change that election, you must request to do so no later than 10 days after you receive our notice. If you do make this new election, and after we verify that you meet all the nonmedical requirements as explained in paragraph (e)(1) of this section, benefits will begin with the month of the Appeals Council remand order and will continue as stated in paragraph (e)(2) of this section.

(4) If a court orders that your case be sent back to us (remanded) and your case is sent to an administrative law judge for further action under the rules provided in § 416.1483, the administrative law judge's decision or dismissal order on your medical cessation appeal is vacated and is no longer in effect. You may be eligible for continued benefits pending a new decision by the administrative law judge or final action by the Appeals Council on the administrative law judge's recommended decision. In these court-remanded cases reaching the administrative law judge, we will follow the same rules provided in paragraph (e)(1), (2), and (3) of this section.

(f) *What if your benefits are suspended, reduced or terminated for other reasons.* If we determine that your payments should be reduced, suspended or terminated for reasons not connected with your medical condition (see Subpart M of Regulations No. 16) benefits may be continued under the procedure described in § 416.1336.

(g) *Responsibility to pay back continued benefits.* (1) If the final decision of the Secretary affirms the determination that you are not entitled to benefits, you will be asked to pay back any continued benefits you receive. However, you will have the right to ask that you not be required to pay back the benefits as described in the overpayment recovery and waiver provisions of Subpart E of this Part.

(2) Waiver of recovery of an overpayment resulting from continued benefits to you may be considered as long as the cessation determination was appealed in good faith. We will assume that your appeal was made in good faith and, therefore, you have the right to waiver consideration *unless* you fail to cooperate in connection with the appeal, e.g., if you fail (without good reason) to give us medical or other evidence we request, or to go for a physical or mental examination when requested, in connection with the appeal.

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Food and Drug Administration

21 CFR Parts 74, 81, and 82

[Docket No. 87N-0182]

Color Additives; D&C Red No. 36

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is permanently listing D&C Red No. 36 for general use in drugs and cosmetics, except for use in the area of the eye. This action responds to a petition filed by the Cosmetic, Toiletry and Fragrance Association (CTFA). This rule will remove D&C Red No. 36 from the provisional list of color additives for general use in drugs and cosmetics.

DATES: Effective September 2, 1988, except as to any provisions that may be stayed by the filing of proper objections; objections and hearing requests by September 1, 1988.

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

FOR FURTHER INFORMATION CONTACT: Patricia J. McLaughlin, Center for Food Safety and Applied Nutrition (HFF–330), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202–472–5740.

SUPPLEMENTARY INFORMATION:

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I. INTRODUCTION

In 1960, Congress passed the Color Additive Amendents (the amendments). In Certified Color Mfrs. Ass'n v. Mathews, 543 F.2d 284, 286–287 (D.C. Cir. 1976), the United States Court of Appeals for the District of Columbia Circuit explained the purpose of this legislation:

> The Color Additive Amendments of 1960 reflect a Congressional and administrative response to the need in contemporary society for a scientifically and administratively sound basis for determining the safety of artificial color additives, widely used for coloring food, drugs, and cosmetics. The Amendments reflect a general unwillingness to allow widespread use of such products in the absence of scientific information on the effect of these products on the human body. The previously used system had some glaring deficiencies, and the 1960 Amendments were designed to overcome them. * * *
>
> (Footnotes omitted.)

As amended, section 706(a) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 376(a)) provides that a color additive will be deemed unsafe for use in food, drugs, cosmetics, and some medical devices unless FDA has issued a regulation permanently listing that color additive for its intended use. FDA will issue such a regulation only if it has been presented with data that establish with reasonable certainty that no harm will result from the use of the color additive. The burden of presenting such data is on the person who is seeking approval of the use of the additive.

In passing the amendments, Congress provided for the provisional listing of the color additives in use at that time, pending completion of the scientific investigations needed for a determination about the safety of these additives (section 203(b) of the transitional provisions of the amendments, Title II, Pub. L. 86–618, 74 Stat. 404–407 (21 U.S.C. 376, note)). Section 81.1 (21 CFR 81.1) of the agency's color additive regulations enumerates those color additives that are still provisionally listed. Among them is D&C Red No. 36 for use in drugs and cosmetics.

II. Regulatory History

A. The Color Additive

D&C Red No. 36, a reddish orange dye of the monoazo class, is identified in *Chemical Abstracts* as 1-[(2-chloro-4-nitrophenyl)azo]-2-naphthalenol (CAS Reg. No. 2814–77–9). It is identified in § 82.1336 (21 CFR 82.1336) as 1-(*o*-chloro-*p*-nitrophenylazo)-2-naphthol. Other names include Colour Index Pigment Red 4 (C.I. No. 12085), Permanent red R, and Permaton red.

The color additive is manufactured by diazotization of 2-chloro-4-nitrobenzenamine in acid medium and coupling with 2-naphthalenol in acid medium. D&C Red No. 36 is insoluble in water and alcohols.

D&C Red No. 36 is used in a few ingested drug preparations and a few externally applied drugs. It is used in cosmetics such as lipstick, skin care, and makeup preparations.

The color additive D&C Red No. 36 has been in use for many years. Because D&C Red No. 36 was in use at the time the Color Additive Amendments of 1960 were enacted, it was provisionally listed for drug and cosmetic use in the **Federal Register** of October 12, 1960 (25 FR 9759).

In the **Federal Register** of October 12, 1960 (25 FR 9759), the agency established temporary tolerances for the provisional listing of certain color additives for use in lipsticks, ingested drugs, and other products subject to ingestion, such as mouthwashes and dentifrices. These temporary tolerances, based on preliminary usage information and toxicity data available at that time, were intended to limit use of the color additive to safe levels until all required toxicity tests were completed. A publication on April 14, 1970 (35 FR 6045) added D&C Red No. 36 to the temporary tolerances list. The agency has revised the temporary tolerances over the years as additional data became available, the latest revision being on August 21, 1979 (44 FR 48964). D&C Red No. 36 usage is limited under the temporary tolerances in 21 CFR 81.25 to 3.0 percent by weight in lip cosmetics, to 1.70 milligrams (mg) per daily dose of drugs, and to amounts consistent with good manufacturing practice in mouthwashes and dentifrices.

Between 1960 and February 4, 1977, FDA postponed the closing date for the provisional listing of D&C Red No. 36 several times. The agency granted these postponements in response to requests for additional time to complete the scientific investigations necessary for listing the color additive under section 706 of the act.

B. The Color Additive Petition

In the **Federal Register** of August 6, 1973 (38 FR 21199), FDA announced that a petition (CAP 9C0089) for the permanent listing of D&C Red No. 36 as a color additive for use in drugs and cosmetics had been filed by the Toilet Goods Association, Inc. (now the Cosmetic, Toiletry and Fragrance Association (CTFA)), c/o Hazleton Laboratories, Inc., P.O. Box 30, Falls Church, VA 22046 (now 9200 Leesburg Turnpike, Vienna, VA 22180).

The petition was filed under section 706 of the act (21 U.S.C. 376). A later notice (41 FR 9584; March 5, 1976) amended the notice of filing of the petition to include the additional use of D&C Red No. 36 in cosmetics intended for use in the area of the eye.

FDA notified the petitioner by letters dated May 14, 1976, August 15, 1977, and August 4, 1978, of the need for data to support the use of D&C Red No. 36 in cosmetics intended for use in the area of the eye. In a fourth letter, dated October 24, 1978, FDA advised the petitioner to consider withdrawing the portion of the petition that sought approval of the use of D&C Red No. 36 in cosmetics intended for use in the area of the eye

because it appeared that the required data from eye-area studies were not readily available.

The petitioner has not submitted the required data on eye-area use. Therefore, FDA considers that portion of the petition that relates to the listing of D&C Red No. 36 for eye-area use to be withdrawn without prejudice in accordance with the provisions of § 71.4 (21 CFR 71.4). Use of D&C Red No. 36 in the area of the eye has never been covered by the provisional listing of this color additive.

The petitioner for CAP 9C0089 requested a regulation permitting up to 1.7 mg of D&C Red No. 36 per daily dose in ingested drugs, up to 3 percent of the color additive in cosmetics subject to ingestion, and use in amounts consistent with current good manufacturing practice in other cosmetics and topically applied drugs. These uses and limitations are the same as the current uses and limitations under the provisional listing.

The petitioner has provided data concerning current use of the color additive in cosmetics which show a wide range of use levels within the limitation of three percent in lip cosmetics.

The petitioner has not provided information, however, on use levels in drugs. The agency searched its new drug application files for data on current use levels of the color additive and found three products, all tablets, that contain the color additive. The largest amount used in any product is 18 micrograms (μg) per tablet.

Section 706(b)(7)(B) states that if a tolerance limitation is necessary to assure that a proposed use of a color additive is safe, the Secretary of Health and Human Services (the Secretary) shall not fix a tolerance limitation at a level higher that he finds to be reasonably required to accomplish the intended physical or other technical effect. Based on current use in ingested drugs, the agency believes that an intended coloring effect can be accomplished in any future product at a level below that requested by the petitioner. The agency concludes that a limitation of 1.0 mg of D&C Red No. 36 per daily dose of an ingested drug is sufficient and more appropriate than the 1.7 mg originally requested by the petitioner. The agency is willing to reconsider this limitation if further information is presented in a petition to amend the regulation.

C. Toxicological Testing of D&C Red No. 36

In the Federal Register of February 4, 1977 (42 FR 6992), FDA published revised regulations that required new chronic toxicity studies on 31 color additives, including D&C Red No. 36, as a condition for continued provisional listing for ingested uses. FDA required the new toxicity studies because the earlier toxicity studies that the petitioners had submitted to support the safe use of these color additives were deficient in several respects. FDA described these deficiencies in the Federal Register of September 23, 1976 (41 FR 41860):

1. Many of the studies were conducted using groups of animals, i.e., control and those fed the color additive, that are too small to permit conclusions to be drawn today on the chronic toxicity or carcinogenic potential of the color. The small number of animals used does not, in and of itself, cause this result, but when considered together with the other deficiencies in this listing, does do so. By and large, the studies used 25 animals in each group; today FDA recommends using at least 50 animals per group.

2. In a number of the studies, the number of animals surviving to and meaningful age was inadequate to permit conclusions to be drawn today on the chronic toxicity or carcinogenic potential of the color additives tested.

3. In a number of the studies, an insufficient number of animals was reviewed histologically.

4. In a number of the studies, and insufficient number of tissues was examined in those animals selected for pathology.

5. In a number of the studies, lesions or tumors detected under gross examination were not examined microscopically.

In the February 4, 1977, rule, FDA postponed the closing date for the provisional listing of the color additives until January 31, 1981, for the completion of required toxicity studies.

In the Federal Register of March 27, 1981 (46 FR 18954), FDA established the closing date of September 30, 1984, for the completion of the evaluation of D&C Red No. 36. Because its review of the data and of the scientific and legal issues raised on this color additive took longer than the agency anticipated, FDA had to extend the provisional listing of the color additive on a number of occasions. On June 26, 1985 (50 FR 26377), FDA proposed a longer extension of the provisional listing for several color additives, including D&C Red No. 36, to provide for the submission of additional information.

On September 4, 1985 (50 FR 35783), the agency published a final rule extending the provisional listing for D&C Red No. 36 until March 3, 1987. On July 30, 1986, CTFA submitted additional information, which is discussed below. To provide time for the completion of its review and preparation of the appropriate documents, the agency further extended the closing date by publication in the Federal Register and established the current closing date of August 30, 1988, on July 1, 1988 (53 FR 25127).

D. Citizen Petition Filed by Public Citizen Health Research Group

On December 17, 1984, the Public Citizen Health Research Group (Public Citizen) petitioned FDA to ban the use of the color additives that remained provisionally listed. On January 22, 1985, Public Citizen filed a complaint in the District Court for the District of Columbia seeking the same relief. Public Citizen alleged that, by continuing to provisionally list the color additives, including D&C Red No. 36, FDA had violated the Color Additive Amendments to the act, as well as those provisions of the Administrative Procedure Act (5 U.S.C. 706(1)) that pertain to unreasonable delay of agency action. Public Citizen sought to enjoin FDA from using the provisional list or any other means to allow the marketing of the provisionally listed color additives.

On June 21, 1985, the Commissioner of Food and Drugs sent a detailed response to the petition to Public Citizen. In his response, the Commissioner carefully reviewed and discussed the arguments and information submitted in support of the petition. The Commissioner concluded that the public health would not be endangered by the continued marketing of the color additives while scientific, legal, and policy issues were addressed and, therefore, the Commissioner denied the petition.

On February 13, 1986, Judge Stanley S. Harris granted FDA's motion for summary judgment and dismissed Public Citizen's complaint. *Public Citizen, et al.* v. *DHHS*, et al., No. 85–1573 (D.D.C. February 13, 1986). Public Citizen's appeal of this decision was denied by the U.S. Court of Appeals, No. 86–5150 (October 23, 1987).

III. Evaluation of Toxicological Tests With D&C Red No. 36

A. Statutory Safety Requirements

Under section 706(b)(4) of the act (21 U.S.C. 376(b)(4)), the so-called "general safety clause" for color additives, a color additive cannot be listed for a particular use unless the data presented to FDA establish that it is safe for that use. Although what is meant by "safe" is not explained in the general safety clause, the legislative history makes clear that this word is to have the same meaning for color additives as for food additives. (See H. Rept. 1761, "Color Additive Amendments of 1960,"

Committee on Interstate and Foreign Commerce, 86th Cong., 2d Sess. 11 (1960).) The Senate report on the Food Additives Amendment of 1958 states:

> The concept of safety used in this legislation involves the question of whether a substance is hazardous to the health of man or animal. Safety requires proof of a reasonable certainty that no harm will result from the proposed use of an additive. It does not—and cannot—require proof beyond any possible doubt that no harm will result under any conceivable circumstances.
>
> This was emphasized particularly by the scientific panel which testified before the subcommittee. The scientists pointed out that it is impossible in the present state of scientific knowledge to establish with complete certainty the absolute harmlessness of any chemical substance.

S. Rept. 2422, "Food Additives Amendment of 1958," Committee on Labor and Public Welfare, 85th Cong., 2d Sess. 6 (1958).

FDA has incorporated this concept of safety into its color additive regulations. Under 21 CFR 40.3(i), a color additive is "safe" if "there is convincing evidence that establishes with reasonable certainty that no harm will result from the intended use of the color additive." Therefore, the general safety clause prohibits approval of a color additive if doubts about the safety of the additive for a particular use are not resolved to an acceptable level in the minds of competent scientists.

The general safety clause is buttressed by the anticancer or Delaney clause, section 706(b)(5)(B) of the act, which provides that a color additive shall be deemed to be unsafe "for any use which will or may result in ingestion of all or part of such additive, if the additive is found by the Secretary to induce cancer when ingested by man or animal, or if it is found by the Secretary, after tests which are appropriate for the evaluation of the safety of additives for use in food, to induce cancer in man or animal," and it shall be deemed unsafe "for any use which will not result in ingestion of any part of such additive, if, after tests which are appropriate for the evaluation of the safety of additives for such use, or after other relevant exposure of man or animal to such additive, it is found by the Secretary to induce cancer in man or animal" (21 U.S.C 376(b)(5)(B)). Recently, the United States Court of Appeals for the District of Columbia held that, once FDA finds that a color additive "induces" cancer, the Delaney clause denies FDA the authority to approve the color. See Public Citizen, et al. v. Young, et al. (D.C. Cir. No. 86–1548, October 23, 1987).

B. Earlier Studies

Among the earlier toxicity studies on the color additive, submitted by the petitioner before 1977, were acute oral toxicity studies in rats and mice; short-term feeding studies in dogs, mice, and rats; chronic feeding studies in dogs and rats; a one-generation and a three-generation reproduction study in rats; teratology studies in rats and rabbits; short-term dermal studies in rabbits; and a chronic skin-painting study in mice. Only minor toxic effects were seen in the pre-1977 feeding studies, and the agency concluded that the color additive could be used safely until the completion of further testing.

From the earlier studies with D&C Red No. 36 submitted by the petitioner, the agency has evaluated the dermal safety of the color additive. The data from these studies demonstrate that D&C Red No. 36 is nonirritating when applied repeatedly to skin. Furthermore, D&C Red No. 36 was not found to be carcinogenic when it was applied periodically to the skin of mice over their lifetimes. No adverse effects in reproduction and teratology studies were seen.

Only fragmentary information on genotoxicity of D&C Red No. 36 is available from the scientific literature. While some in vitro tests using different strains of the bacterium *Salmonella typhimurium* were claimed to be positive with D&C Red No. 36, other were negative. No information is available from several other kinds of the tests that are normally relied upon for making judgments about genotoxicity. Given the incomplete and inconsistent nature of the available data from the in vitro testing, and the fact that FDA considers the full complement of animal toxicity studies to provide more pertinent information on safety than these in vitro tests, FDA finds no basis for further concern.

C. New Studies

Reports were submitted to FDA on the new chronic toxicity studies in rats and mice required by the February 4, 1977, order. These new studies represent current state-of-the-art toxicological testing. The protocols for these studies have benefited from knowledge of deficiencies in previously conducted carcinogenesis bioassays and other chronic toxicity protocols. The use of large numbers of animals of both sexes, pilot studies to determine maximum tolerated dosages, two control groups (thereby effectively doubling the number of controls), and in utero exposure in one of the two species tested, significantly increase the power of these tests to detect treatment-related effects.

Chronic studies were conducted for the petitioner by Litton Bionetics, Inc., Kensington, MD. The color additive fed to the animals in these studies contained 97 to 98 percent total color.

In the new chronic mouse study, D&C Red No. 36 was fed to Charles River CD–1 mice at dietary levels of 0, 0.05, 1.0, and 5.0 percent for a maximum duration of 106 weeks. Sixty females and 60 males were used for each dietary level and in each of 2 control groups. The 5.0 percent dose mice, compared to the controls, showed increased spleen weights in males and increased kidney and liver weights in females. There was also an increased incidence of extramedullary hematopoiesis in spleens of male mice fed 5.0 percent. No adverse effects were seen at the 1.0 or 0.05 percent levels. Based on the evaluation of the results of this chronic mouse toxicity study, the agency has determined that D&C Red No. 36 did not cause cancer in Charles River DC–1 mice.

In one chronic study, Sprague-Dawley (Charles River CD) rats were fed dietary levels of 0, 0.01, 0.025, and 0.1 percent of D&C Red No. 36 for 28 to 29 months. These rats were exposed in utero and during lactation by the feeding of the same dietary levels of D&C Red No. 36 to their parents. Seventy females and 70 males were used for each dietary level and in each of 2 control groups.

A related second study was performed with the same strain of rats, in which the animals, similarly exposed in utero and during lactation, were fed either 0 or 2.0 percent of D&C Red No. 36. FDA requested that this feeding level be added to provide testing at the highest level compatible with completion of the test. The agency's analysis of data from earlier studies suggested that this maximum level of 2.0 percent could be used without jeopardizing completion of the study. The females were sacrificed at 120 weeks of feeding and the males at 127 weeks. There were 70 animals of each sex in each group.

Male rats fed 0.1 percent or 2.0 percent of the color additive showed gastrointestinal tract irritation. Rats fed 2.0 percent showed adverse effects associated with anemia, including decreased erythrocyte counts, decreased hematocrits, decreased hemoglobin levels, and increased reticulocyte counts. Both males and females of this dose group showed a marked increase in parenchymal fibrosis of the spleen compared to their controls. Both sexes also had other splenic changes, that is,

increased organ weights, capsular thickening, capsular fibrous tags, extramedullary hematopoiesis,and pigmentation. One male rat fed 2.0 percent of the color additive had a fibrosarcoma in the spleen. Based on the evaluation of the results of both chronic rat studies, the agency has determined that D&C Red No. 36 did not cause cancer in Sprague-Dawley rats. No adverse effects were seen at the 0.025 percent level or below.

D. The Issue of Whether More Testing Is Necessary

1. *Statement of the issue.* In a notice of proposed rulemaking (50 FR 26377; June 26, 1985), FDA stated that the chronic testing of both D&C Red No. 33 and D&C Red No. 36 did not reveal a carcinogenic effect in the animals in which they were tested. There were increased incidences of splenic lesions that are unusual, but not neoplastic, in Sprague-Dawley rats fed high doses of either color additive; and there were a few splenic tumors with D&C Red No. 33. With D&C Red No. 36, there were higher incidences of parenchymal fibrosis, enlargement, capsular thickening, capsular fibrous tags, and extramedullary hematopoiesis of the spleen. With D&C Red No. 33, there were higher incidences of parenchymal fibrosis, enlargement, capsular fibrosis, and (in males) fatty metamorphosis of the spleen. There was one splenic fibrosarcoma with D&C Red No. 36, and in the 140 rats fed D&C Red No. 33 there were three fibrosarcomas, one capsule hemangioma, and one fibroma.

In the proposal, FDA stated that if it had only results of the testing of D&C Red No. 33 and D&C Red No. 36 before it, the agency would in all likelihood have approved the use of these color additives because the observed effects, standing alone, did not raise any safety concerns. However, the proliferative effects seen in the testing of D&C Red No. 33 and D&C Red No. 36 indicated to FDA that there was a similarity between these color additives and certain other compounds, such as D&C Red No. 9, that have been shown to be carcinogenic. When D&C Red No. 9 was fed to Sprague-Dawley rats, a few rare tumors and numerous rare lesions of the spleen were produced. These rats had the same kinds of nonneoplastic lesions as with D&C Red No. 33 and D&C Red No. 36. When D&C Red No. 9 was fed to Fischer 344 rats, however, numerous rare tumors of the spleen were produced, and D&C Red No. 9 was found to be a splenic carcinogen in this strain.

The association between the nonneoplastic splenic lesions and the occurrence of tumors suggested to FDA that the nonneoplastic lesions may be precursors or indicators of the start of a carcinogenic process. This similarity of effects in the Sprague-Dawley strain of rats between D&C Red No. 33 and D&C Red No. 36, on the one hand, and D&C Red No. 9, on the other, raised concerns that D&C Red No. 33 and D&C Red No. 36 may be carcinogenic in the Fischer 344 rat. To clarify the significance of this similarity of effects, FDA proposed that new studies be conducted on D&C Red No. 33 and D&C Red No. 36 (50 FR 26377). The agency stated that it believed such studies would be the best way to resolve the ambiguities about these color additives that have been created by the results of the testing with D&C Red No. 9 and other compounds in Fischer 344 rats. The agency also noted, however, that it would reconsider the issue of additional testing if data and information were received that showed that such testing was not necessary.

In an earlier approach to this problem, FDA, in 1984, had asked a panel of experts from the National Toxicology Program (NTP) to examine the data on D&C Red No. 33 (but not on D&C Red No. 36) in conjunction with the data on D&C Red No. 9. The NTP panel agreed with agency scientists that there were similarities between the nonneoplastic splenic effects produced by D&C Red No. 33 and D&C Red No. 9. They also thought that the evidence was insufficient to demonstrate a carcinogenic effect from D&C Red No. 33 treatment. The NTP panel recommended that further research be done to gain a better understanding of "the mechanisms of the toxic action of this particular family of compounds in the spleen of rats." The NTP panel did not consider the level of human exposure or whether this color additive posed an actual health concern.

Comments from the petitioner, on the 1985 proposal, suggested that conducting a risk assessment based on the comparative toxicities of D&C Red No. 9, D&C Red No. 33, and D&C Red No. 36 in Sprague-Dawley rats would show that additional testing would not be necessary. The petitioner later submitted a lengthy comparative assessment on the relative splenic toxicities of these three color additives.

2. *Resolution of the issue.* The agency carefully considered the petitioner's comments and concluded that if the splenic toxicity associated with the use of these color additives were produced by the major components of the colors, then it should be possible to evaluate the health concern raised by the color additives using the data from the studies involving the Sprague-Dawley rat and the D&C Red No. 9 study in the Fischer 344 rat. FDA concluded that knowledge of the relative toxicities of these additives would enable the agency to make a determination about the safety of D&C Red No. 33 and D&C Red No. 36 without requiring new long-term studies. See 50 FR 35788; September 4, 1985.

FDA has conducted its own comparative evaluation based on the relative toxicities of D&C Red No. 9 and D&C Red No. 36 (Ref. 1). The assessment shows that even assuming that D&C Red No. 36 were carcinogenic if subjected to further testing in a strain of rat other than the Sprague-Dawley, the theoretical, upper-bound, lifetime risk associated with exaggerated use exposure to the compound would be extremely small, that is, less than $8X10^{-8}$ (Ref. 2).

In light of this comparative evaluation, the agency has reconsidered whether additional chronic testing of D&C Red No. 36 is necessary to establish the safety of the compound. When deciding whether to require additional testing for a compound under review, the agency routinely follows the principle articulated in its toxicology guidelines that "the degree of effort expended in reducing uncertainty about the safety of an additive ought to relate in some concrete way to the likelihood that the substance poses a potential for health risk to the public * * *." (Ref. 3, p. 10). By showing that the splenic toxicity presents no reasonable likelihood of harm to the public, the assessment removes the agency's initial concern that additional testing of the additive was necessary. In fact, in light of the assessment, to require additional testing would be pointless from a public health perspective and contrary to agency practice. Accordingly, the agency concludes that the existing carcinogenicity studies concerning D&C Red No. 30 are adequate for the evaluation of this color additive.

E. Evidence for the Safety of D&C Red No. 36

1. *Adequacy of the submitted studies to demonstrate safety.* The series of studies completed by the petitioner and discussed in sections B and C fulfills the usual requirement to demonstrate safety for a color additive that will be ingested or applied dermally. The studies were properly conducted and are satisfactory by today's standards of toxicity testing. Agency scientists have found no adverse effects related to treatment with the color additive in doses up to the highest dose of 12.5 milligrams per kilogram (mg/kg) in the teratology studies or the reproduction studies. The

long-term studies in dogs, mice, and rats showed no effect levels at 0.125 percent (31 mg/kg) in dogs, 1.0 percent (1,500 mg/kg) in mice, and 0.025 percent (12.5 mg/kg) in rats. Thus, the safety studies established a no-observed-effect-level of 12.5 mg/kg body weight or higher in all species tested.

2. *Negative results of carcinogenicity studies.* As discussed above, the agency believes that these studies are adequate to determine the carcinogenicity of D&C Red No. 36. No increased incidence of any type of tumor, in any of the many tissues examined, in either sex, in any dose group, in any strain of any species tested, by either ingestion or skin application, in any of the studies, was associated with D&C Red No. 36 treatment. Thus, the agency concludes that the completed studies show that D&C Red No. 36 does not induce cancer in the strains of animals tested under the conditions of these studies. As a consequence, the Delaney clause is not applicable to this color additive.

3. *Conclusion.* For the foregoing reasons, the agency considers that the direct testing of D&C Red No. 36 shows that the color additive is safe for use in drugs and cosmetics. The agency must still consider, however, any risk posed by the possibility of a carcinogenic impurity in D&C Red No. 36.

IV. Potential Risk From a Carcinogenic Impurity

During the safety review, the agency developed a new analytical methodology for examining the color additive for the presence of trace level impurities. Analyses by this new methodology found an impurity, 1-[(2,4-dinitrophenyl) azo]-2-naphthalenol, in commercial, certified batches of D&C Red No. 36 (Ref. 4). This chemical can form as an impurity during the process of manufacturing D&C Red No. 36. This chemical is the main component of D&C Orange No. 17, which was found to be carcinogenic (48 FR 14045; April 1, 1983). To ensure that any risk from a carcinogenic impurity is not overlooked, the agency is considering the carcinogenicity of D&C Orange No. 17 to be attributable to its main component. In evaluating the risk from this chemical as a carcinogenic impurity of D&C Red No. 36, the agency used estimates of carcinogenic potency for D&C Orange No. 17 together with estimates of exposure to the impurity for users of D&C Red No. 36.

Because of its concerns about the impurity, the agency has analyzed representative samples from 27 certified batches of the color additive (Ref. 4). Detectable amounts of the impurity were found in 15 commercial batches of D&C Red No. 36, ranging from a trace amount to 0.45 percent. The average impurity level was 0.13 percent. From 0.02 to 0.45 percent was found in the samples used for chronic studies in rats and mice.

A. Prior Actions by FDA

The current testing of D&C Red No. 36 has not proven it to be a carcinogen, and, thus, the anticancer clause does not apply to it. Nevertheless, the agency must still consider whether the color additive, in light of the fact that it may contain a carcinogenic impurity, may be safely used in drugs and cosmetics.

The agency is using the same approach for this situation concerning the impurity in D&C Red No. 36 as it used to examine the risk associated with the presence of minor carcinogenic impurities in other color additives (50 FR 35774; September 4, 1985 and 51 FR 41765; November 19, 1986). These color additives had not been shown to be carcinogenic by appropriate bioassays. FDA concluded that the use of each of these color additives, within prescribed specifications, is safe.

The agency's position is supported by *Scott* v. *FDA*, 728 F. 2d 322 (6th Cir. 1984). That case involved a challenge to FDA's decision to approve the use of D&C Green No. 5 (47 FR 24278; June 4, 1982), which contained a carcinogenic chemical but has not itself been shown to cause cancer. Relying heavily on the reasoning in the agency's decision to list D&C Green No. 5, the U.S. Court of Appeals for the Sixth Circuit rejected the challenge to FDA's action and affirmed the listing regulations.

The risk assessment procedure used to estimate risk from the impurity has two aspects: (1) Assessment of the probable exposure to the impurity from the proposed use of the additive, and (2) extrapolation of carcinogenic potency observed in the animal bioassay with the impurity to the conditions of probable human exposure.

B. Exposure to the Carcinogenic Impurity in D&C Red No. 36

The agency has estimated the maximum risk from exposure to the carcinogenic impurity that may result from use of D&C Red No. 36 in drugs and cosmetics. The lifetime exposure to D&C Red No. 36 is not expected to exceed 90 μg/person/day internally for the high user. With this estimate, the agency has examined the likely exposure to the carcinogenic impurity in D&C Red No. 36.

In adopting specifications for D&C Red No. 36, FDA considered the concentration of the carcinogenic impurity that was present in the certified batches of the color additive that the agency recently surveyed and in the batches used for the toxicological testing.

The agency believes that a specification of 0.5 percent 1-[(2,4-dinitrophenyl)azo]-2-naphthalenol is readily obtainable under good manufacturing practice and will assure safe use of D&C Red No. 36. By multiplying the high user exposure for the color additive itself (90 μg/person/day) by the specification, FDA estimates that the high user systemic exposure to the impurity will be less than 0.45 μg/person/day (Ref. 5). Systemic exposure to the impurity from dermal application will be negligible compared to ingestion because the majority of exposure to this color additive results from its ingested uses and because only a small fraction of a dermally applied product is likely to be absorbed.

C. Risk Estimations for the Impurity

The second part of the evaluation of the risk presented by the presence of the impurity is an extrapolation from the actual compound-related incidence of tumors found in animal bioassays, under conditions of exaggerated exposure, to the conditions of much lower probable exposure for humans.

The agency has used estimates of carcinogenic potency for D&C Orange No. 17 and estimates of exposure to the carcinogenic impurity for high users of D&C Red No. 36 (with the carcinogenic impurity at the maximum concentration allowed by the specification) to estimate risk for exposure to the impurity.

FDA evaluated chronic studies with D&C Orange No. 17 in rats and mice and found that the color additive is carcinogenic to the liver of rats and mice when administered in the diet (51 FR 28331; August 7, 1986). The Color Additive Scientific Review Panel reviewed D&C Orange No. 17 as well as D&C Red No. 9 and other color additives (51 FR 43877). From the panel's report, the agency estimated the potency of D&C Orange No. 17. Using this as the carcinogenic potency for the impurity in D&C Red No. 36, it then estimated that the lifetime risk of cancer, from systemic exposure (0.45 μg/person/day) to the impurity in products containing D&C Red No. 36, is less than 3.2×10^{-9} (3.2 in 1 billion) (Ref. 5).

The agency concludes that this risk from the impurity is negligible. FDA has determined that the use of batches of D&C Red No. 36 that meet the specifications adopted by this rule is safe.

V. References

The following references have been placed on file at the Dockets Management Branch (address above) and may be seen in that office between 9 a.m. and 4 p.m., Monday through Friday.

1. Memorandum, McLaughlin, P.J., to File for D&C Red No. 36, "Comparative Evaluation for Additional Safety Considerations, D&C Red No. 36," June 3, 1988.
2. Memorandum, Quantitative Risk Assessment Committee, "Carcinogenicity Risk Analysis for D&C Red No. 33 and D&C Red No. 36, Including a Discussion of ENVIRON/CTFA's Risk Analysis and Incorportion of Recommendations of the Color Additive Scientific Review Panel," March 12, 1987.
3. FDA, Bureau of Foods, "Toxicological Principles for the Safety Assessment of Direct Food Additives and Color Additives Used in Food," 1982.
4. Memorandum, Scher, A.L., to G.L. McCowin, "Color Additive Petition No. 9C0089—D&C Red No. 36. D&C Orange No. 17 in D&C Red No. 36," May 12, 1986.
5. Memorandum, Quantitative Risk Assessment Committee, "Upper Bound Risks from Carcinogenic Impurities in D&C Red No. 33 and D&C Red No. 36," March 31, 1987.

VI. Conclusions

The agency concludes that D&C Red No. 36 is safe under the conditions of use set forth below for general use in drugs and cosmetics, and that certification is necessary for the protection of the public health. In reaching this conclusion, the agency evaluated a full battery of animal feeding and dermal studies adequate to demonstrate the safety of a color additive. Based on all relevant data, including the comparative splenic toxicity evaluation, the agency concludes that there is a reasonable certainty of no harm from use of the additive and that further testing is unnecessary and of no benefit to the public health.

The final toxicity study reports, interim reports, and the agency's evaluations of these studies are on file at the Dockets Management Branch (address above) and may be seen in that office between 9 a.m. and 4 p.m., Monday through Friday.

The agency concludes that it is necessary to have limitations on the levels of D&C Red No. 36 that may be used in drugs and cosmetics to ensure safe use. As discussed above, the agency is establishing a limit for drug use that is less than that requested because available data show that higher levels are not necessary.

In the past, all of the provisionally listed color additives that were limited by the temporary tolerances (21 CFR 81.25) were permitted for mouthwash and dentifrice use, including D&C Red No. 36. However, this color additive is insoluble in water and in alcohol, which makes it unsuitable for these uses and the agency has no evidence that it has been used in such products. The petitioner has not specifically requested mouthwash and dentifrice uses. Therefore, the regulations below do not provide for use of D&C Red No. 36 in mouthwashes or dentifrices.

The petitioner has not submitted the required data for eye-area use. Therefore, FDA now considers that portion of the petition that included the permanent listing of D&C Red No. 36 for eye-area use to be withdrawn without prejudice in accordance with provisions of 21 CFR 71.4 Use of D&C Red No. 36 in the area of the eye has never been covered by provisional listing. The agency's listing of a color additive for general use in drugs and cosmetics does not encompass eye-area use.

The agency is describing the color additive in this regulation according to the current Chemical Abstracts nomenclature, which differs somewhat from the nomenclature FDA previously used.

The Agency concludes that it is necessary to include in the listing regulations for D&C Red No. 36 a brief description of its manufacturing process to ensure the safety of the color additive. FDA has included that description to define as closely as possible the color additive that has been tested and shown to be safe. The agency is providing this description because use of a different manufacturing process is likely to produce different impurities that have not been considered in establishing specifications for this color additive. The agency is not able at this time to set specifications that would control the presence of all such impurities. FDA is willing to consider petitions for alternative manufacturing processes, but those petitions should contain evidence that demonstrates that those processes will not produce impurities that will make use of the color additive unsafe.

The agency has contracted with the National Academy of Sciences/National Research Council (NAS/NRC) to develop appropriate specifications for color additives for use in food as part of the Food Chemicals Codex. Similarly, appropriate specifications for color additives for use in drugs and cosmetics will be developed following the general guidelines used by NAS/NRC in its evaluation of color additives used in food. The agency concludes that specifying, through a general description, the manufacturing process in the regulations for this color additive will provide an adequate assurance of safety until suitable specifications can be developed.

The agency finds that because of the presence, or possible presence, of a carcinogenic impurity in the color additive, a specification for this impurity is necessary to protect the public health. Specifications are included in the regulation also for other impurities to identify the color additive more precisely and to ensure that the sample tested toxicologically adequately represents future batches.

In the past, D&C lakes have been permitted to be prepared from uncertified straight color additives. The resulting lakes would subsequently be certified. However, to assure that all lakes meet the specification limits for the carcinogenic impurity and that the use of lakes remains consistent with the evaluation, the agency is establishing the requirement that all lakes of D&C Red No. 36 be prepared from certified batches of the straight color additive. Accordingly, 21 CFR 82.1336 is amended to reflect this requirement.

This order does not permanently list D&C Red No. 36 lakes. FDA published a notice of intent in the **Federal Register** of June 22, 1979 (44 FR 36411), which discussed the additional information that the agency believes is needed before final regulations on lakes can be issued. FDA intends to publish proposed regulations governing the use of color additives in lakes in the **Federal Register** in the near future and concludes that the listing of color additives for use in lakes can best be implemented by general regulations. D&C Red No. 36 lakes will, therefore, continue to be provisionally listed for coloring drugs and cosmetics under 21 CFR Parts 81 and 82.

The agency has determined under 21 CFR 25.24(b)(3) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

VII. Objections

Any person who will be adversely affected by this regulation may at any time on or before September 1, 1988, file with the Dockets Management Branch (address above) written objections thereto. Each objection shall be

separately numbered, and each numbered objection shall specify with particularity the provisions of the regulation to which objection is made and the grounds for the objection. Each numbered objection on which a hearing is requested shall specifically so state. Failure to request a hearing for any particular objection shall constitute a waiver of the right to a hearing on that objection. Each numbered objection for which a hearing is requested shall include a detailed description and analysis of the specific factual information intended to be presented in support of the objection in the event that a hearing is held. Failure to include such a description and analysis for any particular objection shall constitute a waiver of the right to a hearing on the objection. Three copies of all documents shall be submitted and shall be identified with the docket number found in brackets in the heading of this document. Any objections received in response to the regulation may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday. FDA will publish notice of the objections that the agency has received or lack thereof in the **Federal Register**.

List of Subjects

21 CFR Part 74

Color additives, Cosmetics, Drugs, Medical devices.

21 CFR Part 81

Color additives, Cosmetics, Drugs.

21 CFR Part 82

Color additives, Cosmetics, Drugs.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, Parts 74, 81, and 82 are amended as follows:

PART 74—LISTING OF COLOR ADDITIVES SUBJECT TO CERTIFICATION

1. The authority citation for 21 CFR Part 74 continues to read as follows:

Authority: Secs. 701, 706, 52 Stat. 1055–1056 as amended, 74 Stat. 399–407 as amended (21 U.S.C. 371, 376); 21 CFR 5.10.

2. Section 74.1336 is added to Subpart B to read as follows:

§ 74.1336 D&C Red No. 36.

(a) *Identity.* (1) The color additive D&C Red No. 36 is 1-[(2-chloro-4-nitrophenyl)azo]-2-naphthalenol (CAS Reg. No. 2814–77–9). The color additive is manufactured by diazotization of 2-chloro-4-nitrobenzenamine in acid medium and coupling with 2-naphthalenol in acid medium.

(2) Color additive mixtures for drug use made with D&C Red No. 36 may contain only those diluents that are suitable and that are listed in Part 73 of this chapter as safe for use in color additive mixtures for coloring drugs.

(b) *Specifications.* D&C Red No. 36 shall conform to the following specifications and shall be free from impurities other than those named to the extent that such impurities may be avoided by current good manufacturing practice:

Volatile matter at 135 °C (275 °F), not more than 1.5 percent.
Matter insoluble in toluene, not more than 1.5 percent.
2-Chloro-4-nitrobenzenamie, not more than 0.3 percent.
2-Naphthalenol, not more than 1 percent.
2,4-Dinitrobenzenamine, not more than 0.02 percent.
1-[(2,4-Dinitrophenyl)azo]-2-naphthalenol, not more than 0.5 percent.
4-[(2-Chloro-4-nitrophenyl)azo]-1-naphthalenol, not more than 0.5 percent.
1-[(4-Nitrophenyl)azo]-2-naphthalenol, not more than 0.3 percent.
1-[(4-Chloro-2-nitrophenyl)azo]-2-naphthalenol, not more than 0.3 percent.
Lead (as Pb), not more than 20 parts per million.
Arsenic (as As), not more than 3 parts per million.
Mercury (as Hg), not more than 1 parts per million.
Total color, not less than 95 percent.

(c) *Uses and restrictions.* The color additive D&C Red No. 36 may be safely used for coloring ingested drugs, other than mouthwashes and dentifrices, in amounts not to exceed 1.0 milligram per daily dose of the drug. D&C Red No. 36 may be safely used for coloring externally applied drugs in amounts consistent with current good manufacturing practice.

(d) *Labeling requirements.* The label of the color additive and any mixtures prepared therefrom intended solely or in part for coloring purposes shall conform to the requirements of § 70.25 of this chapter.

(e) *Certification.* All batches of D&C Red No. 36 shall be certified in accordance with regulations in Part 80 of this chapter.

3. Section 74.2336 is added to Subpart C to read as follows:

§ 74.2336 D&C Red No. 36.

(a) *Identity and specifications.* The color additive D&C Red No. 36 shall conform in identity and specifications to the requirements of § 74.1336 (a)(1) and (b).

(b) *Uses and restrictions.* The color additive D&C Red No. 36 may be safely used for coloring cosmetic lip products in amounts not to exceed 3 percent total color by weight of the finished cosmetic products. D&C Red No. 36 may be safely used for coloring externally applied cosmetics in amounts consistent with current good manufacturing practice.

(c) *Labeling requirements.* The label of the color additive shall conform to the requirements of § 70.25 of this chapter.

(d) *Certification.* All batches of D&C Red No. 36 shall be certified in accordance with regulations in Part 80 of this chapter.

PART 81—GENERAL SPECIFICATIONS AND GENERAL RESTRICTIONS FOR PROVISIONAL COLOR ADDITIVES FOR USE IN FOODS, DRUGS, AND COSMETICS

4. The authority citation for 21 CFR Part 81 continues to read as follows:

Authority: Secs. 701, 706, 52 Stat. 1055–1056 as amended, 74 Stat. 399–407 as amended (21 U.S.C. 371, 376); Title II, Pub. L. 86–618; sec. 203, 74 Stat. 404–407 (21 U.S.C. 376, note); 21 CFR 5.10.

§ 81.1 [Amended]

5. In § 81.1 *Provisional lists of color additives,* the entry for "D&C Red No. 36" is removed from the table in paragraph (b).

§ 81.25 [Amended]

6. In § 81.25 *Temporary tolerances,* the entries for "D&C Red No. 36" are removed from the tables in paragraphs (a)(1) and (c)(1) and the words "and D&C Red No. 36" are removed from paragraph (b)(1)(i).

§ 81.27 [Amended]

7. In § 81.27 *Conditions of provisional listing,* the entry for "D&C Red No. 36" is removed from the table in paragraph (d) introductory text.

PART 82—LISTING OF CERTIFIED PROVISIONALLY LISTED COLORS AND SPECIFICATIONS

8. The authority citation for 21 CFR Part 82 continues to read as follows:

Authority: Secs. 701, 706, 52 Stat. 1055–1056 as amended, 74 Stat. 399–407 as amended (21 U.S.C. 371, 376); 21 CFR 5.10.

9. Section 82.1336 is revised to read as follows:

§ 82.1336 D&C Red No. 36.

(a) The color additive D&C Red No. 36 shall conform in identity and

specifications to the requirements of § 74.1336 (a)(1) and (b) of this chapter.

(b) All lakes of D&C Red No. 36 shall be manufactured from previously certified batches of the straight color additive.

Dated: July 26, 1988.

John M. Taylor,

Associate Commissioner for Regulatory Affairs.

[FR Doc. 88-17360 Filed 8-1-88; 8:45 am]

BILLING CODE 4160-01-M

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 110

[CCGD5 87-037]

Anchorage Ground; Baltimore Harbor, MD

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

SUMMARY: The Coast Guard is amending the boundaries of Anchorages 2, 3, and 6 in Baltimore Harbor. These changes were requested by the Maryland Port Administration to assist navigation into Dundalk Marine Terminal and Seagirt Marine Terminal.

EFFECTIVE DATE: September 1, 1988.

FOR FURTHER INFORMATION CONTACT: Mr. John Walters (804) 398-6230.

SUPPLEMENTARY INFORMATION: On Friday, November 6, 1987, the Coast Guard published a notice of proposed rulemaking in the **Federal Register** for these regulations (52 FR 42683). Interested persons were requested to submit comments and one comment was received.

Drafting Information

The drafters of this notice are Mr. John R. Walters, Project Officer and Captain Robert J. Reining, Project Attorney, Fifth Coast Guard District.

Discussion of Comments

The only comment received was from the Coast Guard's Marine Safety Office in Baltimore, Maryland. They questioned the references to Lazaretto Point in the notice of proposed rulemaking. They stated that while this reference is in the current regulation, there is no distinct geographic feature that can be identified as Lazaretto Point. They recommended that the reference be eliminated. Based on this comment and the fact that the references to both Lazaretto Point and Sollers Point do not directly relate to the description of the anchorages, the references have been eliminated in the final rule.

Economic Assessment and Certification

This rule is considered to be non-major under Executive Order 12291 on Federal Regulation and non-significant under Department of Transportation regulatory policies and procedures (44 FR 11034; February 26, 1979). The economic impact of this rule is expected to be so minimal that a full regulatory evaluation is unnecessary. The Association of Maryland Pilots has indicated that the change in the boundaries will not affect the capacity of the anchorages. Since the impact of this rule is expected to be minimal, the Coast Guard certifies that it will not have a significant economic impact on a substantial number of small entities.

List of Subjects in 33 CFR Part 110

Anchorage grounds.

Final Regulations

In consideration of the foregoing Part 110 of Title 33, Code of Federal Regulations is amended as follows:

PART 110—[AMENDED]

1. The authority citation for Part 110 continues to read as follows:

Authority: 33 U.S.C. 417, 2030, 2035 and 2071; 49 CFR 1.46 and 33 CFR 1.05.1(g).

2. In § 110.158(a), paragraphs (2), (3), and (6) revised to read as follows:

§ 110.158 Baltimore Harbor, MD.

(a) * * *

(2) *Anchorage No. 2, general anchorage.* In the Patapsco River beginning at latitude 39°15'01.43" N., longitude 76°33'43.39" W.; thence southeast to latitude 39°14'49.09" N., longitude 76°33'30.37" W.; thence northeast to latitude 39°14'58.49" N., longitude 76°33'15.63" W.; thence southeast to latitude 39°14'40.5" N., longitude 76°32'57" W.; thence northeast to latitude 39°14'50" N., longitude 76°32'41.5" W.; thence northwest to latitude 39°15'17.2" N., longitude 76°33'10.0" W.; thence northwest to latitude 39°15'18.95" N., longitude 76°33'15.46" W.; thence west to latitude 39°15'18.90" N., longitude 76°33'25.63" W.; thence southwest to latitude 39°15'08.17" N., longitude 76°33'38.79" W., thence southwest to point of beginning. A vessel with a draft of over 24 feet may not use the anchorage. No vessel may remain in this anchorage for more than 72 hours without a written permit from the Captain of the Port.

(3) *Anchorage No. 3, general anchorage.* In the Patapsco River beginning at latitude 39°14'49.09" N, longitude 76°33'30.37" W; thence southeast to latitude 39°14'14.70" N, 76°32'54.10" W; thence northeast to latitude 39°14'24.10" N, longitude 76°32'39.36" W; thence northwest to latitude 39°14'58.49" N, longitude 76°33'15.63" W; thence southwest to point of beginning. A vessel with a draft of less than 24 feet may not use the anchorage. No vessel may remain in this anchorage for more than 72 hours without a written permit from the Captain of the Port.

* * * * *

(6) *Anchorage No. 6, general anchorage.* In the Patapsco River approximately 2,000 yards west of Sollars Point beginning at latitude 39°13'42.58" N, longitude 76°32'20.24" W thence southeast to latitude 39°13'20" N., longitude 76°31'56" W., thence northeast to latitude 39°13'34" N., longitude 76°31'33.5" W., thence northwest to latitude 39°14'02" N., longitude 76°32'02.9" W., thence southwest to latitude 39°13'50.5" N., longitude 76°32'20" W., thence south to point of beginning. A vessel with a draft over 20 feet may not use this general anchorage. No vessel may remain in this anchorage for more than 72 hours without a written permit from the Captain of the Port.

* * * * *

Dated: July 19, 1988.

W. J. Ecker,

Captain, U.S. Coast Guard, Acting Commander, Fifth Coast Guard District.

[FR Doc. 88-17350 Filed 8-1-88; 8:45 am]

BILLING CODE 4910-14-M

33 CFR Part 117

[CGD5-88-28]

Drawbridge Operation Regulations; Potomac River, District of Columbia

AGENCY: Coast Guard, DOT.

ACTION: Temporary regulation with request for comments.

SUMMARY: At the request of the Cianbro Corporation, contractors for the District of Columbia, Department of Public Works, the Coast Guard is issuing additional temporary regulations that govern the operation of the drawbridge across the Potomac River, mile 103.8, between Alexandria, Virginia, and Oxon Hill, Maryland, to extend the times that the draw remains closed to vessel traffic. The purpose of this temporary regulation is to allow the Cianbro Corporation to replace parts of the drawspan during periods of light vehicular traffic congestion. This action provides for the reasonable needs of

navigation. Because of the length of time this temporary rule will be in effect, the Coast Guard requests comments on the rule. The temporary rule may be amended based on the comments received.

DATES: This temporary rule is effective from August 6, 1988, until November 20, 1988, unless amended or terminated before that date. Comments on this temporary rule must be received by September 2, 1988.

ADDRESSES: Comments should be mailed to Commander (ob), Fifth Coast Guard District, 431 Crawford Street, Portsmouth, Virginia 23704–5004. The comments and other materials referenced in this notice will be available for inspection and copying at the above address, Room 507, between 8 a.m. and 4 p.m., Monday through Friday, except holidays. Comments may also be hand-delivered to this address.

FOR FURTHER INFORMATION CONTACT: Ann B. Deaton, Bridge Administrator, Fifth Coast Guard District, at (804) 398–6222.

SUPPLEMENTARY INFORMATION: Interested persons are invited to participate in this rulemaking by submitting written views, comments, data, and arguments. Persons submitting comments should include their names and addresses, identify the bridge, and give reasons for concurrence with or any recommended change in the temporary rule. The Commander, Fifth Coast Guard District, will evaluate all communications received and determine whether the temporary rule should be changed in light of the comments received.

Drafting Information

The drafters of this notice are Linda L. Gilliam, Project Officer, and CAPT Robert J. Reining, Project Attorney.

Discussion of Temporary Rule

On January 21, 1988, the Cianbro Corporation, contractors for the District of Columbia, Department of Public Works, requested the drawbridge regulations be amended to restrict openings during the weekends from August 1 through November 30, 1988. The contractor requested that the drawbridge remain closed from 6:00 p.m. on Saturdays to 12:30 p.m. on Sundays. During these times, half of the channel will be blocked to vessel traffic. After 12:30 p.m. on Sundays, the repair work on the drawspan would stop, and the bridge would resume opening on signal until the existing weekday rush hour restrictions begin on Monday morning. However, they indicated no work would be done on the weekends of September 3, November 12, and November 26, 1988. Therefore, this temporary rule ends on November 20, 1988, rather than November 30, 1988, as requested.

The closure will permit the Cianbro Corporation to replace grating and support stringers of the drawspan, which are in poor condition. In order for this work to be accomplished, the bridge must remain in the closed position. Robinson Terminals in Alexandria, Virginia, the major commercial waterway user on the Potomac River, was consulted concerning the weekend closures. They stated that one or two vessels may require passage through the drawbridge during the four month timeframe that the weekend repair work would be conducted.

Subsequently, Cianbro Corporation indicated that in addition to leaving the draw closed, they would also need to block half of the channel under the drawspan with construction equipment during the repairs. They will need five hours advance notice to move the barges out of the channel for the passage of vessels which are not able to transmit through the other half of the main channel or the flanking channels. The Coast Guard then consulted with the tour boat industry on the Potomac, who indicated they would have some problems with the proposed schedule.

On June 23, 1988, a meeting between Cianbro Corporation, D.C. Department of Public Works, Robinson Terminals, a representative of the tour boat industry, and the Coast Guard was held at Cianbro Corporation's office located in Alexandria, Virginia, to discuss the weekend closures and to work out a schedule agreeable to everyone. During the course of this meeting, D.C. Department of Public Works advised Cianbro Corporation that the repair schedule they requested was not the schedule approved by DC. The original request would have closed the bridge from 9:30 p.m. on Fridays to 7:30 a.m. on Saturdays, and from 8:00 pm. on Saturdays to 10:30 a.m. on Sundays. Robinson Terminals and the tour boat representative had no objections to this new schedule. This new schedule was forwarded to the Coast Guard for approval by Cianbro Corporation's letter dated June 24, 1988.

The other primary waterway users who require drawbridge openings are recreational sailboat operators. They have not been consulted. While sailboat operators would be inconvenienced and their use of the Potomac River restricted by the temporary rule, a larger public interest will be served by repairing this vital highway link.

While scheduling problems by the contractor precluded processing this action in time to permit publication of a notice of proposed rulemaking, the public is being afforded an opportunity to comment. Because of the critical need for repairs to this bridge, good cause exists for publishing this temporary rule without publication of a notice of proposed rulemaking. Delaying this rule for publication of a notice of proposed rulemaking would be contrary to the public interest. However, the opportunity to make comments on the rule provides the public with a reasonable opportunity to submit additional issues for consideration. The public should be aware that other regulatory actions effecting the bridge have taken place during the last six months.

A temporary rule governing the operation of the Woodrow Wilson Memorial Bridge was issued on February 14, 1988, and published in the **Federal Register** on March 4, 1988, (52 FR 6984). That temporary rule was issued for repair work on the bridge and required a one hour advance notice between the hours of 9:00 a.m. to 4:00 p.m., Monday through Friday. That temporary rule is effective between February 29, 1988, and November 30, 1988.

On March 17, 1988, a notice of temporary deviation from drawbridge regulations with request for comments was published in the **Federal Register** (53 FR 8848). That temporary deviation amended the February 14, 1988, temporary rule. The temporary deviation was issued at the request of the City of Alexandria, Virginia; Fairfax County, Virginia; and Congressman Frank R. Wolf of Virginia, and it extended the hours the drawbridge remains closed to most vessel traffic during the morning and evening rush hours. The temporary deviation which expired on June 15, 1988, was issued in conjunction with a notice of proposed rulemaking that was also published in the **Federal Register** on March 17, 1988 (53 FR 8850).

A final rule establishing new permanent regulations for the draw goes into effect on August 1, 1988, and is published in this issue of the **Federal Register**. It extends the periods that the draw may remain closed to vessels other than deep draft commercial vessels and requires one hour advance notice of all draw openings.

This temporary rule amends that final rule during the times and dates specified in this rule. It is being promulgated because of the difficulty in opening the span and clearing the channel during construction. Also, the operator will not be able to open the bridge on signal for

vessels in distress while this temporary rule is in effect.

Economic Assessment and Certification

The temporary regulations are considered to be non-major under Executive Order 12291 on Federal Regulations and nonsignificant under the Department of Transportation regulatory policies and procedures (44 FR 11034; February 24, 1979).

While the temporary rule may have some economic impact on commercial navigation, the impact is expected to be minimal; therefore, a full regulatory evaluation is considered unnecessary. This conclusion is based on the fact that the schedule has been coordinated with the major commercial waterway users, who have indicated it is acceptable to them. Since the economic impact of these regulations is expected to be minimal, the Coast Guard certifies that they will not have a significant economic impact on a substantial number of small entities.

List of Subjects in 33 CFR Part 117

Bridges.

Regulations

In consideration of the foregoing, Part 117 of Title 33, Code of Federal Regulations, is amended as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

1. The authority citation for Part 117 continues to read as follows:

Authority: 33 U.S.C. 449 CFR 1–46; 33 CFR 1.05–(g).

2. Section 117.255(a) is temporarily revised to read as follows:

§ 117.255 Potomac River.

(a) The draw of the Woodrow Wilson Memorial (I–95) bridge, mile 103.8, between Alexandria, Virginia, and Oxon Hill, Maryland—

(1) Need not open:

(i) Except as provided in subparagraph (iv) of this paragraph, for the passage of any vessel unless at least one hour advance notice is given.

(ii) For the passage of any vessel from 6:30 a.m. to 9:00 a.m. and from 4:00 p.m. to 6:30 p.m., on Mondays through Fridays, other than Federal holidays.

(iii) For the passage of any vessel, other than a commercial vessel with a draft of over 20 feet, from 6:00 a.m. to 6:30 a.m., 9:00 a.m. to 10:00 a.m., 3:00 p.m. to 4:00 p.m., and 6:30 p.m. to 8:00 p.m., on Mondays through Fridays, other than Federal holidays.

(iv) For the passage of any vessel, other than a commercial vessel that has given five hours advance notice and is not able to pass under the draw span or flanking spans of the bridge, from August 6, 1988 to November 20, 1988, Between the hours of 9:30 p.m. on Fridays and 7:30 a.m. on Saturdays and the hours of 8:00 p.m. on Saturdays and 10:30 a.m. on Sundays.

(2) From August 6, 1988, until November 20, 1988, between the hours of 9:30 p.m. on Fridays and 7:30 a.m. on Saturdays and 8:00 p.m. on Saturdays and 10:30 a.m. on Sundays, the operator of the bridge may obstruct half of the channel under the draw, but shall clear the channel to permit the passage of a vessel that requires a draw opening under paragraph (a)(1)(iv) of this paragraph.

3. This temporary rule is effective from August 6, 1988, through November 20, 1988, but it is not effective on September 3 and 4, October 8 and 9, November 12, and 13, 1988.

Dated: July 20, 1988.

W.J. Ecker,

Captain, U.S. Coast Guard, Chief of Staff, Fifth Coast Guard District.

[FR Doc. 88–17349 Filed 8–1–88; 8:45 am]

BILLING CODE 4910–14–M

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33 CFR Part 117

[CGD5–88–08]

Drawbridge Operation Regulations; Potomac River, District of Columbia, Maryland, and Virginia

AGENCY: Coast Guard, DOT.

ACTION: Final rule with request for comments.

SUMMARY: At the request of the City of Alexandria, Virginia; Fairfax County, Virginia; and Congressman Frank R. Wolf of Virginia, the Coast Guard is changing the regulations governing the Woodrow Wilson Memorial (I–95) drawbridge across the Potomac River, mile 103.8, between Alexandria, Virginia, and Oxon Hill, Maryland, to extend the times that the draw remains closed to vessel traffic, other than commercial vessels with drafts over 20 feet. This change is being made to help relieve highway traffic congestion during the extended rush hours on this major commuter artery, an important segment of the interstate highway system that connects the northeastern and southeastern portions of the United States. This rule also requires all vessels to give at least one hour advance notice for all bridge openings, and it revokes the temporary regulations that were published in the **Federal Register** on March 4, 1988 (53 FR 6984). This action provides for the reasonable needs of navigation.

EFFECTIVE DATE: These regulations become effective on August 1, 1988.

Comments on the provision relating to the requirement for one hour advance notice must be received by September 2, 1988.

ADDRESS: Comments should be mailed to Commander (ob), Fifth Coast Guard District, 431 Crawford Street, Portsmouth, Virginia 23704–5004. The comments will be available for inspection and copying at the above address in Room 507. Normal working hours are between 8:00 a.m. and 4:30 p.m., Monday through Friday, except holidays.

FOR FURTHER INFORMATION CONTACT: Ann B. Deaton, Bridge Administrator, Fifth Coast Guard District, at (804) 398–6222.

SUPPLEMENTARY INFORMATION: On March 17, 1988, the Coast Guard published proposed rules (52 FR 8850) and a temporary deviation from the existing regulations to evaluate the proposal (52 FR 8848) for the Woodrow Wilson Memorial Bridge. The Commander, Fifth Coast Guard District, also published the temporary deviation as a public notice on March 28, 1988. Interested persons were given until June 15, 1988, to submit comments on the temporary deviation, and until May 2, 1988, to submit comments on the proposed rule. The operation of the bridge is also regulated by a temporary rule that was published in the **Federal Register** on March 4, 1988 (53 FR 6984). That temporary rule, which was issued to accommodate repairs to the draw span, is effective between February 29, 1988, and November 30, 1988. It requires one hour advance notice for openings between 9:00 a.m. and 4:00 p.m.

This final rule also requires at least one hour advance notice for all bridge openings. This requirement was not included in the March 17, 1988, notice of proposed rulemaking. While this requirement is beyond the scope of the notice of proposed rulemaking, a supplemental notice of proposed rulemaking was not published because good cause exists to take such action. Following normal regulatory procedures is not in the public's interest and is, in part, unnecessary. Delaying the imposition of the one hour advance notice requirement will subject motorists to further unnecessary traffic delays at nights and on weekends. Imposition of the one hour advance notice requirement provides motorists with an immediate opportunity to learn about scheduled bridge openings by

radio broadcasts and highway sign announcements, worthwhile communications which would have been delayed for three to four months if the normal extended rulemaking process was followed. The additional regulatory procedures are also, in part, unnecessary since this final rule merely makes permanent a temporary rule that has been in effect for almost 4 months and will be in effect for another 4 months. The March 4, 1988, temporary rule requires one hour advance notice from 9:00 a.m. to 4:00 p.m. on week days. That temporary rule, if not superseded by this final rule, would have remained in effect until November 30, 1988. While comments were requested on the temporary rule when it was published, no comments were received. If marine interests felt that this provision imposed an unreasonable burden upon them, they would have voiced their concerns. While the one hour advance notice requirement is a small additional burden on vessel operators, it does not unduly restrict their passage through the bridge.

Nevertheless, public comments are requested on the one hour advance notice provision to ensure that the rule is both reasonable and workable. Persons wishing to comment may do so by submitting written comments to the office listed under "**ADDRESS**" in this preamble. Persons submitting comments should include their names and addresses, identify the docket number of this rule (CGD5–88–08), and give reasons for their comments. Comments on this provision must be received by September 2, 1988. This rule may be changed based on the comments received.

Good cause exists for making this rule effective in less than 30 days from the date of publication. This rule will help alleviate traffic congestion on a major commuter and interstate transportation artery around the nation's capital, at a time when traffic delays can be expected due to a major repair project on the draw span. This final rule, in conjunction with the additional temporary rule published elsewhere in this issue of the **Federal Register**, will help provide relief to motorists, while still providing for the reasonable needs of both commercial and recreational vessel operators. This rule and the temporary rules will also help expedite the repair of the draw span. (Additional temporary regulations are published elsewhere in this issue of the **Federal Register** that temporarily modify this final rule by restricting bridge openings on the weekends to accommodate necessary repairs to the draw span.)

Drafting Information

The drafters of this notice are Linda L. Gilliam, project officer, Fifth Coast Guard District Bridge Section, and CAPT Robert J. Reining, project attorney, Fifth Coast Guard District Legal Staff.

Discussion of Comments

The City of Alexandria, Virginia; Fairfax County, Virginia; and Congressman Frank R. Wolf of Virginia requested that this drawbridge be regulated to further restrict openings during morning and evening rush hours, Monday through Friday, except Federal holidays, by extending the hours that the bridge is required to be closed to all vessel traffic. As a result of their requests, the March 17, 1988, notice of proposed rulemaking was published, which would have extended the times beyond the existing closed periods that the draw remains closed to all vessel traffic. The bridge is presently allowed to remain closed from 6:30 a.m. to 9:00 a.m. and from 4:00 p.m. to 6:30 p.m., on Mondays through Fridays, except Federal holidays. The proposal would permit the bridge to remain closed from 6:00 a.m. to 10:00 a.m. and from 3:00 p.m. to 8:00 p.m., on Mondays through Fridays, except Federal holidays. A temporary deviation was published on March 17, 1988, in conjunction with the proposed rule. It differed from the proposed rule by requiring the bridge to open only for vessels calling at Robinson Terminals during the extended closed periods.

The proposed rule also eliminated the existing provision that requires the draw to open on signal at all times for public vessels, tour boats, and vessels in distress. The public vessels that are affected are primarily naval vessels visiting the Washington, DC, area and Coast Guard buoy tenders working aids to navigation on the upper Potomac. Only two comments were received that favored the March 17, 1988, proposal. One from the Maryland Department of Transportation merely supported the trial deviation. The second was from a private citizen who provided anecdotal information on the "hours" that traffic is backed up after draw openings during peak commuter hours. Since the bridge logs indicate that the draw is only open for between 8 and 15 minutes at a time, the lengthy delays attributed by the writer to the draw openings must have had causes other than the passage of vessels, although the openings may have been one of the causal factors.

Eight letters were received in opposition to the March 17, 1988, proposal and temporary deviation. Two of the letters were from Robinson Terminals, the last major marine terminal in Alexandria, Virginia. Robinson Terminals pointed out the historic significance of Alexandria as a seaport dating back to colonial days. They stated that the proposal threatened the commercial viability of both their terminal and the port. Their letter documented how it costs a shipper $8000 per day to use their terminal, and that those costs can be increased by $2500 if four hours of overtime are required on a Saturday. They pointed out that the proposal will restrict access to their terminal for nine hours a day, 75% of their working day. Approximately 30% of the vessels that call at their terminal would be effected by the extended closed periods (15 out of 50 vessels). Robinson Terminals also questioned whether the Washington rush hour really extended over the entire nine hour period for which restrictions were proposed. They claimed that the draw is actually open for 7 to 10 minutes for the passage of their ships. They blame the traffic tie-ups on the volume of traffic; the limited capacity of the bridge and its approaches; accidents; weather; the large number of large trucks that use the bridge, even during rush-hours; and problems on the bridge. Robinson Terminals took the position that while they can live with the current restrictions, they do not believe they can survive if the March 17, 1988, notice of proposal rulemaking is adopted as proposed. They recommended an exception for commercial vessels.

Three letters were received from shippers, who ship newsprint and other cargoes to Alexandria, Virginia—Bowater Sales Company, Abitibi-Price, Inc., and Quebec & Ontario Paper Company, Ltd. They argue that because of the current draft limitations on vessels navigating the Potomac River, they are required to pay a dead freight premium, and that if the March 17, 1988, proposal was adopted, they will face increased stevedoring costs due to overtime premiums. They stated that the proposed restrictions will be detrimental to ship operators and those supplying auxiliary services. They intimated the viability of using Alexandria as a port of call could be jeopardized, if additional restrictions are placed on the bridge.

Reed, Inc., the operator of a vessel that routinely calls at Robinson Terminals, described in detail the difficulties they face with the existing restrictions and the anticipated problems if the March 17, 1988, proposal were adopted. They pointed out that access is currently denied for 5 hours out of a 14 hour working day, and the

proposal would increase the closed periods by 80%, from 5 hours to 9 hours. They cited the fact that the vessel presently can only carry 80% of its capacity due to draft limitations, and that the vessel must frequently delay its arrival for 8–10 hours awaiting high tide and another 2½ hours for access to the terminal. The operator pointed out how the delays on the Potomac River would affect arrivals at subsequent ports of call. They pointed out that while the costs of each delay may not be significant, the aggregate can be great. For example, a two hour delay on one day may prevent the complete discharge of the vessel, resulting in an additional 12 hour delay. If the delay causes work to be performed on weekends or holidays, increased overtime costs will result. They also recommended that commercial vessels be required to give advance notice of bridge openings so the highway authorities can advise motorists of a scheduled bridge lift in advance of the opening.

We believe that the proposal to require advance notice for bridge openings has merit; however, we do not believe the advance notice requirement should be limited to only commercial vessels or only during the rush hour periods. It is being adopted for all bridge openings. While we are not, at this time, aware that the District of Columbia Department of Public Works is broadcasting bridge advisories for motorists, we expect them to do so.

Since this one hour advance opening notice requirement was not included within the scope of the original notice of proposed rulemaking, comments are requested on the appropriateness of the requirement. Rather than issue a separate notice of proposed rulemaking and a temporary deviation to evaluate the proposal, it is being included in this final rule as a matter of administrative economy. If the comments received indicate that this provision is inappropriate, a further rule will be issued to delete the requirement.

This provision makes the temporary rule published in the Federal Register on March 4, 1988 (53 FR 6984), unnecessary, and the temporary rule is revoked. That temporary rule required all vessels to give at least one hour advance notice for an opening between 9:00 a.m. and 4:00 p.m. due to repair work being conducted on the bridge. That temporary rule was to be in effect until November 30, 1988. Clipper Cruise Lines objected to the provision in the temporary deviation that only permitted vessels bound to or from Robinson Terminals to pass through the bridge during the extended opening period. They felt this forced them to choose one specific dock site over all the others available in the Washington, DC/Alexandria, Virginia area. This final rule no longer specifies that deep draft vessels tie up at Robinson Terminals to gain passage during the extended rush hour periods.

The Virginia Pilot Association objected to the proposal as it would apply to commercial vessels. They stated that most commercial vessels must time their arrivals at the bridge due to draft limitations. While the current 2½ hour closed periods give them enough leeway, the proposed four and five hour closed periods will cause them problems. They pointed out that a vessel that missed a morning opening might also have to miss the evening opening, and the following morning and evening openings due to the timing of the high tides. They also pointed out that the traffic delays are not caused by the brief passages of vessels, but by frequent electrical failures of the bridge equipment. The pilots also complained that the vessels are frequently delayed because the bridge tower is not always manned as required. In a subsequent discussion to determine which vessels are restricted in their ability to navigate the Potomac River, the pilots reported that vessels with drafts of less than 20 feet are not restricted by the depth of the channel between the mouth of the Potomac River and Haines Point in the District of Columbia.

Neither the Maryland Department of Transportation on the original requestors of the amendment have provided any detailed information to support the position that the draw openings alone contribute substantially to the traffic problems on the bridge and its approaches. Rather, it appears from the comments received that the traffic problems are due to a number of factors, such as the amount of traffic, road conditions, accidents, mechanical breakdowns, and bad weather, and not only by the 8 to 15 minutes required for a bridge opening.

No comments were received from the Navy on the proposal. While Coast Guard vessels will be inconvenienced by this rule, they will work their schedules around the extended closed periods. In any event, the impact on public vessels should be minimal. A review of the drawlogs revealed that only 7 public vessels required openings of the bridge during 1986–1987. Therefore, the exception for public vessels in the current regulations is being eliminated in this final rule.

It is understood that all of the tour boats that routinely use the upper Potomac River are able to pass under the bridge at normal tide levels. No comments were received from the tour boat industry during the comment period. Therefore, the opening requirement for tour boats is also being eliminated by this final rule.

In retrospect, it is felt that it would be prudent to leave intact the provision that requires the bridge to open on signal for vessels in distress. These situations are extremely rare, but the failure to open the bridge would result in loss of life aboard a vessel or an allision of a vessel with the bridge, possibly closing this vital highway link. Therefore, the exception for vessels in distress is retained in this final rule.

Drawlogs for the past two years submitted by the District of Columbia, Department of Public Works were reviewed and they do not substantiate the claims that vehicular traffic is needlessly impeded by draw openings for commercial vessels. These openings are in fact infrequent during morning and evening rush hours. For the entire year of 1987, only 14 openings for commercial vessels occurred during the extended morning rush hours, while only 19 openings occurred during the extended evening rush hours.

In deciding the issues in case, consideration was given to the needs of the motorists who use the bridge, Robinson Terminals, shippers who ship cargoes through the Port of Alexandria, Virginia, commercial vessel operators, and recreational boaters. Also considered was the concept that traffic delays were one of the factors taken into account when the Federal government, the District of Columbia, the State of Maryland, and the Commonwealth of Virginia decided to build and maintain a drawbridge instead of building a fixed bridge with adequate navigational clearances. Since extending the closed periods to deep draft commercial traffic beyond the existing closure periods will seriously jeopardize the economic viability of the Port of Alexandria, Virginia, this final rule will require the draw to open for those vessels during the extended closed period. Since shallow draft commercial vessels are not subject to the same navigational limitations and do not need to time their arrivals to the tides, the bridge will not be required to open for these vessels during the extended closed periods. These vessels, public vessels (primarily Navy and Coast Guard vessels), tour boats, and recreational vessels will need to plan their schedules to accommodate the restricted opening hours. It is felt that it would be unreasonable to tie up this vital highway artery during rush-hour traffic to permit

the passage of vessels that can make minor alterations in their schedules. While they may be inconvenienced, they will not suffer the same hardships as deep draft commercial vessels.

Economic Assessment and Certification

These regulations are considered to be non-major under Executive Order 12291 on Federal Regulation and nonsignificant under Department of Transportation regulatory policies and procedures (44 FR 11034; February 26, 1979).

A final regulatory evaluation has been prepared and placed in the rulemaking docket. It may be inspected and copied in Room 507, Federal Building, 431 Crawford Street, Portsmouth, Virginia. Copies may also be obtained by contacting the person listed under "FOR FURTHER INFORMATION CONTACT" in this preamble.

The economic impact of the proposed rules on Robinson Terminals and other commercial shippers was considered in adopting this rule. The shippers already have restrictions to deal with when transporting their newspaper print to Alexandria, Virginia. They must schedule their ships to coincide with high tides due to the shallow channel in order to transit upriver to Alexandria. The cost for doing so to these shippers is approximately $8000 per day. Additional costs were anticipated if the vessels are further delayed by lack of bridge openings and these additional costs could result in shippers looking elsewhere for ports to deliver their cargoes. If that happened, Robinson Terminals would lose business and, eventually, be forced to close down. It is anticipated that the draw will be required to open less than 35 times per year during the extended weekday rush hours for deep draft commercial traffic, resulting in traffic delays of less than six hours over the year, which can be directly attributable to the passage of these vessels. While the Woodrow Wilson Memorial (I–95) bridge is an important and vital highway link between Virginia and Maryland, and is heavily used by both commuters and interstate highway travelers, the economic needs of local commercial waterway users outweigh the benefits to highway traffic which would be derived by closing the drawbridge to all navigation during the weekday rush hours. This regulation should have no effect on commercial navigation, or on any industries that depend on waterborne transportation.

Based upon the information in the final evaluation, the Coast Guard certifies that this rule will not have a significant economic impact on a substantial number of small entities.

List of Subjects in 33 CFR Part 117

Bridges.

Regulations

In consideration of the foregoing, Part 117 of Title 33, Code of Federal Regulations, is amended as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

1. The authority citation for Part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 49 CFR 1.46; 33 CFR 1.05–1(g)

2. Section 117.255(a) is revised to read as follows:

§ 117.255 Potomac River.

(a) The draw of the Woodrow Wilson Memorial (I–95) bridge, mile 103.8, between Alexandria, Virginia, and Oxon Hill, Maryland—

(1) Shall open on signal at any time for a vessel in distress.

(2) Need not open:

(i) Except as provided in subparagraph (1) of this paragraph, for the passage of any vessel unless at least one hour advance notice is given.

(ii) For the passage of any vessel from 6:30 a.m. to 9:00 a.m. and from 4:00 p.m. to 6:30 p.m., on Mondays through Fridays, other than Federal holidays.

(iii) For the passage of any vessel, other than a commercial vessel with a draft of over 20 feet, from 6:00 a.m. to 6:30 a.m., 9:00 a.m. to 10:00 a.m., 3:00 p.m. to 4:00 p.m., and 6:30 p.m. to 8:00 p.m., on Mondays through Fridays, other than Federal holidays.

* * * * *

3. The temporary regulation issued on February 17, 1988, which was published in the **Federal Register** on March 4, 1988 (53 FR 6984), is revoked.

Dated: July 20, 1988.

W.J. Ecker,

Captain, U.S. Coast Guard; Commander, Fifth Coast Guard District, Acting.

[FR Doc. 88–17348 Filed 8–1–88: 8:45 am]

BILLING CODE 4910–14

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 166 and 168

[OPP–250080; FRL–3423–9]

Notification to Secretary of Agriculture of a Final Regulation on Advertising of Unregistered Pesticides

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notification to the Secretary of Agriculture.

SUMMARY: Notice is given that the Administrator of EPA has forwarded to the Secretary of Agriculture a final regulation that treats unlawful under FIFRA section 12 certain advertising of unregistered pesticides and FIFRA section 24(c) registrations. This action is required by section 25(a)(2)(B) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended.

FOR FURTHER INFORMATION CONTACT:

By Mail:

Franklin Gee, Registration Division (TS–767C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460

Office location and telephone number: Rm. 1120B, CM#2, 1921 Jefferson Davis Highway, Arlington, VA, (703–557–0592).

SUPPLEMENTARY INFORMATION: Section 25(a)(2)(B) of FIFRA provides that the Administrator shall provide the Secretary of Agriculture with a copy of any final regulation at least 30 days prior to signing it for publication in the **Federal Register**. If the Secretary comments in writing regarding the final regulation within 15 days after receiving it, the Administrator shall issue for publication in the **Federal Register**, with the final regulation, the comments of the Secretary, if requested by the Secretary, and the response of the Administrator concerning the Secretary's comments. If the Secretary does not comment in writing within 15 days after receiving the final regulation, the Administrator may sign the regulation for publication in the **Federal Register** anytime after the 15-day period.

As required by FIFRA section 25(a)(3), a copy of this final regulation has been forwarded to the Committee on Agriculture of the House of Representatives and the Committee on

Agriculture, Nutrition, and Forestry of the Senate.

FIFRA section 25(d) requires that a copy of this final rule be forwarded to the Scientific Advisory Panel (SAP) for review and comment. However, because of the nature of the rule, the SAP waived review and comment.

Authority: 7 U.S.C. 136 *et seq.*

Dated: July 25, 1988.

Douglas D. Campt,

Director, Office of Pesticide Programs.

[FR Doc. 88-17342 Filed 8-1-88; 8:45 am]

BILLING CODE 6560-50-M

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40 CFR Part 261

[SW-FRL-3423-2]

Hazardous Waste Management System; Identification and Listing of Hazardous Waste; Final Exclusion

AGENCY: U.S. Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) today is granting a final exclusion from the lists of hazardous wastes contained in 40 CFR Part 261 for certain solid wastes generated by Lederle Laboratories, Pearl River, NY. This action responds to a delisting petition submitted under 40 CFR 260.20, which allows any person to petition the Administrator to modify or revoke any provision of Parts 260 through 268, 124, 270, and 271 of Title 40 of the Code of Federal Regulations, and 40 CFR 260.22, which specifically provides generators the opportunity to petition the Administrator to exclude a waste on a "generator-specific" basis from the hazardous waste lists.

EFFECTIVE DATE: August 2, 1988.

ADDRESSES: The RCRA regulatory docket for this final rule is located at the U.S. Environmental Protection Agency, 401 M Street SW., (sub-basement), Washington, DC, 20460, and is available for viewing from 9:00 a.m. to 4:00 p.m., Monday through Friday, excluding Federal holidays. Call (202) 475-9327 for appointments. The reference number for this docket is "F-88-LDEF-FFFFF". The public may copy materials from any regulatory docket at a cost of $.15 per page.

FOR FURTHER INFORMATION CONTACT: For general information, contact the RCRA/Superfund Hotline, toll-free at (800) 424-9346, or (202) 382-3000. For technical information, contact Linda Cessar, Office of Solid Waste (OS-343), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460, (202) 475-9828.

SUPPLEMENTARY INFORMATION:

I. Background

A. Authority

Under 40 CFR 260.20 and 260.22, facilities may petition the Agency to remove their wastes from hazardous waste control by excluding them from the lists of hazardous wastes contained in 40 CFR 261.31 and 260.32. To have their wastes excluded, petitioners must show that a waste generated at their facility does not meet any of the criteria under which the waste was listed. See 40 CFR 260.22(a) and the background documents for the listed wastes. In addition, the Hazardous and Solid Waste Amendments (HSWA) of 1984 require the Agency to consider factors (including additional constituents) other than those for which the waste was listed, if there is a reasonable basis to believe that such additional factors could cause the waste to be hazardous. Accordingly, a petitioner must demonstrate also that the waste does not exhibit any of the hazardous waste characteristics, (*i.e.*, ignitability, reactivity, corrosivity, and EP toxicity), and present sufficient information for the Agency to determine whether the waste contains any other toxicants at hazardous levels. See 40 CFR 260.22, 42 U.S.C. 6921(f), and the background documents for the listed wastes. Although wastes which are "delisted" (*i.e.*, excluded) have been evaluated to determine whether or not they exhibit any of the characteristics of a hazardous waste, generators remain obligated to determine whether their waste remains non-hazardous based on the hazardous waste characteristics.

B. History of This Rulemaking

Lederle Laboratories (Lederle), a Division of the American Cyanamid Company, located in Pearl River, New York, submitted its petition on March 27, 1981 requesting an exclusion for its filter press sludge and wastewater influent. Lederle was granted a temporary exclusion on November 22, 1982 (47 *FR* 52677). Lederle subsequently withdrew its request to delist the wastewater influent. On October 24, 1986, EPA proposed to exclude Lederle's filter press sludge and the compost derived from the sludge from hazardous waste regulation (see 51 *FR* 37760). Because the Agency did not make a final decision on Lederle's petition by November 8, 1986, pursuant to RCRA section 3001(f), Lederle's temporary exclusion expired on that date.

During the comment period for the proposed rule, the Agency received a request to extend the comment period to allow the commenter more time to review the Agency's proposal to exclude Lederle's waste. The Agency granted the request, extending the comment period (which was to end on November 3, 1986) to November 24, 1986. The decision to extend this comment period was published in the **Federal Register** (see 51 *FR* 40343-40344) on November 6, 1986. Today's notice addresses the comments received during the extended comment period and makes final the decision to grant the delisting petition for Lederle Laboratories.

II. Disposition of Delisting Petition

A. Lederle Laboratories

1. Proposed Exclusion

Lederle Laboratories (Lederle), located in Pearl River, New York, produces vitamins, antibiotics, and other pharmaceutical products. Lederle petitioned the Agency to exclude its wastewater treatment sludges (filter press sludge and composted sludge) from classification as EPA Hazardous Waste Nos. F003 and F005 based on the low concentration and immobilization of the listed constituents in the wastes. The primary and secondary filter press sludges are produced by Lederle's 1.5 million gallon per day Industrial Waste Treatment Plant (IWP). The IWP produces a maximum of 20,640 cubic yards of filter press sludge per year. This sludge is composted with leaves and lime using the windrow method. The composted sludge (also approximately 20,640 cubic yards) is permitted for use under New York State requirements (Case II of 6NYCRR Part 360) which restrict such use to publicly owned land or land dedicated to a specific non-agricultural use, such as a golf course or industrial park.

In the proposed rule, EPA concluded that data submitted by Lederle substantiate its claim that the listed constituents of concern are essentially present in an immobile form. Further more, additional data provided by Lederle indicate that no other hazardous constituents are present in the wastes at levels of regulatory concern, and that the wastes do not exhibit any of the characteristics of hazardous waste. (See 51 *FR* 37760-37767, October 24, 1986, for a more detailed explanation of why EPA proposed to grant Lederle's petition.)

2. Agency Response to Public Comments

The Agency received comments from a single commenter during the extended comment period regarding its decision to grant an exclusion to Lederle for the wastes identified in the petition. The comments received were of two varieties: (1) Those concerning the appropriateness of the vertical and

horizontal spread (VHS) model and (2) those questioning the detection limits encountered in the sample analyses. The specific comments, grouped by these two issues, are addressed below.

Comments Regarding Use of the VHS Model. The commenter stated that using the VHS model for evaluating the composted sludge would be inappropriate since the VHS model predicts the contamination potential for wastes disposed in a Subtitle D landfill. The commenter indicated that use of the composted waste as a soil amendment virtually would guarantee that individuals will come into direct contact with the waste. The commenter identified three pathways for human exposure: Dermal absorption of organic constituents, inhalation of entrained particles, and ingestion. The commenter contended that total constituent analysis data should be used to evaluate the potential hazard posed by the waste due to direct human contact.

The Agency maintains that the VHS model should be used to evaluate Lederle's petitioned waste because these excluded wastes could be disposed as non-hazardous in a Subtitle D landfill should the petitioner choose to do so. However, the Agency does agree with the commenter that other exposure routes may be relevant for this petition and, therefore, alternate scenarios should be explored. The results of the alternate exposure analyses are presented below; the results of the VHS model analysis were presented in the proposed exclusion (51 *FR* 37760). The VHS model analysis demonstrated that Lederle's primary filter press sludge, secondary filter press sludge, and composted sludge do not pose a threat to human health through a ground-water exposure pathway. The results of the VHS model analysis will not be recapitulated in this notice.

The commenter also expressed concern that uninformed individuals would be exposed to health-threatening levels of hazardous constituents. The Agency disagrees with this contention because the results of the Agency's analysis of alternate exposure scenarios (*i.e.*, ingestion, inhalation of suspended particles, and dermal absorption of organic constituents) showed Lederle's waste to be non-hazardous. Additionally, the delisted composted sludge will continue to be subject to state and local regulations regarding transport and use of industrial wastewater treatment sludge. In particular, Lederle's composted sludge will continue to be regulated by the New York State Department of Environmental Conservation according to permit conditions for use and marketing of composted sewage sludge (6NYCRR Part 360). A discussion of the Agency's analysis of the alternate routes of exposure is presented below.

Analysis of Alternate Exposure Scenarios. In response to public comment, the Agency evaluated the alternate exposure pathways suggested by the commenter (ingestion, inhalation of suspended particles, and dermal absorption of organic constituents) in order to determine whether Lederle's composted waste poses a threat to human health.

To perform these evaluations, the Agency identified the appropriate exposure scenario governing the three exposure pathways, the most exposed individual (MEI), and the basis used to assign values to particular exposure assumptions. The Agency attempted to assign reasonable worst-case values or typical-case values (where appropriate) to the factors in the equations used to assess the three alternate exposure pathways. A value was assigned whenever the Agency identified a widely accepted value used in exposure assessments. For example, the Agency assigned a value of 23 cubic meters per day to the respiratory volume factor used in the inhalation exposure equation described in Section II.A.2.b; this is a widely accepted value.[1] Numerous factors, however, did not have widely accepted values. Because each of the exposure scenarios used in the evaluation of Lederle's waste had one or more factors that did not have widely accepted values, the Agency used a two-tiered strategy in the exposure assessment. Initially, overly conservative values were assigned to the exposure assumptions for any parameter in the exposure analysis equation for which a widely accepted value could not be identified. This resulted in an unreasonably conservative (*i.e.*, screening) analysis. If the waste passed the screening analysis for an exposure pathway, then an in-depth analysis would not be required as the waste would clearly be non-hazardous. If the waste failed the screening analysis, a more reasoned analysis (*i.e.*, where more reasonable values were assigned to each factor in the exposure equation) was pursued. The Agency believes that the two-tiered analysis employed is appropriate for assessing the potential effects of the petitioner's composted waste. The Agency does not claim that the assumptions used for this assessment are appropriate for all cases.

In the following discussions of the exposure assessments, each assumption is identified as being a typical-case or a reasonable, absolute, or impossible wort-case assumption. These designations are specific to the exposure assessments of Lederle's waste. The overly conservative values chosen for the screening analysis represent absolute or impossible worst-case assumptions.

Typical-case or reasonable worst-case assumptions were used when widely accepted values were available. An absolute worst-case assumption represents a value at the extreme end (*i.e.*, most conservative with regard to protecting human health) of a range of possible values. Absolute values were used in the screening analysis where it was possible to identify an accepted range of values for a factor. An impossible worst-case assumption represents a value so extreme that it is beyond the range of possible values. Impossible values were used where it was not possible to identify an accepted range of values for a factor. For example, lacking a widely accepted reasonable worst-case value for the frequency of exposure to composted soil through an ingestion pathway, the Agency was confronted with a wide range of possible values depending on the number of years a person would be expected to spend at a residence, the amount of time spent away from the home, and the number of days a person could not ingest a given quantity of soil (*e.g.*, because of illness). Rather than attempt to pinpoint the extreme end of the range of possible values, the Agency chose to assume that a person would ingest compost bearing soil every day of his or her life. Because a value assuming daily exposure over a 70-year lifespan is beyond the range of possible values, it is labeled an impossible worst-case assumption.

The specific exposure assessmsent equations used to evaluate the three routes of exposure are presented below.

(a) *Ingestion.* The Agency performed a screening analysis to determine whether an ingestion exposure pathway warranted closer investigation. The analysis employed reasonable worst-case or typical-case assumptions where appropriate and unreasonably conservative values (*e.g.*, impossible assumptions) for those factors which lacked widely accepted standards. This combination of reasonable and unreasonable worst-case assumptions resulted in an exposure assessment that is overly conservative. The petitioned

[1] International Commission on Radiological Protection. *Report of the Task Group on Reference Man.* New York: Pergammon Press, October 1974, p. 346.

waste passed this analysis for the ingestion pathway; therefore, the Agency concluded that ingestion of the composted sludge is not likely to pose a threat to human health.

To calculate the exposure rate due to the ingestion of the composted waste, the Agency used the following assumptions:

- A person would ingest 100 mg of soil per day.[2] The choice of a 100 mg per day ingestion rate represents a typical-case assumption. The ingestion rate assumed by the Agency does not account for pica. A small fraction of children between the ages of 2 and 6 years exhibit pica tendencies, consuming up to 5 grams of soil per day. The Agency has not assumed pica behavior because it is pathological and is not representative of the population at large. That is, a pica assumption would not be reasonable worst-case.
- A person would ingest this amount of composted waste every day of his or her life. This is an impossible worst-case scenario.
- The soil ingested would contain the same concentration of hazardous constituents as the composted sludge. This is an absolute worst-case assumption.
- All of the contaminants ingested would be absorbed into the body (*i.e.*, the ingestion rate equals the exposure rate). This is an absolute worst-case assumption.

Using these assumptions, the Agency calculated the ingestion exposure rates for the EP toxic metals, nickel, cyanide, and the organic constituents detected in the composted sludge and filter press sludge. For example, the ingestion exposure rate for levels of arsenic in the composted sludge (reported as 8.6 mg/kg) was calculated as follows:

$$\frac{8.6\ \text{mg}}{\text{kg soil}} \left| \frac{100\ \text{mg soil}}{\text{day}} \right| \frac{\text{kg}}{10^6\ \text{mg}} = 8.6 \times 10^{-4}\ \text{mg/day}$$

The ingestion exposure rates for each of these constituents were then compared with the health-based levels used in delisting decision-making for each constituent. The regulatory levels were calculated from reference doses (RfDs), risk specific doses (RSDs), or maximum contaminant levels (MCLs). A 70 kg body weight was used to convert RfDs and RSDs to units of mg/day. A 2 liter per day water consumption rate was used to convert MCLs to units of mg/day. These levels are specific to an oral exposure route and, therefore, are appropriate to an ingestion exposure analysis. The results of these calculations are presented in Table 1.

TABLE 1.—EXPOSURE FROM INGESTION

Constituents	Total constituent analyses (mg/kg)	Ingestion exposure rate (mg/day)	Levels of regulatory concern [1] (mg/day)
Arsenic	8.6	8.6×10^{-4}	0.1
Barium	38	3.8×10^{-3}	2
Cadmium	<3	3.0×10^{-4}	0.02
Chromium	9.1	9.1×10^{-4}	0.1
Lead	36	3.6×10^{-3}	0.1
Mercury	0.89	8.9×10^{-5}	0.004
Nickel	23	2.3×10^{-3}	1
Selenium	<5	5.0×10^{-4}	0.02
Silver	<1	1.0×10^{-4}	0.1
Cyanide	1.6	1.6×10^{-4}	1
MIBK	0.6	6.0×10^{-5}	4
Carbon Disulfide	0.59	5.9×10^{-5}	7
Phenol	[2] 11	1.1×10^{-3}	3
Toluene	[2] 3.1	3.1×10^{-4}	20
Xylene	[2] 1.3	1.3×10^{-4}	100

NOTE: <: Denotes concentrations below the detection limit.
[1] See "Docket Report on Health-Based Regulatory Levels and Solubilities Used in the Evaluation of Delisting Petitions," June 8, 1988, located in the RCRA public docket.
[2] From total constituent analyses of the primary filter press sludge.

In this and subsequent analyses, the highest constituent concentrations in the composted waste were used in the calculations except for phenol, toluene, and xylene. These latter three compounds were detected in the filter press sludge but not in the composted sludge. The exposure analysis equation was applied to the filter press concentrations of these constituents to determine whether they would pose a health risk.

The exposure rates for all of the constituents are well below the health-based levels. The screening analysis demonstrates that even using some unreasonable worst-case assumptions Lederle's waste does not pose a threat to human health from an ingestion route, thereby obviating the need for a more in-depth analysis.

(b) *Inhalation of Suspended Particles.* The inhalation rate of four constituents (arsenic, cadmium, chromium, and nickel) computed using the screening analysis exceeded the health-based level indicating that this pathway warranted further investigation. Therefore, the Agency determined it

[2] *Superfund Public Health Evaluation Manual*, EPA–540/1–861060 (OSWER Directive 9285.4–1), October 1986, p. D–2.

was necessary to perform a more in-depth analysis for this exposure route. The Agency replaced the unreasonable worst-case or typical-case assumptions used in the screening analysis with reasonable worst-case or typical-case assumptions deemed appropriate for Lederle's disposal scenario. This more reasoned analysis indicated that exposure through inhalation of suspended, composted sludge waste particles is not likely to pose a threat to human health.

The more reasoned analysis used the following assumptions to calculate the exposure rate due to the inhalation of suspended particles:

- The concentration of suspended particulate matter in air was assumed to be 0.075 mg/m³. EPA's Office of Air Quality Planning and Standards indicated that 95 percent of the 2,044 sites monitored nationally reported total suspended particulates (TSP) concentrations of 0.075 mg/m³ or lower.[3] The Agency, therefore, believes that this is a reasonable worst-case assumption.
- The concentration of the hazardous constituents in the suspended particulate matter was assumed to be the same as the concentration of hazardous constituents in the composted sludge. This assumption is appropriate to this exposure assessment because no other source of suspended particulate matter (*e.g.*, an incinerator) is under investigation. This is an absolute worst-case assumption.
- The fraction of inhaled particulates that would be absorbed into the lungs would be 12.5 percent. The remaining 87.5 percent would be exhaled (25 percent) or eliminated from the respiratory passages and swallowed (62.5 percent).[4] This is a reasonable worst-case assumption.
- A moderately active person breathes 23 m³ of air per day.[5] This is a reasonable worst-case assumption.
- A person would be exposed to this concentration of suspended waste particulates on the 262 days per year that climatic conditions favor dust emissions. A person would remain at the residence 80 percent of the time over a 70-year lifespan.[6] This a reasonable worst-case assumption.

Using these assumptions, the Agency calculated the inhalation exposure rates for the EP toxic metals, nickel, cyanide, and the organic constituents detected in the composted sludge and filter press sludge. For example, the inhalation exposure rate for levels of arsenic in the composted sludge (reported as 8.6 mg/kg) was calculated as follows:

$$\frac{8.6\ \text{mg}}{\text{kg soil}} \times \frac{0.075\ \text{mg}}{\text{m}^3} \times \frac{0.125}{} \times \frac{23\ \text{m}^3}{\text{day}}$$

$$\frac{262\ \text{days}}{365\ \text{days}} \times \frac{0.8}{} \times \frac{\text{kg}}{10^6\ \text{mg}} = 1.1 \times 10^{-6}\ \text{mg/day}$$

These inhalation exposure rates were then compared with the health-based level for each constituent. The health-based levels were calculated from available inhalation-based RSDs for arsenic, cadmium, chromium, and nickel. In the absence of an established inhalation level, an oral MCL, RfD, or RSD was used. The extremely low regulatory levels for arsenic, cadmium, chromium, and nickel derive from their higher carcinogenic potency from an inhalation route. The results of these calculations are presented in Table 2.

[3] EPA, *National Air Quality and Emissions Trends Report 1986*, EPA 450/4-88-001, February 1988, p. 3-6.

[4] EPA, *Risk Analysis of TCDD Contaminated Soil*, EPA-600/8-84-031, November 1984, p. 20.

[5] International Commission on Radiological Protection, *Report of the Task Group on Reference Man*, New York: Pergammon Press, October 1984, p. 346.

[6] EPA, *Risk Analysis of TCDD Contaminated Soil*, p. 17.

TABLE 2.—EXPOSURE FROM INHALATION OF SUSPENDED PARTICLES

Constituents	Total constituent analyses (mg/kg)	Inhalation exposure rate (mg/day)	Levels of regulatory concern [1] (mg/day)
Arsenic	8.6	1.1×10^{-6}	5.3×10^{-6}
Barium	38	4.7×10^{-6}	2
Cadmium	<3	3.7×10^{-7}	1.3×10^{-5}
Chromium	9.1	1.1×10^{-6}	1.9×10^{-6}
Lead	36	4.5×10^{-6}	0.1
Mercury	0.89	1.1×10^{-7}	0.004
Nickel	23	2.8×10^{-6}	9.6×10^{-5}
Selenium	<5	6.2×10^{-7}	0.02
Silver	<1	1.2×10^{-7}	0.1
Cyanide	1.6	2.0×10^{-7}	1
MIBK	0.6	7.4×10^{-8}	4
Carbon disulfide	0.59	7.3×10^{-8}	7
Phenol	[2] 11	1.4×10^{-6}	3
Toluene	[2] 3.1	3.8×10^{-7}	20
Xylene	[2] 1.3	1.6×10^{-7}	100

NOTE: <: Denotes concentrations below the detection limit.

[1] For inhalation-based RSDs used to calculate health-based levels for arsenic, cadmium, chromium, and nickel, see "Carcinogenic Risk Assessment Verification Endeavor (CRAVE) Risk Estimate for Carcinogenicity, Office of Health and Environmental Assessment, Environmental Criteria and Assessment Office, Cincinnati, OH, 1988. For oral MCLs, RfDs, RSDs used to calculate the health-based levels for the remaining constituents, see "Docket Report on Health-Based Regulatory Levels and Solubilities Used in the Evaluation of Delisting Petitions," June 8, 1988, located in the RCRA public docket.

[2] From total constituent analyses of the primary filter press sludge.

The exposure rates for these constituents are well below the health-based levels. The reasonable worst-case analysis demonstrates that Lederle's waste does not pose a threat to human health from an inhalation pathway.

The Agency also determined whether the ingestion of hazardous constituents eliminated from the respiratory pathway (*i.e.*, the 62.5 percent of inhaled particulates that are eliminated and swallowed) would significantly impact the ingestion exposure analysis. These calculations indicated that, although the respiratory tract elimination and subsequent ingestion of inhaled particulates would be 5 times greater than the amount absorbed into the lungs, the inhalation contribution to the ingestion pathway would be insignificant (3 orders of magnitude lower than the amount directly ingested).

(c) *Dermal Absorption of Organic Constituents.* The Agency performed a screening analysis to determine whether this exposure pathway warranted closer investigation. The analysis employed reasonable worst-case or typical-case assumptions where available and unreasonably conservative values (*e.g.*, impossible assumptions) for those factors which lacked widely accepted standards. This combination of reasonable and unreasonable worst-case assumptions resulted in an exposure assessment that is overly conservative. The petitioned waste passed this analysis for the dermal absorption pathway; therefore, the Agency concluded that exposure through dermal absorption via handling the composted waste is not likely to pose a threat to human health.

The Agency calculated the daily intake of hazardous constituents through dermal absorption using the following assumptions:

- The overall daily contact rate would be 1.5 mg of soil per cm^2 of exposed skin.[7] This is a reasonable worst-case assumption.
- The exposed surface area of an adult wearing a short-sleeved, open-necked shirt, pants, and shoes with no gloves or hat is 2,940 cm^2.[8] This is a typical-case assumption.
- The accumulated soil would be pure composted waste; there would be no dilution with ordinary topsoil. This is an absolute worst-case assumption.
- All of the organic constituents present in soil that accumulate on an exposed person's skin would be absorbed. This is an absolute worst-case assumption.
- An adult would be exposed to the composted waste every day of his or her life. This is an impossible worst-case assumption.

Using these assumptions, the Agency calculated dermal absorption rates for MIBK and carbon disulfide, the two organic constituents that were present at detectable levels in the composted sludge. For example, the dermal absorption rate for levels of carbon disulfide in the composted sludge (reported as 0.59 mg/kg) was calculated as follows:

[7] The determination of an overall daily contact rate was suggested by EPA, *Risk Analysis of TCDD Contaminated Soil*, p. 26, by using soil accumulation results presented in "Exposure to Lead by the Oral and Pulmonary Routes of Children Living in the Vicinity of a Primary Lead Smelter," Roels, Harry et al., Environmental Research, Vol. 22, pp. 81–94 (1980).

[8] The value cited was obtained from EPA, *Risk Analysis of TCDD Contaminated Soil*, p. 26. The original source is Sendroy, J. and Cecchini, L.P., "Determination of Human Body Surface Area from Height and Weight," J. of Appl. Physiology, 7(1):1–12 (1954).

$$\frac{0.59\ \text{mg}}{\text{kg soil}} \times \frac{1.5\ \text{mg soil}}{\text{cm}^2\ \text{day}} \times 2{,}940\ \text{cm}^2 \times \frac{\text{kg}}{10^6\ \text{mg}} = 0.0026\ \text{mg/day}$$

Dermal absorption rates were also calculated for phenol, toluene, and xylene (which were detected only in the filter press sludge) using total constituent analysis data to determine whether these constituents might pose a threat to human health. These dermal absorption rates were then compared to the health-based level for each organic constituent. The health-based levels are specific to an oral exposure route. Although standards for dermal exposure would likely be much higher, the Agency has opted to use the more conservative oral levels to be consistent with the premise that the screening analysis is an unreasonable worst-case analysis. The results of these analyses are presented in Table 3.

TABLE 3.—EXPOSURE FROM DERMAL ABSORPTION

Constituents	Total constituent analyses (mg/kg)	Dermal absorption rate (mg/day)	Levels of regulatory concern [1] (mg/day)
Carbon disulfide	0.59	2.6×10^{-3}	7
MIBK	0.6	2.7×10^{-3}	4
Phenol	[2] 11	4.9×10^{-2}	3
Toluene	[2] 3.1	1.4×10^{-2}	20
Xylenes	[2] 1.3	5.7×10^{-3}	100

[1] See "Docket Report on Health-Based Regulatory Levels and Solubilities Used in the Evaluation of Delisting Petitions," June 8, 1988, located in the RCRA public docket.

[2] From total constituent analyses of the primary filter press sludge.

As shown in Table 3, exposure rates for these constituents are well below the health-based levels. Because the waste proved to be non-hazardous using this overly conservative approach, a more in-depth analysis was not required.

In summary, the alternate exposure analyses demonstrate that Lederle's composted waste does not pose a threat to human health due to ingestion, inhalation, or dermal absorption of hazardous constituents.

Evaluation of Lederle's Pre-compost Sludge. The composting process seeks to reduce the toxicity of the sludge using two mechanisms: Biological degradation and dilution/stabilization. Biological degradation works to reduce the concentration of hazardous organic constituents. Dilution and matrix stabilization effects from the mixing of soil and organic matter (leaves) with the filter press sludge work to reduce the concentrations of both the organic and inorganic species. The composted sludge is, therefore, likely to have lower concentrations of the hazardous constituents present in the filter press sludge. However, there is a possibility that these mechanisms may fail to produce the expected reduction in toxic constituent concentrations. A number of circumstances could result in hindered performance of these mechanisms. For example, the microbes which break down the organic constituents could die off during the winter months. The Agency investigated the impacts of a complete break down of these mechanisms using the same alternate exposure pathway analysis methodologies described above. Several constituents were detected in the primary or secondary filter press sludge at higher concentrations than in the composted sludge and thus these levels were subjected to the alternate exposure analyses used for the composted sludge. The primary filter press sludge concentrations of three of these constituents (phenol, toluene, and xylene) were included in the original analyses of the composted sludge. The results of the alternate exposure analyses for the remaining three compounds (chromium, mercury, and MIBK) detected at higher concentrations in the filter press sludges are presented in Table 4. These results reflect the use of the higher filter press concentrations as inputs to the exposure assessment equations; that is, the exposure analyses used are identical, except for the use of the filter press concentrations in place of the composted sludge concentrations in the calculations.

TABLE 4.—EXPOSURE ASSUMING INADEQUATE COMPOSTING

Constituents	Total constituent analyses (mg/kg)	Exposure rate (mg/day)	Levels of regulatory concern [1] (mg/day)
Ingestion:			
Chromium	12	1.2×10^{-3}	0.1
Mercury	0.96	1.0×10^{-4}	0.004
MIBK	7.3	7.3×10^{-4}	4
Inhalation:			
Chromium	12	1.2×10^{-6}	1.9×10^{-6}
Mercury	0.96	9.5×10^{-8}	0.004
MIBK	7.3	7.2×10^{-7}	4
Dermal absorption:			
MIBK	7.3	3.2×10^{-2}	4

[1] For all health-based levels except the inhalation level for chromium, see "Docket Report on Health-Based Regulatory Levels and Solubilities Used in the Evaluation of Delisting Petitions," June 8, 1988, located in the RCRA public docket. For the inhalation level for chromium, see "Carcinogenic Risk Assessment Verification Endeavor (CRAVE) Risk Estimate for Carcinogenicity, Office of Health and Environmental Assessment, Environmental Criteria and Assessment Office, Cincinnati, OH, 1988.

Based on the evaluation of organic constituent and metal levels in the filter press sludge, the raw sludge would not pose a threat to human health by the three pathways discussed in today's notice.

Comments Regarding Detection Limits. In addition to questioning the Agency's use of the VHS model, the commenter questioned the detection limits listed for organic constituents of concern. The commenter stated that the detection limits presented in Table 4 (51 *FR* 37766) of the proposed exclusion were unusually high. The commenter also stated that the Agency did not provide the detection limits associated with the analysis for priority pollutants in the composted sludge.

The Agency believes that the test methods employed and detection limits encountered in the analysis of Lederle's waste are appropriate and acceptable for Lederle's waste matrix. Consistent with requirements for delisting petitions, the analytical methods used derive from the EPA document entitled *Test Methods for Evaluating Solid Waste* (SW-846). The detection limits associated with the composted sludge analysis were 7.6 to 16 ppm for base/neutral extractables (Method 8270), 1.7 to 16 ppm for acid extractables (Method 8270), 1.7 to 16 ppm for acid extractables (Method 8270), 0.1 to 0.4 ppm for pesticides (Method 8080), and 0.5 ppm for purgeables (Method 8240). The vegetable matter and oil and grease content of the composted sludge contributed to the relatively high detection limits encountered. The presence of a number of aliphatic compounds in the composted sludge samples (documented in the spot-check report: ERCO/Energy Resources Co., Inc., Sampling Mission #3, Lederle Laboratories, Pearl River NY, Draft Report, February 1984) resulted in chromatographic baseline elevation, making analyses of the GC results more difficult and increasing detection limits. That is, pure extract could not be run through the column because certain compounds were present at concentrations which could damage the column; the extract was diluted and the extract/diluent mixture was injected into the column. The amount of diluent necessary varied according to the concentration of the compounds that could damage the column and the detection limits increased proportionally with the rate of dilution. As expected, the detection limits varied between samples collected from the filter press and the compost pile and were higher than what would be expected from "clean" wastes. The Agency is not indicating that these limits are appropriate detection limits for all petitioners, but for Lederle's particular waste matrix these limits are adequate.

3. Final Agency Decision

For the reasons stated in the proposal and the responses to public comment, the Agency believes that the filter press sludge and the composted sludge are non-hazardous and as such should be excluded from hazardous waste control. The Agency, therefore, is granting a final exclusion to Lederle Laboratories for its

wastewater treatment sludges (EPA Hazardous Waste Nos. F003 and F005) generated at Lederle's Pearl River, New York facility. The exclusion remains in effect unless the wastes vary from those originally described in the petition (*i.e.*, the wastes are altered as a result of changes in the manufacturing or treatment processes).

Delisted wastes must be managed in accordance with the same applicable Federal and State regulations as other industrial non-hazardous wastes. Therefore, when the Agency delists a petitioned waste, the generator of the waste must either treat, store, or dispose of the waste in an on-site or an off-site storage, treatment, or disposal facility, either of which complies with State regulations for permitting, licensing, and management of municipal or industrial solid waste. Alternatively, a delisted waste may be delivered to a facility which beneficially uses or reuses, or legitimately recycles or reclaims the waste; or treats the waste prior to such beneficial use, reuse, recycling, or reclamation.

In Lederle's case, State regulations (6NYCRR Part 360) permit restricted use of composted sludge as a soil amendment. The New York State Department of Environmental Conservation will continue to regulate the delisted waste under Case II of Part 360 which specifies that the compost (a) must not be available to the general public, (b) must be used to establish final vegetative cover on a landfill or other publicly-owned lands dedicated to non-agricultural uses, (c) will be tested to determine whether metals concentrations render the compost unsuitable for land application, and (d) must be applied in accordance with the "Solid Waste Management Facilities Guidelines" on land application with regard to site separation distances (500 feet from the nearest private residence) and application practices (application rates not to exceed vegetation nutrient requirements). Thus, Lederle's waste management practices must comply with the stipulations presented in the preceding paragraph.

While the State of New York provides a mechanism for Lederle's distribution of their composted sludge, other states are not obliged to do so. If Lederle's composted sludge is transported outside the State of New York, the waste will be subject to appropriate state and local regulations regarding the transport and use of industrial wastewater treatment sludge. For example, if the waste were transported to New Jersey for disposal, the facility would be required to obtain a NJPDES permit which similarly restricts disposal.

III. Limited Effect of Federal Exclusion

The final exclusion being granted today is being issued under the Federal (RCRA) delisting program. States, however, are allowed to impose their own, non-RCRA, regulatory requirements that are more stringent than EPA's pursuant to section 3009 of RCRA. These more stringent requirements may include a provision that prohibits a Federally issued exclusion from taking effect in the State. Since a petitioner's waste may be regulated under a dual system (*i.e.*, both Federal (RCRA) and State (non-RCRA) programs), petitioners are urged to contact their State regulatory authority to determine the regulatory status of their wastes under State law.

IV. Effective Date

This rule is effective immediately. Although Subtitle C regulations normally take effect six months after promulgation (RCRA section 3010(b)), the Hazardous and Solid Waste Amendments of 1984 amended section 3010 of RCRA to allow rules to become effective in less than six months when the regulated community does not need the six-month period to come into compliance. That is the case here since this rule reduces, rather than increases, the existing requirements for persons generating hazardous wastes. In light of the unnecessary hardship and expense that would be imposed on this petitioner by an effective date six months after promulgation, and the fact that a six-month deadline is not necessary to achieve the purpose of Section 3010, EPA believes that this exclusion should be effective immediately. These reasons also provide a basis for making this rule effective immediately under the Administrative Procedures Act, pursuant to 5 U.S.C. 553(d).

V. Regulatory Impact

Under Executive Order 12291, EPA must judge whether a regulation is "major" and, therefore, subject to the requirement of a Regulatory Impact Analysis. This grant of exclusion is not major since its effect is to reduce the overall costs and economic impact of EPA's hazardous waste management regulations. This reduction is achieved by excluding wastes generated at a specific facility from EPA's lists of hazardous wastes, thereby enabling this facility to treat its wastes as non-hazardous. There is no additional impact, therefore, due to today's rule. This rule is not a major regulation, therefore, no Regulatory Impact Analysis is required.

VI. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601–612, whenever an Agency is required to publish a general notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis which describes the impact of the rule on small entities (*i.e.*, small businesses, small organizations, and small governmental jurisdictions). The Administrator may certify, however, that the rule will not have a significant economic impact on a substantial number of small entities.

This amendment will not have a adverse economic impact on small entities since its effects will be to reduce the overall costs of EPA's hazardous waste regulations. Accordingly, I hereby certify that this final regulation will not have a significant economic impact on a substantial number of small entities.

This regulation, therefore, does not require a regulatory flexibility analysis.

List of Subjects in 40 CFR Part 261

Hazardous materials, Waste treatment and disposal, Recycling.

Authority: Sec. 3001 RCRA, 42 U.S.C. 6921.

Date: July 25, 1988.

Jeffery D. Denit,

Deputy Director, Office of Solid Waste.

For the reasons set out in the preamble, 40 CFR Part 261 is amended as follows:

PART 261—IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

1. The authority citation for Part 261 continues to read as follows:

Authority: Sec. 1006, 2002(a), 3001, and 3002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. 6905, 6912(a), 6921, and 6922).

2. In Appendix IX, add to table 1 the following wastestreams in alphabetical order:

Appendix X—Wastes Excluded Under § 260.20 and § 260.22

TABLE 1.—WASTE EXCLUDED FROM NON-SPECIFIC SOURCES

Facility	Address	Waste description
*	*	* * *
Lederle Laboratories.	Pearl River, NY.	Spent non-halogenated solvents and still bottoms (EPA Hazardous Waste Nos. F003 and F005) generated from the recovery of the following solvents: Xylene, acetone, ethyl acetate, ethyl ether, methyl isobutyl ketone, n-butyl alcohol, cyclohexanone, methanol, toluene, and pyridine after [insert publication date]. Exclusion applies to primary and secondary filter press sludges and compost soils generated from these sludges.
*	*	* * *

[FR Doc. 88–17335 Filed 8–1–88; 8:45 am]
BILLING CODE 6560–50–M

GENERAL SERVICES ADMINISTRATION

41 CFR Part 101–7

[FPMR Temp. Reg. A–30, Supp. 3]

Use of Contract Airline/Rail Passenger Service Between Selected Cities/Airports

AGENCY: Federal Supply Service, GSA.

ACTION: Temporary regulation.

SUMMARY: FPMR Temp. Reg. A–30 prescribes policies and procedures governing the use of U.S. certificated air carriers and rail carriers under contract with the General Services Administration (GSA) to furnish passenger services to Federal employees and other persons authorized to travel at Government expense between selected cities/airports. This supplement incorporates changes in the carrier contracts effective February 1, 1988. Supplements 1 and 2 are canceled and the expiration date of FPMR Temp. Reg. A–30 is extended to January 31, 1989. Attachment A of this regulation is amended as follows: Par. 3 is revised to change the criteria for exempt persons. Subpar. a of par. 6 is revised to correct the reference to subpar. "g" to read "h," and the reference to "Traffic" Management Centers to read "Travel" Management Centers. Subpar. h of par. 6 is revised for editorial reasons. In the caption of par. 7, reference to "Traffic" Management Centers is revised to read "Travel" Management Centers. Par. 10 is revised by adding a reference to travelers of the uniformed services.

DATES: *Effective date:* August 2, 1988.
Expiration date: January 31, 1989.

FOR FURTHER INFORMATION CONTACT: Donna M. Stright, Director, Travel and Transportation Management Division (FBT); telephone FTS 557–1261 or commercial 703–557–1261.

SUPPLEMENTARY INFORMATION: The General Services Administration has determined that this rule is not a major rule for the purposes of Executive Order 12291 of February 17, 1981, because it is not likely to result in an annual effect on the economy of $100 million or more, a major increase in costs to consumers or others, or significant adverse effects. The General Services Administration has based all administrative decisions underlying this rule on adequate information concerning the need for, and consequences of, this rule; has determined that the potential benefits to society from this rule outweigh the potential costs and has maximized the net benefits; and has chosen the alternative approach involving the least cost to society.

List of Subjects in 41 CFR Part 101–7

Government employees, Government property management, Motor vehicles, Travel, Travel allowances, Travel and transportation expenses.

Authority: Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c).

In 41 CFR Chapter 101, supplement 3 is added to the appendix at the end of Subchapter A to read as follows:

Federal Property Management Regulations, Temporary Regulation A–30, Supplement 3

July 14, 1988

To: Heads of Federal agencies.

Subject: Use of contract airline/rail passenger service between selected cities/airports.

1. *Purpose.* This supplement incorporates changes in the carrier contracts effective February 1, 1988. Supplements 1 and 2 are canceled and the expiration date of FPMR Temp. Reg. A–30 is extended to January 31, 1989.

2. *Effective date.* This regulation is effective August 2, 1988.

3. *Expiration date.* This regulation expires January 31, 1989.

4. *Explanation of changes.*

a. The expiration date in par. 3 of the regulation is revised to January 31, 1989.

b. Par. 3 of attachment A is revised to read as follows:

3. *Applicability.*

a. This regulation is mandatory for all executive agencies (except the Department of Defense (DOD)) and other Federal agencies subject to the authority of the Administrator of General Services under section 201 of the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 481), and 5 U.S.C. 5701 and 5721 *et seq.* (Uniformed members and civilian employees and DOD are subject to the procedures established in the Military Traffic Management Regulations AR 55–355/NAVSUPINST 4600.70/MCO P4600.14A/DLAR 4500.3.)

b. The following persons are exempt from the mandatory use of this regulation; however, they are authorized to obtain services under this regulation at the option of the contractors when seating space is available:

(1) Uniformed members of the U.S. Coast Guard;

(2) Members and employees of the U.S. Congress;

(3) Employees of the judicial branch of the Government;

(4) Employees of the U.S. Postal Service;

(5) Foreign service officers;

(6) Employees of any agency having independent statutory authority to prescribe travel allowances and who are not subject to the provisions of 5 U.S.C. 5701 through 5709; and

(7) Eligible contractors working for the Government, including:

(a) Contractors working under cost reimbursable contracts or other types of contracts involving direct travel costs to the Government; or

(b) Contractors working for the Government at specific sites under special arrangements with the applicable contracting agency, and which are wholly funded at such sites through Congressional appropriations (e.g., Government-owned, contractor-operated (GOCO), federally funded research and development (FFRDC), or management and operating (M&O) contracts).

Note.—Each contracting agency is responsible for identifying contractor eligibility and authorization for GSA contract fares.

c. Par. 6 of attachment A is revised to read as follows:

6. *Procedures for obtaining service.*

a. Except as provided in subpars. b, c, and h of this paragraph, contract airline/rail passenger service shall be ordered by the issuance of a U.S. Government Transportation Request (GTR) (Standard Form 1169), either directly to contractors or indirectly to Travel Management Centers (TMCs) established by GSA as provided in FPMR Temp. Reg. A–24. (See par. 7 on the use of TMCs.)

b. Agencies and departments participating in GSA's travel and transportation expense payment system are authorized to use GSA contractor-issued charge cards to the extent provided in FPMR Temp. Reg. A–25 and supplements thereto. These charge cards may be presented to contractors, TMCs, airline and AMTRAK ticket counters, or agency travel officers, as appropriate and in accordance with agency policies and procedures implementing the charge card program.

c. In limited circumstances when a traveler uses cash to procure service under FPMR 101–41.203–2, the traveler shall be prepared to authenticate the trip as official travel. When cash is used, the contractors listed in the FTD

have the option of furnishing services at either the contract or noncontract fare. If only one contract is awarded for a city/airport pair and the contractor does not provide a contract fare with the use of cash, the traveler shall procure service from a contract or noncontract carrier offering the lowest fare. If more than one carrier has been awarded a contract for a city/airport pair, the traveler shall observe the order of contractor succession in selecting a contractor which provides a contract fare with the use of cash; if none of the contractors provides a contract fare with the use of cash, the traveler shall procure service from a contract or noncontract carrier offering the lowest fare and which will accept cash. Cash or personal credit cards shall not be used to circumvent the Government's contracts.

d. When a reservation for contract service is requested, the fare basis shall be identified as "YCA' (unrestricted) or "____CA" (restricted), as appropriate, and the contractor's ticket agent shall be instructed to apply the appropriate fare basis and contract fare. Agencies using teletype ticketing equipment shall examine airline tickets to determine if the tickets contain the correct fare or whether they should be canceled and new tickets issued. Tickets picked up at the airline ticket office shall be verified to ensure that the proper fare is shown on the ticket.

e. Contract fares apply only for the city-airport pairs named in the FTD, and are not applicable to or from intermediate points. However, the contract fares are applicable in conjunction with other published fares or other contract fares. Contract fares shall not be used for personal travel taken in connection with official travel.

f. When a city/airport pair published in the FTD indicates that only one contract is awarded and the contractor subsequently offers a fare lower than its contract fare for the same service, the ordering agency may elect to use the lower fare. Promotional, restricted, and those special fares offered by the contractor and applicable only to Government employees on official travel (commonly known as status fares) may be used if the traveler can meet the qualifying restrictions to obtain such fares.

g. When the FTD indicates that separate contract fares apply for specific airports in selected cities served by more than one airport, travelers may (without further justification) use the airport which best meets their needs.

h. Eligible contractors (as defined in subpar. 3b(7)), traveling in performance of a Government contract and with proper identification from the contracting agency, are authorized to obtain contract fares if the carrier contractor agrees to the arrangement. Carriers may, at their option, require Government contractors to furnish a GTR or contract number, for endorsement purposes, in conjunction with the form of payment (GTR, cash, or personal credit card). The FTD identifies those carriers which have agreed to furnish transportation services at the GSA contract fare to eligible contractors.

d. Par. 7 of attachment A is revised to read as follows:

7. Use of Travel Management Centers (TMCs). TMCs are commercial offices operated by travel agents under contract with GSA. These TMCs are responsible for providing and arranging all travel services required by the participating agencies.

a. When GTRs are used, the TMCs are assigned GTR numbers by each participating agency and these GTR numbers shall be shown on all transportation tickets issued.

b. When GSA contractor-issued charge cards or Government Travel System (GTS) accounts are used, travel management services will be furnished as provided in FPMR Temp. Reg. A–25. (See the FTD for the location of TMCs.)

e. Par. 10 of attachment A is revised to read as follows:

10. *Traveler liability.* In the absence of specific authorization or approval stated on or attached to the travel authorization or travel voucher, a civilian traveler shall be responsible for any difference in the cost that may result from the traveler's unauthorized use of noncontract service or failure to observe the order of contractor succession. The traveler's indebtedness to the Government shall be the difference between the price of the service used and the lowest contract fare applicable to the travel involved. The entitlement of a uniformed services traveler who fails to use directed Government-procured transportation shall be as specified in the Joint Federal Travel Regulations, Volume 1.

John Alderson,

Acting Administrator.

[FR Doc. 88–17303 Filed 8–1–88; 8:45 am]

BILLING CODE 6820–24–M

41 CFR Part 101–40

[FPMR Temp. Reg. G–51]

Use of Carrier Contractors for Express Small Package Transportation

AGENCY: Federal Supply Service, GSA.

ACTION: Temporary regulation.

SUMMARY: The provisions of this regulation were formerly issued as FPMR Temp. Reg. A–23 and added to the appendix at the end of Subchapter A in 41 CFR Chapter 101. Since FPMR Temp. Reg. A–23 and the supplements thereto are transportation oriented, GSA has determined that the provisions governing the use of carrier contractors for express small package transportation should be added to the appendix at the end of Subchapter G (entitled "Transportation and Motor Vehicles") in 41 CFR Chapter 101.

DATES: *Effective date:* August 2, 1988.

Expiration date: September 30, 1988.

FOR FURTHER INFORMATION CONTACT: Donna M. Stright, Director, Travel and Transportation Management Division (FBT), Washington, DC 20406, telephone FTS 557–1261 or commercial 703–557–1216.

SUPPLEMENTARY INFORMATION: GSA has determined that this rule is not a major rule for the purposes of Executive Order 12291 of February 17, 1981, because it is not likely to result in an annual effect on the economy of $100 million or more, a major increase in costs to consumers or others, or significant adverse effects. GSA has based all administrative decisions underlying this rule on adequate information concerning the need for, and consequences of, this rule; has determined that the potential benefits to society from this rule outweigh the potential costs and has maximized the net benefits; and has chosen the alternative approach involving the least net cost to society.

List of Subjects in 41 CFR Part 101–40

Freight, Government property, Moving of household goods, Office relocations, Transportation.

1. The authority citation for 41 CFR Part 101–40 continues to read as follows:

Authority: Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c).

2. In 41 CFR Chapter 101, the following temporary regulation is added to the appendix at the end of Subchapter G to read as follows:

Federal Property Management Regulations Temporary Regulation G–51

July 7, 1988.

To: Heads of Federal agencies.

Subject: Use of carrier contractors for express small package transportation.

1. *Purpose.* This regulation prescribes policies, procedures, and contract rates applicable to Federal civilian agencies and departments when next day express small package transportation service from and to specified city-pairs is required.

2. *Effective date.* August 2, 1988.

3. *Expiration date.* September 30, 1988.

4. *Background.*

a. The provisions of this regulation were formerly issued as FPMR Temp. Reg. A–23 and added to the appendix at the end of Subchapter A in 41 CFR Chapter 101. Since FPMR Temp. Reg. A–23 is transportation oriented, GSA has determined that the provisions governing the use of carrier contractors for express small package transportation should be transferred to the appendix at the end of Subchapter G (entitled "Transportation and Motor Vehicles") in 41 CFR Chapter 101. Except for the removal of the former paragraph 13 (which has become obsolete with the passage of time), the provisions of FPMR Temp. Reg. A–23 are transferred to Subchapter G without change in policy or procedures.

b. Under section 201(a) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 481(a)), as amended, the General Services Administration (GSA) is responsible for prescribing policies and procedures that are advantageous to the Government in terms of economy, efficiency, or service, regarding program activities in the area of transportation and traffic

management. Accordingly, GSA has entered into a contract with the carrier listed in attachment A for the transportation of express small packages from and to specified locations in the United States (including Alaska and Hawaii) and Puerto Rico, where the contractor or its agent presently provides or will provide next day service. In consideration of the contract rates listed in attachment A and to the extent provided in this regulation, the Government has agreed to place all its transportation requirements for express small package service with the contractor.

5. *Scope.*

a. This regulation is mandatory for all civilian executive agencies pursuant to section 201(a) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 481(a)), as amended, and also may be used by (1) cost-reimbursable contractors working for the Government, (2) the legislative and judicial branches of the U.S. Government, and (3) the Department of Defense.

b. Next day express small package transportation is premium transportation. Therefore, agencies and other qualified users shall make prudent use of the services available under this regulation. When next day service is not required to accomplish an agency's mission, other less costly methods of transportation shall be used.

6. *Definitions.*

a. "Agency" means any ordering activity (including cost-reimbursable contractors) authorized to obtain contractor services at the contract rate.

b. "Commercial form" means a commercial uniform straight bill of lading, a commercial express receipt, or any other commercial instrument constituting a contract of carriage subject to the terms and conditions set forth in Standard Form 1103, U.S. Government Bill of Lading (see 41 CFR 101–41.302–3).

c. "Commercial forms and procedures" means a provision whereby shipments are made using commercial forms and commercial billing procedures instead of Government bills of lading (SF 1103) and their related billing procedures. (See 41 CFR 101–41.304–2.)

d. "Contractor" means the contract awardee listed in attachment A.

e. "Contract rate" means a shipment charge listed in attachment A.

f. "Express small package" means a package weighing 50 pounds or less, measuring a maximum of 108 inches in length and girth combined, and containing general commodities except:

(1) Hazardous materials as defined in 49 CFR 172.101;

(2) Property of extraordinary value;

(3) Live animals or plants;

(4) Precious metals or stones;

(5) Weapons or firearms;

(6) Liquor or tobacco products;

(7) Currenty, inlcuding money orders;

(8) Narcotics or other controlled substances, unless otherwise accepted by the contractor;

(9) Any other article which the contractor prohibits its commercial customers from shipping; and

(10) Letters, unless adhering to the criteria established by the U.S. Postal Service as specified in subpar. 7a, below.

g. "Geographical areas" means locations lying wholly or partially within cities, towns, and communities identified by the U.S. Postal Service national five-digit ZIP code in the contractor's service guide or analogous listing.

h. "Holiday" means a Federal holiday.

i. "Special service" means any other agency-required services, such as weekend delivery, escorted courier service, insurance, proof of delivery, additional airbill copies, etc., which, if requested, will be subject to fees not higher than those charged to the contractor's regular commercial customers.

j. "Standard service" means pickup and next day delivery (including desk pickup and desk delivery) between the hours of 8 a.m. and 5 p.m., Mondays through Fridays, except holidays.

7. *Applicability*

a. The scope of the express small package contract does not include "letters"; i.e., routine first class mail, as defined in U.S. Postal Service Regulations, 39 CFR 310.1 (Private Express Statutes) unless the letters are so "extremely urgent" that the value or usefulness of the letters would be lost or greatly diminished if not delivered within the time liimts noted in par. (2), below. "Letter" is generally defined as "a message directed to a specific person or address and recorded in or on a tangible object." (See 39 CFR 310.1 for specific exclusions from the definition.)

(1) It is conclusively presumed that a letter is "extremely urgent" if the amount paid for carriage under the contract is at least $3 or twice the applicable U.S. postage for first class mail (including priority mail), whichever is greater. If a single shipment consists of a number of letters that are picked up together at a single origin for shipment to a single destination, postage may be computed as though the shipment constitutes a single letter. For other types of charges, a bona fide estimate of the average number of letters or shipments may be divided into the charge.

(2) If the value or usefulness of a letter would be lost or greatly diminished if the letter were not delivered under the following conditions, then the letter is considered "extremely urgent" and may be shipped by the contractor under the express small package contract:

(a) Where the letter is dispatched within 50 miles of the intended destination, delivery must be completed within 6 hours or by the close of the addressee's normal business hours on the date of dispatch, whichever is later, except that letters dispatched after noon, and before midnight must be delivered by 10 a.m. of the addressee's next business day;

(b) For all other letters, delivery must be completed within 12 hours or by noon of the addressee's next business day;

(c) Agencies shall ensure that all outside covers or containers of letters are prominently marked with the words "Extremely Urgent—Private Carriage Authorized." In addition, each outside cover shall show the names and addresses of the contractor, the sender, and the addressee;

(d) The determination that a letter or letters meet the extreme urgency provisions of 39 CFR 320.6 shall be made by the responsible sending office. If such letters are sent to an agency mailroom for pickup by a private carrier rather than pickup at the sending office, the sending office shall ensure that such letters are marked clearly with the legend "Extremely Urgent—Private Carriage Authorized"; or

(e) Any letters, the extreme urgency of which meets the requirements of 39 CFR 320.6, sent by a private express carrier, shall be placed in plain envelopes.

(3) In addition to the exception for extremely urgent letters, data processing materials may be shipped as an express small package if the data processing materials are conveyed (a) to data processing center, if carriage is completed within 12 hours or by noon of the addressee's next business day and if data processing work is commenced on such materials within 36 hours of their receipt at the center; or (b) back from the data processing center to the address of the office originating the incoming materials, if carriage is completed within 12 hours or by noon of the addressee's next business day and if data processing work was commenced on the incoming materials within 36 hours of their receipt at the center.

(4) For further guidance with respect to shipments of letters, including data processing materials, see U.S. Postal Service Regulations at 39 CFR Parts 310 and 320, or call the Law Department of the U.S. Postal Service at FTS 245–4616.

b. The provisions of this regulation apply only when agencies subject to this regulation are using commercial forms and procedures. These agencies shall ship their express small packages by the contractor specified in attachment A, except that the Government reserves the right to use the U.S. Postal Service when in the Government's best interest.

c. To the extent cost-reimbursable contractors are authorized by an agency to ship under this regulation and are reimbursed the transportation costs as direct allowable costs, the contract rates and services provided in this regulation apply to cost-reimbursable contractors. Agencies shall instruct their cost-reimbursable contractors that, before a shipment is made under this regulation, the commercial shipping document must be annotated with either of the following notations, as appropriate:

(1) *When the Government is shown as the consignee*—"Transportation is for the (name of specific agency) and the actual total transportation charges paid to the carrier by the consignor are assignable to, and shall be reimbursed by, the Government"; or

(2) *When the Government is not shown as either the consignor or consignee*—"Transportation is for the (name or specific agency) and the actual total transportation charges paid to the carrier by the consignor or consignee shall be reimbursed by the Government, pursuant to cost-reimbursement contract number _____. This may be confirmed by contacting (name and address of the contract administration office listed in the contract)."

d. If the contractor offers and publishes for use by the general public a charge that is

lower than the contract rate for the same service, agencies shall pay the lower charge.

e. The contract rate does not apply for local pickup and delivery between locations in the metropolitan area of any city, town, or community.

8. *Contractor responsibilities.*

a. In consideration of payment for services provided at the contract rates, the contractor will furnish:

(1) Standard service (see subpar. 6j);

(2) Delivery service for "extremely urgent" letters (see par. 7);

(3) Pickup service on the same day pickup is requested (see subpar. 12a); and

(4) Delivery service on the next day (excluding Staurdays, Sundays, and holidays) following receipt from the shipper. Next day delivery service will not apply when delivery is delayed due to acts of God, the public enemy, the authority of law, or the acts of the consignor (shipper) or consignee (receiver).

b. Packages not delivered on the next day as prescribed in subpar. 8a(4) shall be transported free of charge.

c. When an agency uses purchase orders (POs) or blanket purchase agreements (BPAs), as authorized at 48 CFR Subpart 13.2, and these contain a dollar value limitation, the contractor will monitor the BPAs/POs and promptly notify the issuing agency when the contractor's service charges approach the dollar value ceilings noted on the BPAs/POs. The contractor will monitor the BPAs/POs to determine if such instruments restrict the ordering of contractor service to only certain authorized personnel of an agency. If there are restrictions, the contractor will communicate with the issuer of the BPAs/POs to clarify the intent and purpose of the restriction or to remove the restriction, as agreed to by the Government agency involved. The contractor's financial system should have the flexibility to separately account for contractural and noncontractural services which may have been authorized by separate BPAs/POs, and also "break out" the charges for such services on subsequent invoices.

9. *Payment responsibilities.* In accordance with the terms of the contract, payments to the contractor will be due on the 30th calendar day after the date of actual receipt of a proper invoice. The contractor is authorized to suspend service to an account to the extent that undisputed amounts are overdue more than 90 calendar days from the invoice date in accordance with par. 10. The date of the check issued in payment or the date of payment by wire transfer through the Treasury Financial Communications System shall be considered to be the date payment is made. The Prompt Payment Act (Pub. L. 97–177, 31 U.S.C. 3902, May 21, 1982) provides for the assessment of interest penalties when payments are overdue. A claim for reimbursement of paid transportation charges shall be filed against the contractor when it is determined that the contractor failed to furnish next day delivery service as provided in subpars. 8a(4) and 8b.

a. GSA has determined that the contractor's invoicer form meets the requirements of 41 CFR 101–41.304–2(d)(2) regarding payment of charges and is a proper invoice for payment and for the purposes of implementing the Prompt Payment Act. Accordingly, agencies should establish simplified procedures to ensure prompt payment to the contractor. If agencies do not have an effective payment system to achieve this purpose, they should consider requiring the shipper and/or consignee to forward a copy of the contractor's airbill to the appropriate paying office for payment or reconciliation. (Requests for additional airbill copies are considered "special services" under subpar. 6i, however.)

b. Agencies shall instruct their cost-reimbursable contractors shipping under this regulation to ensure that the commercial document bears a proper "bill to" address and appropriate account reference(s) to facilitate the prompt processing and payment of the contractor's invoice by the due date.

c. At the option of the agency, and with the concurrence of the contractor, use of automated electronic billing and payment systems, or other sophisticated methods to simplify the verification and control process, may be separately negotiated and established by agreement between the Government agency and the contractor.

10. *Suspension of service.*

a. Service to any delinquent agency account may be suspended to the extent that undisputed amounts are overdue more than 90 calendar days provided the contractor has simultaneously notified the account holder and the appropriate GSA zone office 60 calendar days after the invoice date that amounts are overdue and need to be paid within 30 calendar days of the date of the delinquency notice.

b. When a question arises concerning the proper amount of charges for services rendered (e.g., improper billing, failure to post payments, erroneous charges, etc.), agencies shall give notice of the apparent error, defect, or impropriety in an invoice to the contractor's billing office, with a copy to the appropriate GSA zone office, within 15 calendar days of receipt of the invoice, pursuant to 31 U.S.C. 390(5) and OMB circular A–125, sec. 6b., which implement the Prompt Payment Act.

c. No suspension of service will be initiated where such disputes exist if an activity has paid the balance of undisputed billings. The GSA contracting officer will make the final decisions concerning any disputed charges.

d. Any suspension will be taken only against the activity to which the account number is assigned, not against the entire agency.

e. Service shall be restored within 5 calendar days of payment of the overdue amount(s).

11. *Shipment weight and charge.* Rates applicable under this regulation will be assessed on the total weight of each shipment moving at one time from one consignor to one consignee. For example, if three packages weigh one pound each, the applicable charge of the shipment will be computed at the rate applicable to one 3-pound package.

12. *Agency procedures for obtaining service.*

a. Pickup service as noted in subpar. 6j may be ordered on an as-needed basis. In these instances, agencies shall allow the contractor a minimum of 2 hours to make the pickup. For repetitive shipments agencies may arrange with the contractor to install "lock boxes" and/or furnish regular pickup service at specified times on specified days to meet the shipper's requirements. Agencies should arrange such security clearances and passes as may be necessary to enable the contractor to perform pickup services in a timely fashion in accordance with agency procedures.

b. When and where practicable, agencies shall minimize transportation and administrative costs by consolidating into one shipment packages moving at one time from one consignor to one consignee.

c. Agencies shall determine the weight of each shipment and have the weight indicated on the appropriate commercial form. The total weight of a shipment shall be rounded to the nearest whole pound. Shipments weighing less than 1 pound shall be shown as weighing 1 pound.

d. Where the Government requires special services beyond the scope of the contract (such as weekend or holiday pickup and delivery, escorted courier services, insurance, airbill copies, and proof of delivery, international service, service to communities not served next day by the contractor or its agent), an agency will have the option either to purchase these services from the contractor at the same fees charged to its regular commercial customers or use another carrier.

e. Agencies shall provide the contractor with a billing address at the time an agency account is established. To ensure that billings are directed to the proper paying office and subsequent payments are credited, agencies may establish a centralized payment system or clearly identify individual shipping activities/accounts to which billings are to be directed. Some agencies may require more than one account number per ordering activity if they wish to differentiate billing of different type shipments.

f. Agencies using a purchase order (PO), a blanket purchase agreement (BPA) pursuant to 48 CFR Subpart 13.2 or other simplified acquisition procedures, should provide the following information:

(1) Name of contractor;

(2) Account number(s);

(3) GSA contract number GS–00F–88038;

(4) Purchase order number;

(5) "Bill to" address;

(6) Term of the BPA/PO; and

(7) Total dollar value authorized under the BPA/PO.

g. The contractor's Government coordinator may be contacted to establish accounts or resolve service issues. (See attachment A.)

13. *Contractor performance.* The performance of contractor responsibilities as specified in par. 8 is essential to meet the objectives for which the express small package contract and these regulations were developed. Agencies should notify the appropriate GSA zone office, Federal Supply Service Bureau, Attn: Traffic and Travel Services Zone Manager, in writing, when the contractor fails to meet its contractural responsibilities. For purposes of this paragraph, the appropriate GSA zone office is that office listed in attachment B having

jurisdiction over specified locations from which a shipment originates. These agency reports shall be compiled and forwarded for appropriate action to the GSA Travel and Transportation Management Division (FBT), Washington, DC 20406.

14. *Comments.* Comments and recommendations concerning use of this program or implementing regulations may be submitted to the General Services Administration, Travel and Transportation Management Division (FBT), Washington, DC 20406.

15. *Effects on other directives.* FPMR Temporary Regulation A-23 and supplements 3 through 5 are canceled.

John Alderson,

Acting Administrator of General Services.

Contractor, Shipment Charges, and Geographical Areas

CONTRACTOR CODE AND NAME: DHL–DHL AIRWAYS, INCORPORATED

Shipment weight (lbs)	Shipment charge
1	$4.94
2	5.88
3	6.82
4	7.76
5	8.70
6	9.64
7	10.58
8	11.52
9	12.46
10	13.40
11	14.34
12	15.28
13	16.22
14	17.16
15	18.10
16	19.04
17	19.98
18	20.92
19	21.86
20	22.80
21	23.74
22	24.68
23	25.62
24	26.56
25	27.50
26	28.44
27	29.38
28	30.32
29	31.26
30	32.20
31	33.14
32	34.08
33	35.02
34	35.96
35	36.90
36	37.84
37	38.78
38	39.72
39	40.66
40	41.60
41	42.54
42	43.48
43	44.42
44	45.36
45	46.30
46	47.24
47	48.18
48	49.12
49	50.06
50	51.00

Geographical Areas Served

The DHL contract rates listed in this attachment apply to any location within the geographical area of cities, towns, and communities in the United States (including Alaska and Hawaii) and Puerto Rico, where DHL or its agent presently, or in the future, provides or will provide next day service to the extent prescribed in par. 8 of this regulation. The geographical area of cities, towns, and communities is the U.S. Postal Service national five-digit ZIP code area listed in DHL's publication, "DHL Express Guide for U.S. Federal Government Shippers," or as may be subsequently identified by DHL as being served next day. Since it is impracticable to print a current area listing in these regulations, agencies may determine up-to-date areas of service and obtain other information by contacting either DHL's Government coordinator at 703–684–0102, the DHL offices listed herein, or the appropriate GSA office listed in attachment B. DHL will furnish its guide to agencies upon request.

DHL Offices

Alabama

Birmingham, (205) 591–6560
Huntsville, (205) 772–3887
Mobile, (800) 231–3391
Montgomery, (205) 265–5666

Alaska

Anchorage, (907) 243–1503
Fairbanks, (907) 456–1707
Homer, (907) 235–5244
Juneau, (907) 789–2187
Kenai, (907) 283–4650
Ketchikan, (907) 225–5777
Kodiak, (907) 486–5354
Prudhoe Bay, (907) 659–2547
Sitka, (907) 747–3063
Valdez, (907) 835–2625

Arizona

Phoenix, (602) 244–9922
Tucson, (602) 294–1887

Arkansas

Little Rock, (501) 562–1666

California

Bakersfield, (805) 392–0183
Burbank, (818) 785–7555
Concord, (800) 345–6011
Fresno, (209) 454–0535
Los Angeles, (213) 973–7300
Ontario, (714) 241–1520
Oxnard, (805) 967–5551
Sacramento, (916) 929–1112
San Diego, (619) 275–3890
San Francisco, (415) 345–9400
San Jose, (408) 345–9400
Santa Ana,
(714) 241–1520
Santa Barbara, (805) 967–5551
Santa Maria, (805) 967–5551
Stockton, (800) 632–4774
Van Nuys, (213) 973–7300

Colorado

Colorado Springs, (303) 528–6777
Denver, (303) 388–9212

Connecticut

Hartford, (203) 683–2014

Delaware

(215) 461–8111

District of Columbia

Washington, (703) 684–8733

Florida

Ft. Lauderdale, (305) 791–7400
Ft. Myers, (800) 231–3391
Jacksonville, (904) 739–2327
Melbourne, (305) 851–1432
Miami, (305) 592–8795
Orlando, (305) 851–1432
Pensacola, (800) 231–3391
St. Petersburg, (813) 886–5889
Sarasota, (813) 886–5889
Tallahassee, (800) 231–3391
Tampa, (813) 886–5889
West Palm Beach, (305) 737–2922

Georgia

Atlanta, (404) 997–1635
Savannah, (912) 233–5111

Hawaii

Hilo, (808) 836–0441
Honolulu, (808) 836–0441
Kaanapali, (808) 836–0441
Kahului, (808) 836–0441
Kailua/Kona, (808) 836–0441
Lihue, (808) 836–0441

Idaho

Boise, (208) 322–1466
Idaho Falls, (800) 828–3314
Lewiston, (800) 828–3314
Pocatello, (800) 828–3314
Twin Falls, (800) 828–3314

Illinois

Chicago, (312) 456–3200
Decatur, (800) 942–0503
Moline, (800) 942–0503
Peoria, (800) 942–0503
Rockford, (800) 942–0503
Springfield, (800) 942–0503

Indiana

Fort Wayne, (800) 231–3391
Indianapolis, (317) 241–4464
South Bend, (800) 231–3391

Iowa

Cedar Rapids, (800) 942–0503
Des Moines, (515) 282–5418

Kansas

Kansas City, (816) 587–5040
Topeka, (913) 232–5096
Wichita, (316) 263–8300

Kentucky

Lexington, (606) 254–0105
Louisville, (502) 499–7131

Louisiana

Baton Rouge, (800) 231–3391
Lafayette, (800) 231–3391
Lake Charles, (800) 231–3391

New Orleans, (504) 464–0231
Shreveport, (318) 631–9843

Maine

Portland, (800) 225–5345

Maryland

Baltimore, (301) 768–3730

Massachusetts

Boston, (617) 846–8900

Michigan

Battle Creek, (800) 446–6650
Detroit, (313) 388–6810
Flint, (800) 446–6650
Grand Rapids, (800) 446–6650
Jackson, (800) 446–6650
Lansing, (800) 446–6650
Saginaw, (800) 446–6650

Minnesota

Duluth, (800) 272–1825
Minneapolis/St. Paul, (612) 727–1100
Rochester, (800) 272–1825
St. Cloud, (800) 272–1825

Mississippi

Gulfport, (800) 231–3391
Jackson, (800) 231–3391

Missouri

Kansas City, (816) 587–5040
St. Louis, (314) 423–8663
Springfield, (913) 621–0900

Montana

Billings, (800) 826–1063

Nebraska

Lincoln, (402) 474–1111
Omaha, (402) 330–6806

Nevada

Las Vegas, (702) 798–4090
Reno, (702) 358–0545

New Hampshire

Manchester, (800) 225–5345

New Jersey

Newark, (201) 225–8800
Teterboro, (201) 225–8800
Trenton, (201) 382–8820

New Mexico

Albuquerque, (505) 292–7699

New York

Albany, (800) 632–3301
Buffalo, (716) 685–2500/01/03/04
Elmira, (800) 225–5345
Farmingdale, (516) 333–3370
New York City, (718) 917–8000
Rochester, (716) 436–7031
Syracuse, (315) 432–8953
White Plains, (914) 683–1183

North Carolina

Charlotte, (704) 398–2354
Fayetteville, (704) 398–2354
Greensboro, (919) 668–9533
High Point, (919) 668–9533
Raleigh/Durham, (919) 787–9584
Wilmington, (800) 722–8620
Winston-Salem, (919) 668–9533

North Dakota

Bismarck, (612) 727–1100
Fargo, (701) 232–2838
Moorhead, (800) 272–1825

Ohio

Akron, (216) 798–0155
Cincinnati, (606) 331–7777
Cleveland, (261) 671–4700
Columbus, (614) 252–8470
Dayton, (513) 252–3773
Toledo, (419) 866–1560
Youngstown, (261) 671–4700

Oklahoma

Oklahoma City, (405) 682–8088
Tulsa, (918) 622–8311

Oregon

Eugene, (503) 257–3551
Medford, (503) 257–3551
Portland, (503) 275–3551
Redmond, (503) 257–3551

Pennsylvania

Allentown/Bethlehem/Easton, (215) 264–4550
Erie, (412) 262–2764
Philadelphia, (215) 461–8111
Pittsburgh, (412) 262–2764
Scranton, (800) 225–5345
York, (717) 564–7860

Rhode Island

Providence, (401) 739–5900

Puerto Rico

San Juan, (809) 757–5800

South Carolina

Charleston, (803) 767–0275
Columbia (803) 796–9640
Florence, (803) 767–0275
Greenville/Spartanburg, (803) 234–6651

South Dakota

Sioux Falls, (605) 335–8053 + dial tone + 950–1088

Tennessee

Chattanooga, (404) 820–0821
Johnson City, (800) 231–3391
Knoxville, (615) 970–2232
Memphis, (901) 795–9911
Nashville, (615) 889–4602

Texas

Addison, (214) 471–1999
Amarillo, (800) 833–0151
Austin (512) 928–3960
Beaumont/Pt. Arthur, (713) 442–4500
College Station, (713) 442–4500
Corpus Christi, (800) 833–0151
Dallas/Ft. Worth, (214) 471–1999
El Paso, (800) 833–0151
Harlingen-McAllen/Brownsville, (800)–833–0151
Houston, (713) 442–4500
Lake Jackson, (713) 442–4500
Laredo, (800) 833–0151
Longview/Tyler, (214) 757–9287
Lubbock, (800) 833–0151
Midland, (800) 833–0151
San Antonio, (512) 491–0430
Sugarland, (713) 442–4500
Texarkana, (800) 833–0151
Town & Country, (800) 833–0151
Victoria, (713) 442–4500

Utah

Ogen, (801) 539–8900
Provo, (801) 539–8900
Salt Lake City (801) 539–8900

Vermont

Burlington, (800) 225–5345

Virginia

Charlottesville, (800) 225–5345
Norfolk, (804) 857–6116
Richmond, (804) 353–2277
Roanoke, (800) 225–5345

Washinton

Pasco, (800) 468–6856
Seattle, (206) 763–4222
Spokane, (509) 456–6200
Wenatchee, (800) 468–6856
Yakima (800) 468–6856

West Virginia

Charleston, (800) 225–5345
Huntington, (800) 225–5345

Wisconsin

Appleton, (800) 242–5243
Greenbay, (414) 762–3372
Madison, (800) 242–5243
Manitowoc, (414) 762–3372
Wausau, (414) 762–3372
Milwaukee, (414) 762–3372

Wyoming

Casper, (800) 826–1063
Cheyenne, (800) 826–1063

Attachment B

Areas of Jurisdiction, Federal Supply Service Bureaus, Traffic and Travel Services Zone Offices

Eastern Zone

Jurisdiction: AL, CT, DE, FL, GA, KY, MA, MD (note A), ME, MS, NC, NH, NJ, NY, PA, Puerto Rico, RI, SC, TN, VT, VA (note B), Virgin Islands, WV
Address: GSA, Attn: 4FBT, 75 Spring Street, SW., Atlanta, GA 30303
Telephone: FTS 242–5121, CML (404) 331–5121

Central Zone

Jurisdiction: IA, IL, IN, KS, MI, MN, MO, NE, OH, WI
Address: GSA, Attn: 6FBT, 1500 E. Bannister Street, Kansas City, MO 64131
Telephone: FTS (not available), CML (816) 523–6029

Southwestern Zone

Jurisdiction: AR, CO, LA, MT, ND, NM, OK, SD, TX, UT, WY
Address: GSA, Attn: 7FBT, 819 Taylor Street, Fort Worth, TX 76102
Telephone: FTS 334–2737, CML (817) 334–2737

Western Zone

Jurisdiction: AK, American Samoa, AZ, CA, GU, HI, ID, NV, Northern Mariana Islands, OR, Pacific Trust Territories, WA
Address: GSA, Attn: 9FBT, 525 Market Street, San Francisco, CA 94105
Telephone: FTS 454–9288, CML (415) 974–9288

National Capital Region (NCR)

Jurisdiction: DC, MD (note C), VA (note D)

Address: GSA, Attn: WFBT, 7th & D Streets, SW., Washington, DC 20407
Telephone: FTS 472–1626, CML (202) 472–1626
Note A—Except for those counties under NCR jurisdiction as listed in note C.
Note B—Except for those cities and counties under NCR jurisdiction as listed in note D.
Note C—Counties of Prince Georges and Montgomery only.
Note D—Cities of Alexandria, Fairfax, Manassas, and Manassas Park, and counties of Arlington, Fairfax, Loudoun, and Prince William only.

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41 CFR Parts 201–11, 201–30, 201–31, and 201–32

[FIRMR Amdt. 13]

Revision To Remove Additional Redundant and Nonregulatory Provisions

AGENCY: Information Resources Management Service, GSA.

ACTION: Final rule.

SUMMARY: This revision is the second of two amendments to streamline and simplify the FIRMR by immediately removing redundancies and nonregulatory provisions. The first amendment removed and updated provisions without change to regulatory requirements, policies, or procedures. This amendment consolidates provisions and removes additional provisions not requiring regulatory coverage. Although the amendment results in no policy revisions, some changes have been made to reporting requirements and procedures. The intent is to streamline and simplify provisions to facilitate useability.

EFFECTIVE DATE: This rule is effective October 3, 1988, but may be observed earlier.

FOR FURTHER INFORMATION CONTACT: Carolyn A. Thomas, Regulations Branch, Office of Information Resources Management, telephone (202) 566–0194 or FTS, 566–0194.

SUPPLEMENTARY INFORMATION: (1) The purpose of this amendment is to streamline and simplify FIRMR provisions to facilitate ease of use. Although no changes have been made to current policies, some changes have been made to reporting requirements and procedures.

(2) A notice of proposed rulemaking regarding this action was published in the **Federal Register** on January 22, 1988. All comments received have been considered.

(3) Changes made in 41 CFR Chapter 201 are explained in the following paragraphs.

(a) In Part 201–11, Competition, the following changes are made.

(i) Section 201–11.001, paragraph (b) is revised to incorporate provisions removed from § 201–11.003, paragraph (a) related to the full and open competitive objective.

(ii) Section 201–11.003, paragraph (a) is removed to eliminate redundant provisions on full and open competition as the basic procurement objective of the Government. Pertinent provisions from paragraph (a) are consolidated in § 201–11.001 (subject: the full and open competitive objective).

(iii) Section 201–11.003, paragraph (b) is revised to incorporate provisions removed from § 201–30.008 related to agency responsibilities for managing and planning for full and open competition in subsequent procurements.

(iv) Section 201–11.003, paragraph (c) is revised to make editorial changes.

(b) The changes made in Part 201–30, Management of ADP Resources, are explained in the following paragraphs.

(i) Section 201–30.007, paragraph (c), which contains provisions on the use of specifications, is removed. Pertinent provisions from paragraph (c) are consolidated in § 201–30.013 (subject: specifications).

(ii) Section 201–30.007, paragraphs (d)(5) and (d)(6) are removed as factors to be considered in the determination of need and requirements analysis. Paragraph (d)(5) is consolidated in § 201–30.009 (subject: analysis of alternatives for satisfying a requirement) since the provisions contained in that paragraph are more appropriate as factors to be considered when analyzing alternatives. The provisions contained in paragraph (d)(6) are adequately covered in paragraph (d)(3).

(iii) In § 201–30.008, paragraph (a) is revised to clarify use of the determination of need and requirements analysis in determining the system/item life and to remove provisions related to unplanned augmentations. Paragraph (d) is revised to remove and consolidate in § 201–11.003, provisions related to agency responsibilities for managing and planning for full and open competition for subsequent procurements. Paragraph (d) is further revised to clarify existing provisions on system/item life and to expand upon provisions related to unplanned augmentations and the need for a new system/item life.

(iv) In § 201–30.009, paragraph (a) is revised to remove the cross-reference to § 201–16.002 and paragraph (b) is revised to remove the cross-reference to § 201–30.009–2(a). Paragraph (a)(2), providing information related to the requirements of OMB Circular A–130 when sharing ADP resources, is moved to § 201–31.001 since that section addresses policies for sharing ADP resources. A new paragraph (a)(3) is added to include provisions removed from § 201–30.007 (see paragraph 2b).

(v) In § 201–30.013, paragraph (a) is revised by removing the parenthetical listing of responsible sources to obtain full and open competition and paragraph (b) is revised to remove the cross-reference to § 201–11.002–1. Paragraph (a) is also revised to include provisions removed from § 201–30.007 (see paragraph 2a).

(c) The changes made in Part 201–31, Sharing of ADP Resources, are explained in the following paragraphs.

(i) Section § 201–31.001 is revised to include provisions removed from § 201–30.009 (see paragraph 2d).

(ii) Section 201–31.006, paragraph (b) requiring agencies to report to GSA on services obtained from commercial sources is removed.

(d) The changes made in Part 201–32, Contracting for ADP Resources, are explained in the following paragraphs.

(i) Section 201–32.103, requiring agencies to report to GSA when contracting for major system acquisitions under OMB Circular A–109 is removed.

(ii) Section 201–32.106, paragraph (a) serving to cross-reference FAR provisions on synopsizing is removed.

(iii) In § 201–32.206, paragraphs (g)(2)(iii)(A) through (g)(2)(iii)(C) are removed. These paragraphs contained provisions for issuing solicitations and synopsizing procurements when the results of a schedule order synopsis indicates that ordering from a GSA nonmandatory ADP schedule may not result in the lowest overall cost alternative to the Government. The provisions of the Federal Acquisition Regulation are applicable.

(4) The General Services Administration (GSA) has determined that this is not a major rule for purposes of Executive Order 12291 of February 17, 1981. GSA decisions are based on adequate information concerning the need for, and the consequences of the rule. The rule is written to ensure maximum benefits to Federal agencies. This is a Governmentwide management regulation that will have little or no net cost effect on society. The rule is therefore not likely to have a significant economic impact on a substantial number of small entities under the

Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

List of Subjects in 41 CFR Parts 201–11, 201–30, 201–31, and 201–32

Information resources activities, Competition.

PART 201–11—COMPETITION

1. The authority citation for Part 201–11 continues to read as follows:

Authority: Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c) and Sec. 101(f), 100 Stat. 1783–345; 40 U.S.C. 751(f).

2. Section 201–11.001, paragrpah (b) is revised to read as follows:

§ 201–11.001 The full and open competition objective.

* * * * *

(b) It is essential that agencies accomplish proper management actions, including planning and market research activities before contract actions becomes imminent. This requires an acquisition strategy, suitable to the circumstances, in which the statement of the user's requirement is set forth in the least restrictive terms possible without compromising economy or efficiency. It shall be designed to elicit favorable offers from all responsible sources capable of satisfying the Government's needs.

* * * * *

3. Section 201–11.003 is revised to read as follows:

§ 201–11.003 Agency responsibilities.

(a) Both agency information resources managers and contracting officers have the responsibility for ensuring that the Government's basic procurement objective for full and open competition is met. This responsibility extends to fostering competitive conditions and planning for subsequent procurements. The information contained in prior justifications for other than full and open competition shall be used to manage and plan actions necessary to foster competitive conditions for subsequent procurements.

(b) Agencies must consider the systems life and contract expiration dates for existing systems when planning for future information resources requirements activities. Agency plans for follow-on procurements should allow sufficient time for completion of the acquisition process, including any required conversion of data files and programs. Agencies shall begin competition for the follow-on period in sufficient time to ensure completion before the expiration of the existing contract.

PART 201–30—MANAGEMENT OF ADP RESOURCES

1. The authority citation for Part 201–30 continues to read as follows:

Authority: Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c) and Sec. 101(f), 100 Stat. 1783–345; 40 U.S.C. 751(f).

2. Section 201–30.007 is amended by removing paragraph (d) and revising paragraph (c) to read as follows:

§ 201–30.007 Determination of need and requirements analysis.

* * * * *

(c) As a minimum, the agency shall consider the following factors in the requirements analysis:

(1) The information processing functions that must be performed.

(2) The agency applications, information resource systems, and components involved, their physical locations, and operational constraints.

(3) The problem that will be solved by acquiring new or additional equipment, systems and/or software.

(4) The nature of the data or information to be generated, transmitted, or stored on the proposed equipment or system, who will mintain it, and who will require access to it.

(5) Space management considerations; e.g., heat dissipation, air flow, temperature range, relative humidity, energy conservation, power supply, cables, including coordination with building managers and GSA. (See FPMR § 101–17.101–5.)

(6) The present and projected workload in terms of:

(i) Systems life;

(ii) Data entry and associated telecommunications support;

(iii) Data base(s) and data base management;

(iv) Data handling or transaction processing by type and volume;

(v) Output needs and associated telecommunications support;

(vi) Expandability requirements; and

(vii) Privacy and security safeguards.

(7) A performance evaluation of the currently installed ADP system(s) to provide a baseline for evaluation of proposed alternatives for meeting the data processing needs.

(8) The risks over the systems life of adverse impact on agency missions by acquiring insufficient ADPE capacity versus the extra costs of acquiring excessive ADPE capacity.

(9) The appropriate performance and capability validation techniques that should be employed in the acquisition.

3. Section 201–30.008 is amended by revising paragraphs (a) introductory text, (a)(1), and (d) to read as follows:

§ 201–30.008 Determination of system/item life.

(a) Except as provided in paragraph (c) of this § 201–30.008, the Government system/item life shall be established by the initial acquiring agency as a part of each determination of need and requirements analysis. This life shall be used in the evaluation to determine the lowest overall cost offer and whether purchase, lease to ownership, lease with option to purchase, or straight lease is the lowest cost method of acquisition for the Government. The following factors shall be considered in determining the Government system/item life:

(1) The period of time that the system/item, plus any planned augmentation, will satisfy the needs of the initial user;

* * * * *

(d) Agencies shall consider subsequent procurement when establishing system/item lives. If augmentation other than that provided for in the initial acquisition is necessary, consideration should be given to establishing a new system/item life. The new system/item would be useful for replacement planning and lease/purchase evaluations.

4. Section 201–30.009 is revised to read as follows:

§ 201–30.009 Analysis of alternatives for satisfying a requirement.

(a) A comparative cost analysis shall be performed for each identified requirement or when planning indicates the possible existence of outdated ADPE. The purpose of the analysis is to determine which alternative will meet the user's needs at the lowest overall cost over the system/item life. The alternatives to be considered shall include, but are not limited to the following:

(1) Use of non-ADP resources to satisfy the requirement.

(2) Use of existing ADP facilities (e.g., Federal Data Processing Centers) and resources on a shared basis.

(3) Use of reassigned or excess Government-owned or -leased equipment.

(4) Use of commercial ADP services.

(5) Redesign of application programs, using Federal or ANSI standard language to the maximum practicable extent.

(6) Revision of production schedule or job stream and matching work elements to resource systems to improve productivity.

(7) Addition or change in working shifts to increase capacity.

(8) Augmentation of installed ADPE by adding additional components to increase data processing capacity.

(9) Upgrading selected system components, such as adding additional selector channels, memory, faster tape or disk units, etc., in order to improve throughput capability

(10) Replacing installed ADP system with a compatible system that will handle the workload.

(11) Competitive replacement of the installed ADP system through use of functional specifications.

(b) Where the analysis includes evaluation of the continued use of outdated ADPE, the analysis shall also evaluate the newer functionally-similar ADPE alternatives. Identifiable and quantifiable costs that are directly related to the costs of obsolescence (e.g., maintenance and operation, energy consumption, floor space, personnel, and other applicable factors) shall be considered.

4. Section 201–30.013 is revised to read as follows:

§ 201–30.013 Specifications.

(a) Agencies shall design ADP specifications to describe their requirements based on need and the specific circumstances of the agency. Specifications shall be designed to obtain full and open competition from all responsible sources with due regard to the nature of the property or services to be acquired, including market availability to satisfy needs. Functional specifications maximize competition. If functional specifications cannot be used, other types of specifications shall be used in the following order of precedence:

(1) Equipment performance specifications.

(2) Software and equipment plug-to-plug compatible functionally equivalent specifications.

(3) Brand name or equal specifications.

(4) Specific make and model specifications.

(b) Specific make and model type specifications restrict competition. Use of this type of specification must be justified.

PART 201–31—SHARING OF ADP RESOURCES

1. The authority citation for Part 201–31 continues to read as follows:

Authority: Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c) and Sec. 101(f), 100 Stat. 1783–345; 40 U.S.C. 751(f).

2. The table of contents for Part 201–31 is amended by revising the entry for § 201–31.006 to read as follows:

201–31.006 Reporting of sharing.

3. Section 201–31.001 is revised to read as follows:

§ 201–31.001 Relationship to management policy.

OMB Circular A–130 requires executive agencies to establish a management control procedure to determine which existing data processing facility will be used to support major new applications. Agencies shall consider sharing and use of existing ADP resources as an economical and efficient means of meeting their ADP needs.

§ 201–31.006 [Amended]

4. The section heading for § 201–31.006 is revised to read as follows:

§ 201–31.006 Reporting of sharing.

5. Section 201–31.006 is amended by removing paragraph (b) and redesignating paragraph (c) as paragraph (b).

PART 201–32—CONTRACTING FOR ADP RESOURCES

1. The authority citation for Part 201–32 continues to read as follows:

Authority: Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c) and Sec. 101(f), 100 Stat. 1783–345; 40 U.S.C. 751(f).

2. The table of contents for Part 201–32 is amended by removing and reserving the entry for § 201–32.103 to read as follows:

§ 201–32.103 [Reserved]

§ 201–32.103 [Reserved]

3. Section 201–32.103 is removed and reserved.

§ 201–32.106 [Amended]

4. In § 201.32.106 remove paragraph (a) and redesignate paragraphs (b) through (d) as paragraphs (a) through (c). Newly redesignated paragraph (b) is amended by changing the reference to "Section 201–32.106(b)" to read "Section 201–32.106(a)". Newly redesignated paragraph (c) is amended by changing the reference to "paragraph (b) of this section" to read "paragraph (a) of this section ", and changing the reference to "§ 201–32.106(d)" to read "§ 201–32.106(c)".

§ 201–32.206 [Amended]

5. In § 201–32.206, paragraph (g)(2)(iii) introductory text, remove the words "In this event:" at the end of the paragraph, and remove paragraphs (g)(2)(iii) (A) through (g)(2)(iii) (C).

Dated: July 7, 1988.

John Alderson,

Acting Administrator of General Services.

[FR Doc. 88–17304 Filed 8–1–88; 8:45 am]

BILLING CODE 6820–25–M

FEDERAL EMERGENCY MANAGEMENT AGENCY

44 CFR Part 64

[Docket No. 6803]

Suspension of Community Eligibility Under the National Flood Insurance Program; New York; Correction

AGENCY: Federal Emergency Management Agency.

ACTION: Final rule; correction.

SUMMARY: This document makes correction to final rule, Suspension of Community Eligibility under the National Flood Insurance Program, (NFIP), published on July 27, 1988, at 53 FR 28206, Docket No. 6802. The following community was erroneously omitted from this rule. It should be added to the list of communities subject to be suspended on August 4, 1988 for failure to adopt the required NFIP October 1, 1986 revised regulations.

Community Name: Town of Orwell
State: New York
County: Oswego
Community Number: 361262
Effective date: August 4, 1988

FOR FURTHER INFORMATION CONTACT: Frank H. Thomas, Assistant Administrator, Office of Loss Reduction, Federal Insurance Administration, (202) 646–2717, 500 C Street, Southwest, Room 416, Washington, DC 20472.

PART 64—[CORRECTED]

1. The authority citation for Part 64 continues to read as follows:

Authority: 42 U.S.C. 4001 et. seq., Reorganization Plan No. 3 of 1978, E.O. 12127.

Harold T. Duryee,

Administrator, Federal Insurance Administration.

[FR Doc. 88–17330 Filed 8–1–88; 8:45 am]

BILLING CODE 6718–21–M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 0 and 64

Common Carrier Services; National Security and Emergency Preparedness

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This action makes several editorial changes to the rules to reflect current organizational arrangements and functional assignments. The Order also amends the rules to reflect the internal responsibilities for national security and

emergency preparedness matters in light of the elimination of the Emergency Communications Division.

EFFECTIVE DATE: August 2, 1988.

FOR FURTHER INFORMATION CONTACT: Brent Weingardt, Office of the Managing Director, (202) 632–3906.

SUPPLEMENTARY INFORMATION:

Order

Adopted: June 24, 1988.
Released: July 21, 1988.

1. By this Order Part 0 and 64 of the rules are amended to simplify, clarify and update them to reflect current organizational arrangements and functional assignments at the Federal Communications Commission.

2. Also, various rule changes are made concerning National Security Emergency Preparedness related activities. Included are those changes required to transfer functions of the former Emergency Communications Division (ECD) to the Management Planning and Program Evaluation Office/Office of the Managing Director. Part 64, Appendix A, sections 7 and 10 are also amended to indicate that the Common Carrier Bureau is responsible for receiving and processing restoration priority (RP) certification applications instead of the Emergency Communications Division staff. These changes were previously approved by the Commission. The public should note that changes to the RP system are now under consideration by the Commission. *Notice of Proposed Rule Making in General Docket 87–505*, 2 FCC Rcd 724 (1987).

3. Because these amendments concern rules of agency organization, procedures or practices, the notice and comment provisions of the provisions of the Administrative Procedure Act are not applicable. *See* 5 U.S.C. 553(b)(A). These rules are not considered substantive in nature and are therefore effective upon publication in the Federal Register. *See* 5 U.S.C. 553(d).

4. Because a notice of proposed rule making is not required, an initial and final regulatory flexibility analysis is not required. See the Regulatory Flexibility Act of 1980, 5. U.S.C. 603 and 604.

5. This action is taken under the Managing Director's delegated authority to make nonsubstantive, editorial amendments of the Commission's rules and regulations. 47 CFR 0.231(d).

6. Accordingly, it is ordered, pursuant to the authority provided by sections 4(i), 4(j), and 303(r) of the Communications Act, 47 U.S.C. 154(i), 154(j) and 303(r), Part 0 and 64 of the Commission's Rules are amended as shown below.

List of Subjects

47 CFR Part 0

Organization and functions (Government agencies).

47 CFR Part 64

Civil defense.

Rule Amendments

Parts 0 and 64 of title 47 of the Code of Federal Regulations are amended as follows:

PART 0—COMMISSION ORGANIZATION

1. The authority citation for Part 0 is revised to read as follows:

Authority: 47 U.S.C. 154, 303 unless otherwise noted. Implement 5 U.S.C. 552, unless otherwise noted.

2. 47 CFR 0.1 is revised to read as follows:

§ 0.1 The Commission.

The Federal Communications Commission is composed of five (5) members who are appointed by the president subject to confirmation by the Senate. Normally, one Commissioner is appointed or reappointed each year, for a term of five (5) years.

3. 47 CFR 0.5 is amended by revising paragraph (b) to read as follows:

§ 0.5 General description of Commission organization and operations.

* * * * *

(b) Staff responsibilities and functions. The organization and functions of these major staff units are described in detail in §§ 0.11 through 0.161. The defense and emergency preparedness functions of the Commission are set forth separately, beginning at Section 0.181. For a complete description of staff functions, reference should be made to those provisions. (See also the U.S. Government Organization Manual, which contains a chart showing the Commission's organization, the names of the members and principal staff officers of the Commission, and other information concerning the Commission.)

* * * * *

§ 0.6 [Removed]

4. 47 CFR 0.6 is removed.

5. 47 CFR 0.11 is amended by revising paragraph (b) to read as follows:

§ 0.11 Functions of the office.

* * * * *

(b) The Secretary is the official custodian of the Commission's documents.

§ 0.12 [Removed]

6. 47 CFR 0.12 is removed.

§ 0.16 [Removed]

7. 47 CFR 0.16 is removed.

§ 0.32 [Removed]

8. 47 CFR 0.32 is removed.

§ 0.42 [Removed]

9. 47 CFR 0.42 is removed.

§ 0.62 [Removed]

10. 47 CFR 0.62 is removed.

§ 0.92 [Removed]

11. 47 CFR 0.92 is removed.

§ 0.112 [Removed]

12. 47 CFR 0.112 is removed.

13. 47 CFR 0.121 is revised to read as follows:

§ 0.121 Location of field installations.

(a) Field offices are located throughout the United States. For the address and phone number of the closest office contact the Field Operations Bureau or see the U.S. Government Manual.

(b) Protected field offices are located at the following geographical coordinates:

Allegan, Michigan
42</d>36'20" N. Latitude
85</d>57'20" W. Longitude
Anchorage, Alaska
61</d>09'43" N. Latitude
149</d>59'55" W. Longitude
Belfast, Maine
44</d>26'42" N. Latitude
69</d>04'58" W. Longitude
Canandaigua, New York
42</d>54'48" N. Latitude
77</d>15'59" W. Longitude
Douglas, Arizona
31</d>30'02" N. Latitude
109</d>39'12" W. Longitude
Ferndale, Washington
48</d>57'21" N. Latitude
122</d>33'13" W. Longitude
Grand Island, Nebraska
40</d>55'21" N. Latitude
98</d>25'42" W. Longitude
Kingsville, Texas
27</d>26'29" N. Latitude
97</d>53'00" W. Longitude
Laurel, Maryland
39</d>09'54" N. Latitude
76</d>49'17" W. Longitude
Livermore, California
37</d>43'30" N. Latitude
121</d>45'12" W. Longitude
Powder Springs, Georgia
33</d>51'44" N. Latitude
84</d>43'26" W. Longitude
Sabana Seca, Puerto Rico
18</d>27'23" N. Latitude
66</d>13'37" W. Longitude

Santa Isabel, Puerto Rico
18</d>00'26" N. Latitude
66</d>22'32" W. Longitude
Vero Beach, Florida
27</d>36'21" N. Latitude
80</d>38'06" W. Longitude
Waipahu, Hawaii
21</d>22'45" N. Latitude
157</d>59'54" W. Longitude

§ 0.132 [Removed]

14. 47 CFR 0.132 is removed.

§ 0.152 [Removed]

15. 47 CFR 0.152 is removed.

§ 0.176 [Removed]

16. 47 CFR 0.176 is removed.

17. 47 CFR 0.183 is revised to read as follows:

§ 0.183 Emergency Communications Administration.

The Management Planning and Program Evaluation Office, Office of the Managing Director, coordinates the National Security and Emergency Preparedness (NSEP) activities of the Federal Communications Commission including Continuity of Government Planning and the Emergency Broadcasting System (EBS) and other such functions as may be delegated during a national emergency or activation of the President's war emergency powers as specified in section 706 of the Communications Act; maintains liaison with FCC Bureaus/Offices, other government agencies, the telecommunications industry and FCC licensees on NSEP matters; and, as requested, represents the Commission at NSEP meetings and conferences.

18. 47 CFR 0.186 is revised to read as follows:

§ 0.186 Emergency Relocation Board.

(a) As specified in the Commission's Continuity of Government Plan and consistent with the exercise of the War Emergency Powers of the President as set forth in section 706 of the Communications Act of 1934, as amended, an Emergency Relocation Board will be convened at the Commission's Headquarters or other relocation site designated to serve as Primary FCC Staff to perform the functions of the Commission following the announcement of national level mobilization of the Federal government by the President or other designated authority; in the absence of such announcement, immediately following receipt of an attack warning signal; or in the absence of either announcement or attack warning, immediately following an actual attack.

(b) The Board shall comprise such Commissioners as may be present and able to act. In the absence of the Chairman, the Commissioner present with the longest seniority in office will serve as acting Chairman. If no Commissioner is present and able to act, the person designated as next most senior official in the Commission's Continuity of Government Plan will head the Board.

19. 47 CFR 0.231 is amended by adding paragraph (l) to read as follows:

§ 0.231 Authority delegated.

* * * * *

(l) The Secretary, acting under the supervision of the Managing Director, serves as the official custodian of the Commission's documents and shall have authority to appoint a deputy or deputies for purposes of custody and certification of documents located in Gettysburg, Pennsylvania or other established locations.

20. 47 CFR 0.284 is amended by revising paragraph (a)(4) to read as follows:

§ 0.284 Actions taken under delegated authority.

(a) * * *

(4) Matters involving emergency communications, including the issuance of Emergency Broadcast System Authorizations (FCC Form 392)—Office of the Managing Director.

* * * * *

21. 47 CFR 0.314 is amended by revising paragraph (g) to read as follows:

§ 0.314 Additional authority delegated.

* * * * *

(g) To act on and make determinations on behalf of the Commission regarding requests for reassignment of restoration priority levels and assignment of new restoration priorities concerning the restoration in emergencies of common carrier-provided intercity private line service pursuant to Appendix A of Part 64 of the Commission's rules when, for any reason, the Commission's RP processing staff cannot be contacted.

* * * * *

22. The heading preceding 47 CFR 0.381 is revised to read as follows:

National Security and Emergency Preparedness Delegations

23. 47 CFR 0.383 is amended by revising the section heading and paragraph (a) to read as follows:

§ 0.383 Emergency Relocation Board, authority delegated.

(a) During any period in which the Commission is unable to function because of the circumstances set forth in § 0.186(b), all work, business or functions of the Federal Communications Commission arising under the Communications Act of 1934, as amended, is assigned and referred to the Emergency Relocation Board.

* * * * *

24. 47 CFR 0.387 is amended by revising paragraph (a) to read as follows:

§ 0.387 Other National Security and Emegency Preparedness delegations; cross reference

(a) For authority of the Chief of the Mass Media Bureau to issue Emergency Broadcast System Authorizations (FCC Form 392), see §§ 0.284(a)(4) and 73.913.

* * * * *

PART 64—MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

25. The authority citation for Part 64 continues to read as follows:

Authority: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 201, 218, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 201, 218, unless otherwise noted.

26. 47 CFR Part 64, Appendix A is amended by revising section 7, paragraph b. to read as follows:

Appendix A—Priority System for the Restoration of Common Carrier Provided Intercity Private Line Services

* * * * *

7. Certification

b. All other private line users are required to provide their request for a restoration priority directly to the FCC. This information is to be filed on FCC Form 915—Priority Request and Certification—and will be used by the Commission's RP processing staff (Common Carrier Bureau) in making a determination. Each request should be accompanied by a copy of an emergency communications plan or reference to an FCC approved plan for the individual user organization or for an industry [e.g.: Aeronautical Emergency Communications System (AECS)]. In addition, a recommendation from the associated Federal agency is required for restoration priority requests to the FCC that involve prearranged voluntary participation with the Federal government in emergencies. In applying for a restoration priority the user of a private line service accepts responsibility for making semi-annual appraisals of the criticality of the service, for making appraisals at the time of any change in the nature or use of the service, and for notifying the FCC promptly of discontinuation of the

service or of any factors that may affect either the requirement for restoration priority or the level of priority.

* * * * *

Federal Communications Commission.

Edward J. Minkel,

Managing Director.

[FR Doc. 88-17270 Filed 8-1-88; 8:45 am]

BILLING CODE 8712-01-M

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47 CFR Part 73

[MM Docket No. 87-298; RM-5754]

Radio Broadcasting Services; Garden City, IN

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document stays the opening of the filing window for FM Channel 275A at Garden City, Indiana. This window period for filing applications would have opened on July 12 and closed on August 11, 1988.

FOR FURTHER INFORMATION CONTACT: Robert Hayne, Mass Media Bureau, (202) 634-6530.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Order Granting Petition for Stay, MM Docket No. 87-298, adopted July 7, 1988, and released July 11, 1988. 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 Commission's copy contractors, International Transcription Service, (202) 857-3800, 2100 M Street, NW., Suite 140, Washington, DC 20037.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

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

Authority: 47 U.S.C. 154, 303.

Federal Communications Commission.

Bradley P. Holmes,

Chief, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 88-16658 Filed 8-1-88; 8:45 am]

BILLING CODE 6712-01-M

Proposed Rules

Federal Register
Vol. 53, No 148
Tuesday, August 2, 1988

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

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 831 and 841

Court Orders Affecting Retirement Benefits

AGENCY: Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: The Office of Personnel Management (OPM) is proposing regulations concerning modifications of State court orders affecting survivor annuities under the Civil Service Retirement System (CSRS) and Federal Employees Retirement System (FERS). These rule implement sections 8341(h)(4) and 8445(d) of Title 5, United States Code, that, after the retirement or death of the employee, prohibit modification of State court orders relating to survivor annuities. These regulations clarify that OPM will not honor a State court order awarding a survivor annuity if issued after the retirement or death of the employee unless that order actually terminates the marriage. The regulations also clarify that State courts cannot bypass the statutory prohibition against modifications by reserving jurisidiction in the decree terminating the marriage or by making the award effective retroactively to the date of the judgment terminating the marriage.

DATE: Comments must be received on or before October 3, 1988.

ADDRESS: Send comments to Reginald M. Jones, Jr., Assistant Director for Retirement and Insurance Policy; Retirement and Insurance Group; Office of Personnel Management; P.O. Box 57; Washington, DC 20044; or deliver to OPM, Room 4351, 1900 E Street NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Harold L. Siegelman, (202) 632–4682.

SUPPLEMENTARY INFORMATION: The Civil Service Retirement Spouse Equity Act of 1984, Pub. L. 98–615, added section 8341(h) to title 5, United States Code. This section permits State courts, when terminating a marriage, to award survivor annuities under CSRS to former spouses of employees and retirees covered by that retirement system. Paragraph (h)(4) of this section nullifies modifications of State court orders or court-approved property settlement agreements after the retirement or death of the employee to the extent that the modification involves a CSRS survivor annuity for a former spouse.

Similarly, the FERS Act of 1986, Pub. L. 99–335, applied a similar provision, in section 8445 of title 5, United States Code, to employees covered by FERS. Subsection (d) of that section contains the same restriction against modifications involving FERS survivor annuities.

Recently, OPM has received an increasing number of State court orders that terminate marriages of Federal employees and retirees but leave property rights of the parties (including the right to survivor annuities under CSRS or FERS) for later adjudication. These regulations clarify that OPM will not honor court orders awarding a survivor annuity if issued after the retirement or death of the employee, unless the award is made in, or prior to, the judgement terminating the marriage, regardless of any reservation of jurisdiction or retroactive effective date of the order granting the survivor annuity.

E.O. 12291, Federal Regulation

I have determined that this is not a major rule as defined under section 1(b) of E.O. 12291, Federal Regulation.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because the regulation will only affect Federal agencies and retirement payments to retired Government employees, spouses, and former spouses.

List of Subjects in 5 CFR Parts 831 and 841

Administrative practice and procedure, Claims, Disability benefits, Firefighters, Government employees, Income taxes, Law enforcement officers, Pensions, Retirement.

U.S. Office of Personnel Management
Constance Horner,
Director.

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

PART 831—RETIREMENT

Subpart Q—Court Orders Affecting Retirement Benefits

1. The authority citation for Subpart Q of Part 831 continues to read:

Authority: 5 U.S.C. 8347.

2. In § 831.1704, paragraph (e) is revised to read as follows:

§ 831.1704 Qualifying court orders.

* * * * *

(e)(1) For purposes of awarding, increasing, reducing, or eliminating a former spouse annuity, or explaining, interpreting, or clarifying a court order that awards, increases, reduces or eliminates a former spouse annuity, the court order must be—

(i) Issued on a day prior to the date of retirement or date of death of the employee; or

(ii) The first order terminating the marital relationship between the employee and the former spouse.

(2) In paragraph (e)(1) of this section, "date of retirement" means the later of—

(i) The date that the employee files an application for retirement; or

(ii) The effective commencing date for the employee's annuity.

(3) In paragraphs (e)(1) and (e)(4) of this section, "issued" means actually filed with the clerk of the court, and does not mean the effective date of a retroactive court order that is effective prior to the date when actually filed with the clerk of the court (e.g., order issued *nunc pro tunc).*

(4) In paragraph (e)(1)(ii) of this section, the "first order terminating the marital relationship between the employee and the former spouse" means the original order that first ends the marriage, and does not include—

(i) Any order that amends, explains, clarifies, or interprets the original order regardless of the effective date of the order making the amendment, explanation, clarification, or interpretation; or

(ii) Any order issued under reserved jurisdiction or any other orders issued subsequent to the order terminating the marriage that divide marital property (even if no division of marital property was made in the order terminating the marriage) regardless of the effective date of the order.

PART 841—FEDERAL EMPLOYEES' RETIREMENT SYSTEM—GENERAL ADMINISTRATION

Subpart I—Court Orders Affecting Retirement Benefits

PART 841—[AMENDED]

3. The authority citation for Subpart I of Part 841 continues to read:

Authority: 5 U.S.C. 8461

4. In 841.903, Paragraph (d) is revised to read as follows:

§ 841.903 Qualifying court orders.

* * * * *

(d)(1) For purposes of awarding, increasing, reducing, or eliminating a former spouse annuity, or explaining, interpreting, or clarifying a court order that awards, increases, reduces or eliminates a former spouse annuity, the court order must be—

(i) Issued on a day prior to the date of retirement or date of death of the employee; or

(ii) The first order terminating the marital relationship between the employee and the former spouse.

(2) In paragraph (d)(1) of this section, "date of retirement" means the later of—

(i) The date that the employee files an application for retirement; or

(ii) The effective commencing date for the employee's annuity.

(3) In paragraphs (d)(1) and (d)(4) of this section, "issued" means actually filed with the clerk of the court, and does not mean the effective date of a retroactive court order that is effective prior to the date when actually filed with the clerk of the court (e.g., order issued *nunc pro tunc).*

(4) In paragraph (d)(10(ii) of this section, the "first order terminating the marital relationship between the employee and the former spouse" means the original order that first ends the marriage, and does not include—

(i) Any order that amends, explains, clarifies, or interprets the original order regardless of the effective date of the order making the amendment, explanation, clarification, or interpretation; or

(ii) Any order issued under reserved jurisdiction or any other orders issued subsequent to the order terminating the marriage that divide marital property (even if no division of marital property was made in the order terminating the marriage) regardless of the effective date of the order.

[FR Doc. 88-17315 Filed 8-1-88; 8:45 am]

BILLING CODE 6325-01-M

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 166

[CGD 88-041]

Part Access Routes; Approaches to Chesapeake Bay, VA

AGENCY: Coast Guard, DOT.

ACTION: Notice of study; correction.

SUMMARY: This notice corrects an error published in the **Federal Register** July 12, 1988, Volume 53, page 26282, second column, under the Study Area section. The last geographic coordinate in the "Longitude" column is incorrect and should read 76°05' W instead of 75°05' W.

FOR FURTHER INFORMATION CONTACT: Mr. John Walters, (804) 398-6230.

July 25, 1988.

R.T. Nelson,

Rear Admiral, U.S. Coast Guard, Chief, Office of Navigation Safety And Waterway Services.

[FR Doc. 88-17351 Filed 8-1-88; 8:45 am]

BILLING CODE 4910-14-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 261

[SW-FRL-3423-1]

Hazardous Waste Management System; Identification and Listing of Hazardous Waste; Proposed Exclusion

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule and request for comment.

SUMMARY: The Environmental Protection Agency (EPA or Agency) today is proposing to grant a petition submitted by Vulcan Materials Company, Port Edwards, Wisconsin, to exclude, on a one-time basis, certain solid wastes generated at its facility from the lists of hazardous wastes contained in 40 CFR 261.31 and 261.32. This action responds to a delisting petition submitted under 40 CFR 260.20, which allows any person to petition the Administrator to modify or revoke any provision of Parts 260 through 268, 124, 270, and 271 of Title 40 of the Code of Federal Regulations, and under 40 CFR 260.22, which specifically provides generators the opportunity to petition the Administrator to exclude a waste on a "generator-specific" basis from the hazardous waste lists. Today's proposed decision is based on an evaluation of waste-specific information provided by the petitioner.

The Agency is also proposing the use of a fate and transport model and its application in evaluating the waste-specific information provided by the petitioner. This model has been used in evaluating the petition to predict the concentrations of hazardous constituents released from the petitoned waste, once it is disposed of.

DATES: EPA is requesting public comments on today's proposed decision and on the applicability of the fate and transport model used to evaluate the petition. Comments will be accepted until September 16, 1988. Comments postmarked after the close of the comment period will be stamped "late."

Any person may request a hearing on this proposed decision and/or the model used in the petition evaluation by filing a request with Bruce R. Weddle, whose address appears below, by August 17, 1988. The request must contain the information prescribed in 40 CFR 260.20(d).

ADDRESSES: Send the copies of your comments to EPA. Two copies should be sent to the Docket Clerk, Office of Solid Waste (WH-562), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460. A third copy should be sent to Jim Kent, Variances Section, Assistance Branch, PSPD/OSW (OS-343), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460. Identify your comments at the top with this regulatory docket number: "F-88-VMEP-FFFFF."

Requests for a hearing should be addressed to Bruce R. Weddle, Director, Permits and State Programs Division, Office of Solid Waste (OS-340), U.S. Environmental Protection Agency, 401 M Street, SW., Washingotn, DC 20460.

The RCRA regulatory docket for this proposed rule is located at the U.S. Environmental Protection Agency, 401 M Street, SW., (sub-basement), Washington, DC 20460, and is available for viewing from 9:00 a.m. to 4:00 p.m. Monday through Friday, excluding Federal holidays. Call (202) 475-9327 for appointments. The public may copy material from any regulatory docket at a cost of $0.15 per page.

FOR FURTHER INFORMATION CONTACT: For general information, contact the

RCRA Hotline, toll free at (800) 424–9346, or at (202) 382–3000. For technical information concerning this notice, contact Scott Maid, Office of Solid Waste (OS–343), U.S. Environmental Protection Agency, 401 M Street, SW., Washingttn, DC 20460, (202) 382–4783.

SUPPLEMENTARY INFORMATION: .

I. Background

A. Authority

On January 16, 1981, as part of its final and interim final regulations implementing section 3001 of RCRA, EPA published an amended list of hazardous wastes from non-specific and specific sources. This list has been amended several times and is published in 40 CFR 261.31 and 261.32. These wastes are listed as hazardous because they typically and frequently exhibit one or more of the characteristics of hazardous wastes identified in Subpart C of Part 261 (*i.e.*, ignitability, corrosivity, reactivity, and extraction procedure (EP) toxicity) or meet the criteria for listing contained in 40 CFR 261.11 (a)(2) or (a)(3).

Individual waste streams may vary, however, depending on raw materials, industrial processes, and other factors. Thus, while a waste that is described in these regulations generally is hazardous, a specific waste from an individual facility meeting the listing description may not be. For this reason, 40 CFR 260.20 and 260.22 provide an exclusion procedure, allowing persons to demonstrate that a specific waste from a particular generating facility should not be regulated as a hazardous waste.

To have their wastes excluded, petitioners must show that wastes generated at their facilities do not meet any of the criteria for which the wastes were listed. See 40 CFR 260.22(a) and the background documents for the listed wastes. In addition, the Hazardous and Solid Waste Amendments (HSWA) of 1984 require the Agency to consider factors (including additional constituents) other than those for which the waste was listed, if there is a reasonable basis to believe that such additional factors could cause the waste to be hazardous. Accordingly, a petitioner also must demonstrate that the waste does not exhibit any of the hazardous waste characteristics (*i.e.*, ignitability, reactivity, corrosivity, and EP toxicity), and must present sufficient information for the Agency to determine whether the waste contains any other toxicants at hazardous levels. See 40 CFR 260.22(a), 42 U.S.C. 6921(f), and the background documents for the listed wastes. Although wastes which are "delisted" (*i.e.*, excluded) have been evaluated to determine whether or not they exhibit any of the characteristics of a hazardous waste, generators remain obligated to determine whether their waste remains non-hazardous based on the hazardous waste characteristics.

In addition to wastes listed as hazardous in 40 CFR 261.31 and 261.32, residues from the treatment, storage, or disposal of listed hazardous wastes and mixtures containing hazardous wastes also are eligible for exclusion and remain hazardous wastes until excluded. See 40 CFR 261.3 (c) and (d)(2). The substantive standard for "delisting" a treatment residue or a mixture is the same as previously described for listed wastes.

B. Approach Used To Evaluate This Petition

In making a delisting determination, the Agency evaluates each petitioned waste against the listing criteria and factors cited in 40 CFR 261.11 (a)(2) and (a)(3). If the Agency believes that the waste remains hazardous, based on the factors for which the waste was originally listed, EPA will propose to deny the petition. If, however, the Agency agrees with the petitioner that the waste is non-hazardous with respect to the original listing criteria, EPA then will evaluate the waste with respect to other factors or criteria, if there is a reasonable basis to believe that such additional factors could cause the waste to be hazardous. The Agency considers whether the waste is acutely toxic, and considers the toxicity of the constituents, the concentration of the constituents in the waste, their tendency to migrate and to bioaccumulate, their persistence in the environment once released from the waste, plausible and specific types of management of the petitioned waste, the quantities of waste generated, and any other additional factors which may characterize the petitioned waste.

The Agency is proposing to use such information to identify plausible exposure routes for hazardous constituents present in the waste, and is proposing to use a fate and transport model to predict the concentrations of hazardous constituents that may be released from the petitioned waste after disposal and to determine the potential impact of the unregulated disposal of Vulcan's petitioned waste on human health and the environment. Specifically, the model will be used to predict compliance-point concentrations, which will be compared directly to the levels of regulatory concern for particular hazardous constituents.

EPA believes that this model represents a reasonable worst-case waste disposal scenario for the petitioned waste, and that a reasonable worst-case scenario is appropriate when evaluating whether a waste should be relieved of the protective management constraints of RCRA Subtitle C. Because a delisted waste is no longer subject to hazardous waste control, the Agency is generally unable to predict and does not control how a waste will be managed after delisting. Therefore, EPA currently believes that it is inappropriate for the Delisting Program to consider extensive site-sepecific factors. For example, a generator may petition the Agency for delisting of a metal hydroxide sludge which is currently being managed in an on-site landfill and provide data on the nearest drinking water well, permeability of the aquifer, dispersivities, etc. If the Agency were to base its evaluation solely on these site-specific factors, the Agency might conclude that the waste, at that specific location, cannot affect the closest well, and the Agency might grant the petition. Upon promulgation of the exclusion, however, the generator is under no obligation to continue to manage the waste at the on-site landfill. In fact, it is likely that the generator will either choose to send the delisted waste off-site immediately, or will eventually reach the capacity of the on-site facility and subsequently send the waste off-site to a facility which may have very different hydrogeological and exposure conditions.

The Agency also considers the applicability of ground-water monitoring data to its evaluation of delisting petitions. In this case, the Agency determined that, because Vulcan is seeking a delisting for waste disposed on-site (*i.e.*, subsoils beneath a closed storage pad), ground-water monitoring data collected from the area where Vulcan has diposed of the waste are necessary to determine whether hazardous constituents have migrated from the unit to the underlying ground water. Because the petitioned waste is disposed on-site, ground-water data collected from Vulcan's monitoring wells are compared directly to the levels of regulatory concern for particular hazardous constituents detected in the ground water, and will help to characterize the potential impact (if any) of the unregulated disposal of Vulcan's petitioned waste on human health and the environment.

Finally, the Hazardous and Solid Waste Amendments of 1984 specifically require the Agency to provide notice and an opportunity for comment before

granting or denying a final exclusion. Thus, a final decision will not be made on this petition until all public comments (including those at requested hearings, if any) are addressed.

II. Disposition of Petition

Vulcan Materials Company, Port Edwards, Wisconsin.

1. Petition for Exclusion

Vulcan Materials Company (Vulcan), located in Port Edwards, Wisconsin, manufactures chlorine and caustic soda by the mercury cell process, with some chlorine used on-site for the produciton of muriatic acid. Vulcan petitioned the Agency to exclude, on a one-time basis, subsoils beneath a former waste pile where quantities of EPA Hazardous Waste No. K071—"Brine purification muds from the mercury cell process in chlorine production, where separately prepurified brine is not used"—were previously stored. The listed constituent of concern for EPA Hazardous Waste No. K071 is mercury. Vulcan petitioned to exclude its waste because it does not believe that the waste meets the criteria for which it was listed. Vulcan also believes that the waste is not hazardous for any other reason (*i.e.*, there are no additional constituents or factors that could cause the waste to be hazardous). Review of this petition included consideration of the original listing criteria, as well as the additional factors required by the Hazardous and Solid Waste Amendments (HSWA) of 1984. See section 222 of the Amendments, 42 U.S.C. 6921(f), and 40 CFR 260.22(d)(2)–(4). Todays' proposal to grant this petition for delisting is the result of the Agency's evaluation of Vulcan's petition.

2. Background

Vulcan petitioned the Agency to exclude its subsoils on May 5, 1986 and subsequently provided additional information to complete its petition. In support of its petition, Vulcan has submitted (1) results from total constituent and EP leachate analyses for the EPA toxic metals, nickel, and cyanide from representative samples of the subject subsoils, (2) results form constituent analyses for total sulfide, (3) results from total oil and grease analyses, (4) ground-water monitoring data collected between 1980 and 1986 for mercury from ground-water monitoring wells located upgradient and downgradient of the waste pile storage area, and (5) test results for the characteristics of ignitability corrosivity, and ignitability. In addition, Vulcan had previously submitted to the Agency a detailed description of its production processes and a list of all raw materials used in both the manufacturing and treating processes, in support of an earlier exclusion petition covering the Port Edwards facility's treated brine purification muds and saturator insolubles. The Agency granted this earlier petition. See both the proposed and final exclusion notices, 51 FR 16860, May 7, 1986, and 51 FR 41486, November 17, 1986, respectively.

K071 wastes were accumulated and stored in waste piles at the Vulcan plant from late 1970 to early 1973 while construction of a process development and treatment facility was underway. Accumulated piled wastes were stored on a curbed asphalt pad and covered with tarpaulins. In mid-1982, a failure of the asphalt pad occurred, and mercury-bearing lachates reached the subsoils beneath the storage pad.

By November 1983, all of the previously accumulated and piled K071 waste was either processed or removed to a hazardous waste landfill. During the summer of 1984, the subsoils beneath the pile storage area were sampled, and any subsoil containing 40 ppm or more of total mercury, or more than 0.2 mg/l of EP leachable mercury, were excavated and disposed of at an off-site hazardous waste landfill.

Vulcan initially provided the results of analyses on six core samples for the EP toxic constituents in 1985. However, the Agency determined that the sampling method used by Vulcan to collect the six core samples was inadequate and, therefore, requested that the subsoils area be resampled. When sampling soils, petitioners are generally requested to divide the soils area into four sections and randomly collect five full-depth core samples from each quadrant (the number of full-depth core samples can decrease if the number of sections is increased). The full-depth core samples then are composited by section and depth. See "Test Methods for Evaluating Solid Wastes: Physical/Chemical Methods," U.S. EPA Office of Solid Waste and Emergency Response, Publication SW–846 (third edition), November 1986, and "Petitions to Delist Hazardous Waste—A Guidance Manual," U.S. EPA, Office of Solid Waste, (EPA/530–SW–85–003), April 1985.

In January 1987, Vulcan divided the waste pile storage area into five subdivisions of approximately equal area. Four full-depth core samples were randomly collected from each of the five subdivisions (*i.e.*, each core sample was collected by driving a coring device through the waste until the bottom of the subsoil area was reached, thus collecting a representative core sample of all the soil layers in the subsoils area—see explanation below). Based on knowledge gained during the clean-up activities in 1984, Vulcan determined that the full-depth core samples should span twelve feet (*i.e.*, Vulcan believed that only the remaining twelve feet of subsoils were potentially contaminated with mercury leachate). Additionally, Vulcan claims that a schistose layer begins at a depth of approximatley 10–12 feet and that the schistose layer is relatively impermeable. Therefore, Vulcan reasoned that samples collected at or above the schistose layer would represent a "worst-case" analysis for the presence of contaminants in the remaining subsoils because the schistose layer would cause any migrating materials to follow the path of least resistance (*i.e.*, horizontally, rather than vertically).

Each single core sample was collected as an 18-inch long "cut" at depths of 2–3.5 feet (25 percent of the total depth of the contaminated subsoils); 5–6.5 feet (25 percent of the total depth); 8–9.5 feet (25 percent of the total depth); and 10.5–12 feet (25 percent of the total depth). Equal weight cuts from each core sample collected at the same depth were then combined by subdivision to form four composite samples each representing 25 percent of the depth of the contaminated subsoils. Twenty composite samples (four composite samples from each of the five subdivisions) were prepared using this method.

3. Agency Analysis

Vulcan used SW–846 method numbers 7060 through 7760, 9010, and 9030 to quantify the total constituent concentrations (*i.e.*, mass of a particular constituent per mass of waste) of the EP toxic metals, nickel, cyanide, and sulfide. Vulcan used SW–846 method number 1310 to quantity the EPA leachable concentrations (*i.e.*, mass of a particular constituent per unit volume of extract) of the EP toxic metals, nickel, and cyanide in the subsoils. Table 1 presents the maximum total constituent concentrations of the EPA toxic metals, nickel, cyanide, and sulfide. Table 2 presents the maximum EP leachate values of the EP toxic metals, nickel, and cyanide. (Analysis for EP leachable concentrations of sulfide or reactive sulfide is not necessary since the Agency's level of regulatory concern is based on the total constituent concentration of sulfide.) Detection limits represent the lowest concentrations quantifiable by Vulcan when using the appropriate SW–846

analytical methods to analyze its waste. (Detection limits may vary according to the waste and waste matrix being analyzed, *i.e.*, the "cleanliness" of waste matrices varies and "dirty" waste matrices may cause interferences, thus raising the detection limit.)

TABLE 1.—TOTAL CONSTITUENT ANALYSES (MG/KG)

[Subsoils previously in contact with leachate from K071 waste]

Constituents	Concentration by core depth (feet)			
	2–3.5	5–6.5	8–9.5	10.5–12
Arsenic:				
Sample I	3.3	1.8	0.5	1.3
Sample II	2.8	1.4	.8	.7
Sample III	2.7	1.2	.5	.7
Sample IV	1.4	1.5	.5	.9
Sample V	.6	.8	.2	.2
Barium:				
Sample I	96.2	22.5	16.5	15.6
Sample II	36.5	27.8	19.4	21.7
Sample III	55.8	56.2	32.1	22.7
Sample IV	25.9	48.6	7.6	11.3
Sample V	27.4	28.1	10.3	11.9
Cadmium:				
Sample I	3.7	.2	.1	.1
Sample II	.1	.1	.1	.1
Sample III	.6	.2	.2	.1
Sample IV	.2	.4	.3	.1
Sample V	.1	.1	.2	.1
Chromium:				
Sample I	55.3	17.0	41.1	16.5
Sample II	42.5	53.0	8.8	16.7
Sample III	20.3	13.3	21.6	17.0
Sample IV	17.5	15.7	50.1	8.8
Sample V	25.8	17.8	18.8	10.3
Lead:				
Sample I	5.3	.9	<.1	<.1
Sample II	9.3	1.1	1.0	.3
Sample III	12.0	5.0	.5	.6
Sample IV	.1	4.5	.3	.3
Sample V	2.8	.5	.4	.5
Mercury:				
Sample I	8.5	3.6	1.2	1.6
Sample II	4.8	5.8	1.1	.3
Sample III	12.8	6.7	.6	1.4
Sample IV	17.9	34.0	1.5	.4
Sample V	7.1	1.9	.7	1.1
Selenium:				
Sample I	1.5	.2	.3	.4
Sample II	0.3	<.1	.1	.1
Sample III	<.1	<.1	<.1	.2
Sample IV	.2	.5	.1	.2
Sample V	.2	.1	.2	.2
Silver:				
Sample I	1.4	5.8	.6	.7
Sample II	2.9	.6	1.1	.7
Sample III	1.8	5.5	2.4	6.5
Sample IV	2.6	3.8	1.8	.6
Sample V	.7	.6	1.4	.7
Nickel:				
Sample I	23.2	17.5	14.0	9.2
Sample II	5.2	4.2	4.3	4.9
Sample III	8.0	5.8	17.5	3.8
Sample IV	6.4	4.2	2.9	7.1
Sample V	4.4	10.9	3.6	2.6
Sulfide:				
Sample I	64.6	59.46	12.28	59.48
Sample II	126.94	20.18	23.76	166.98
Sample III	56.30	40.97	29.20	25.27
Sample IV	56.77	74.56	44.02	60.26
Sample V	123.24	52.95	31.54	331.56
Cyanide:				
Sample I	<.25	<.25	<.25	<.25
Sample II	<.25	<.25	<.25	<.25
Sample III	.28	<.25	.34	<.25
Sample IV	.25	<.25	<.25	<.25
Sample V	<.25	<.25	<.25	<.25

<: Denotes that the actual value is below the detection limit specified in the table.

TABLE 2.—MAXIMUM EP LEACHATE CONCENTRATIONS (MG/L)

[Subsoils previously in contact with leachate from K071 waste]

Constituents	Concentration by core depth (feet)			
	2-3.5	5-6.5	8-9.5	10.5-12
Arsenic:				
Sample I	0.007	<0.001	<0.001	<0.001
Sample II	.001	<.001	<.001	<.001
Sample III	.011	.004	<.001	<.001
Sample IV	.002	.003	<.001	<.001
Sample V	.004	<.001	<.001	<.001
Barium:				
Sample I	.216	.280	.114	.052
Sample II	.050	.306	.052	.020
Sample III	.082	.124	.110	.128
Sample IV	.082	.100	.096	.012
Sample V	.012	.032	.042	.090
Cadmium:				
Sample I	.004	.003	.004	.001
Sample II	.004	.002	.001	.002
Sample III	.007	.005	.001	.002
Sample IV	.003	.005	.001	.001
Sample V	.002	.001	.001	.001
Chromium:				
Sample I	.002	.006	.006	.003
Sample II	.015	.001	.001	.002
Sample III	.002	.001	.001	.002
Sample IV	.001	.002	.002	<.001
Sample V	.002	<.001	<.001	.001
Lead:				
Sample I	.058	.271	.005	.093
Sample II	.081	.001	.001	.009
Sample III	.052	.025	.017	.095
Sample IV	.029	.052	.006	.004
Sample V	.018	.002	.002	.001
Mercury:				
Sample I	<.001	<.001	.003	.002
Sample II	<.001	<.001	.001	.002
Sample III	<.001	<.001	<.001	<.001
Sample IV	<.001	<.001	.002	<.001
Sample V	<.001	<.001	.003	<.001
Selenium:				
Sample I	<.001	.004	<.001	<.001
Sample II	<.001	.006	<.001	<.001
Sample III	<.001	.012	.002	.002
Sample IV	.001	.001	<.001	<.001
Sample V	<.001	<.001	<.001	.002
Silver:				
Sample I	<.001	<.001	<.001	<.001
Sample II	<.001	<.001	<.001	<.001
Sample III	<.001	<.001	<.001	<.001
Sample IV	<.001	<.001	<.001	<.001
Sample V	<.001	<.001	<.001	<.001
Nickel:				
Sample I	.188	.508	.132	.080
Sample II	.104	.080	.058	.044
Sample III	.055	.028	.020	.040
Sample IV	.020	.032	.012	.004
Sample V	.008	.008	.004	.092
Cyanide:				
Sample I	.03	<.01	<.01	<.01
Sample II	<.01	<.01	<.01	.01
Sample III	.02	.01	.01	<.01
Sample IV	<.01	<.01	<.01	<.01
Sample V	<.01	<.01	<.01	<.02

<: Denotes that the actual value is below the detection limit specified in the table.

Table 3 and Table 4 present ground-water monitoring data for dissolved mercury and total mercury, respectively, for the years 1984 through 1986. Data were collected from ground-water monitoring wells upgradient and downgradient of the waste storage area.

TABLE 3.—CONCENTRATIONS OF DISSOLVED MERCURY IN GROUND WATER NEAR THE WASTE STORAGE AREA (MG/1)

Date	Upgradient		Downgradient		
	Well No. 7	Well No. 15	Well No. 4	Well No. 4A	Well No. 9
Mar. 3, 1986	0.0003	<0.0002	0.0005	0.0010	0.0002
June 11, 1986	0.0003	0.0008	0.0005	0.0010	0.0002
Sept. 22, 1986	(*)	0.0002	0.0010	0.0007	0.0010
Oct. 21, 1986	0.0020	0.0008	0.0011	0.0006	0.0011
Mar. 20, 1985	0.0018	0.0002	0.0018	0.0002	0.0002
June. 13, 1985	0.0006	<0.0002	<0.0002	<0.0002	<0.0002
Aug. 27, 1985	0.0008	0.0002	0.0011	0.0010	0.0008
Nov. 6, 1985	0.0008	0.0006	0.0011	0.0018	0.0004
Jan. 6, 1984	(*)	(*)	(*)	(*)	(*)
Jan. 6, 1984	(*)	0.0002	(*)	<0.0002	(*)
Feb. 22, 1984	(*)	0.0008	(*)	0.0005	0.0010
Mar. 26, 1984	(*)	0.0002	(*)	0.0002	0.0004
June 18, 1984	(*)	0.0029	(*)	0.0004	0.0028
Sept. 20, 1984	(*)	0.0004	(*)	0.0002	0.0004
Nov. 7, 1984	0.0008	0.0002	0.0005	0.0007	0.0004

(*) No sample collected due to well damage.
<: Denotes that the actual value is below the detection limit specified in the table.

TABLE 4.—CONCENTRATIONS OF TOTAL MERCURY IN GROUND WATER NEAR THE WASTE STORAGE AREA (MG/1)

Date	Upgradient		Downgradient		
	Well No. 7	Well No. 15	Well No. 4	Well No. 4A	Well No. 9
Mar. 24, 1986	0.0040	0.0006	0.0006	0.0023	0.0040
June 11, 1986	0.0020	0.0003	0.0020	0.0050	0.0032
Sept. 22, 1986	(*)	0.0006	0.0020	0.0018	0.0056
Oct. 21, 1986	0.0310	0.0004	0.0048	0.0031	0.0116
Mar. 20, 1985	0.0180	1.0015	0.0060	0.0032	0.0090
June 13, 1985	0.0050	0.0008	0.0009	0.0015	0.0075
Aug. 27, 1985	0.0030	0.0011	0.0280	0.0033	0.0060
Nov. 6, 1985	0.0022	0.0006	0.0240	0.0015	0.0072
Jan. 6, 1984	(*)	(*)	(*)	(*)	0.0002
Jan. 24, 1984	(*)	0.0010	(*)	<0.0002	(*)
Feb. 22, 1984	(*)	0.0008	(*)	0.0016	0.0160
Mar. 26, 1984	(*)	0.0016	(*)	0.0002	0.0080
June 18, 1984	(*)	0.0019	(*)	0.0056	0.0048
Sept 20, 1984	(*)	0.0036	(*)	0.0008	0.0020
Nov. 7, 1984	0.0455	0.0019	0.0048	0.0030	0.0132

(*) No sample collected due to well damage.
<: Denotes that the actual value is below the detection limit specified in the table.

Using SW–846 method number 3540, Vulcan determined that the subsoils had a maximum oil and grease content of 0.42 percent; therefore, the EP analyses did not have to be modified in accordance with the Oily Waste EP methodology (*i.e.*, wastes having more than one percent total oil and grease may either have significant concentrations of the constituent of concern in the oil phase, which may not be assessed using the standard EP leachate procedure, or the concentration of oil and grease may be sufficient to coat the solid phase of the sample and interfere with the leaching out of metals from the sample). See SW–846 method number 1330. Vulcan also submitted test results for the characteristics of ignitability, corrosivity, or reactivity. See 40 CFR 261.21, 261.22, and 261.23.

Vulcan submitted a signed certification stating that, based on the dimensions of the subsoils area, the maximum volume of contaminated subsoils is 5400 tons. The Agency reviews a petitioner's estimates and, on occasion, has requested a petitioner to re-evaluate estimated waste volume. EPA accepts Vulcan's certified estimate of 5400 tons (approximately 5,333 cubic yards).

EPA does not generally verify submitted test data before proposing delisting decisions, and has not verified the data upon which it proposes to grant Vulcan's exclusion. The sworn affidavit submitted with this petition binds the petitioner to present truthful and accurate results. The Agency, however, has previously conducted a spot-sampling and analysis program to verify the representative nature of the data for some percentage of the submitted petitions, and may select to visit this facility in the future for spot-sampling.

4. Agency Evaluation

The Agency considered the appropriateness of alternative disposal scenarios for contaminted subsoils and decided that a landfill scenario is the most reasonable, worst-case scenario for this waste. Under a landfill disposal scenario, the major exposure route of concern for any hazardous constituents would be ingestion of contaminated ground water. The Agency, therefore, evalauted the petitioned waste using its vertical and horizontal spread (VHS) landfill model which predicts the potential for ground-water contamination from wastes that are landfilled. See 50 FR 7882 (February 26, 1985), 50 FR 48896 (November 27, 1985), and the RCRA public docket for these notices for a detailed description of the VHS model and its parameters. This modeling approach, which includes a ground-water transport scenario, was used with conservative, generic parameters, to predict reasonable worst-case contaminant levels in ground water at a hypothetical receptor well (*i.e.*, the model estimates the ability of an aquifer to dilute the toxicant from a specific volume of waste). The Agency requests comments on the use of the VHS model

as applied to the evaluation of Vulcan's waste.

Specifically, the Agency used the VHS model to evaluate the mobility of the inorganic constituents from Vulcan's waste. The Agency's evaluation, using the waste volume of 5,333 cubic yards and the maximum EP leachate concentration of the listed constituent of concern in the VHS model, generated the compliance-point concentration in Table 5.

TABLE 5.—VHS MODEL: COMPLIANCE-POINT CONCENTRATION (MG/1) LISTED CONSTITUENT SUBSOILS PREVIOUSLY IN CONTACT WITH LEACHATE FROM K071 WASTE

Constituent	Compliance-point concentration (January 1987 samples)	Regulatory standard
Mercury	0.0005	0.002

Mercury levels at the compliance point are below the level prescribed by the National Primary Drinking Water Regulations (NPDWR). See 40 CFR Part 141.

The Agency also evaluated the mobility of the non-listed EP toxic metals (except silver—see explanation below), nickel, and cyanide in the subject subsoils using the VHS model. The compliance-point concentrations for these constituents are presented in Table 6. The Agency did not evaluate the mobility of silver from Vulcan's subsoils because it was not detected in the EP extract using the appropriate SW–846 analytical test methods (see Table 2). The Agency believes that it is inappropriate to evaluate non-detectable concentrations of a constituent of concern in its modeling efforts if the non-detectable value was obtained using the appropriate analytical method. Specifically, if a constituent cannot be detected (when using the appropriate analytical method) the Agency assumes that the constituent is not present and therefore does not present a threat to either human health or the environment.

TABLE 6.—VHS MODEL: COMPLIANCE-POINT CONCENTRATION (MG/1) LISTED CONSTITUENT SUBSOILS PREVIOUSLY IN CONTACT WITH LEACHATE FROM K071 WASTE

Constituents	Compliance-point concentration (January 1987 samples)	Regulatory standards
Arsenic	0.0017	0.05
Barium	0.049	1.0
Cadmium	0.001	0.01
Chromium	0.002	0.05
Lead	0.043	0.05
Selenium	0.0019	0.01
Nickel	0.08	0.5
Cyanide	0.005	0.7

The calculated compliance-point concentrations of arsenic, barium, cadmium, chromium, lead, and selenium are below the levels prescribed by the NPDWR. The nickel level (at the compliance point) does not exceed the Agency's health-based standard of 0.5 mg/1.[1] Additionally, the cyanide level (at the compliance point) does not exceed the Agency's health-based standard of 0.7 mg/1.[2] Lastly, because the maximum total constituent concentrations of cyanide and sulfide (see Table 1) were 0.34 ppm and 331.56 ppm, respectively, the Agency believes that the total concentrations of reactive cyanide and reactive sulfide will be below the Agency's interim standards of 250 ppm and 500 ppm respectively.[3]

Based on the review of Vulcan's processes and raw materials list, the Agency determined that no Appendix VIII hazardous constituents, other than those for which tests were conducted, are likely to be present or formed in the subsoils previously in contact with leachate originating from the K071 waste storage pile. On the basis of test results submitted by the petitioner, pursuant to 260.22, the Agency concludes that the subject subsoils do not exhibit any of the characteristics of ignitability, reactivity, or corrosivity. See 40 CFR 261.21, 261.22, and 261.23.

The Agency also evaluated the ground-water monitoring data submitted for the years 1980 through 1986 to determine whether the ground-water contamination at the site is a direct result of the petitioned waste. Ground water at the site is contaminated with mercury as shown in the isopleth of total mercury contamination provided in Figure 1.

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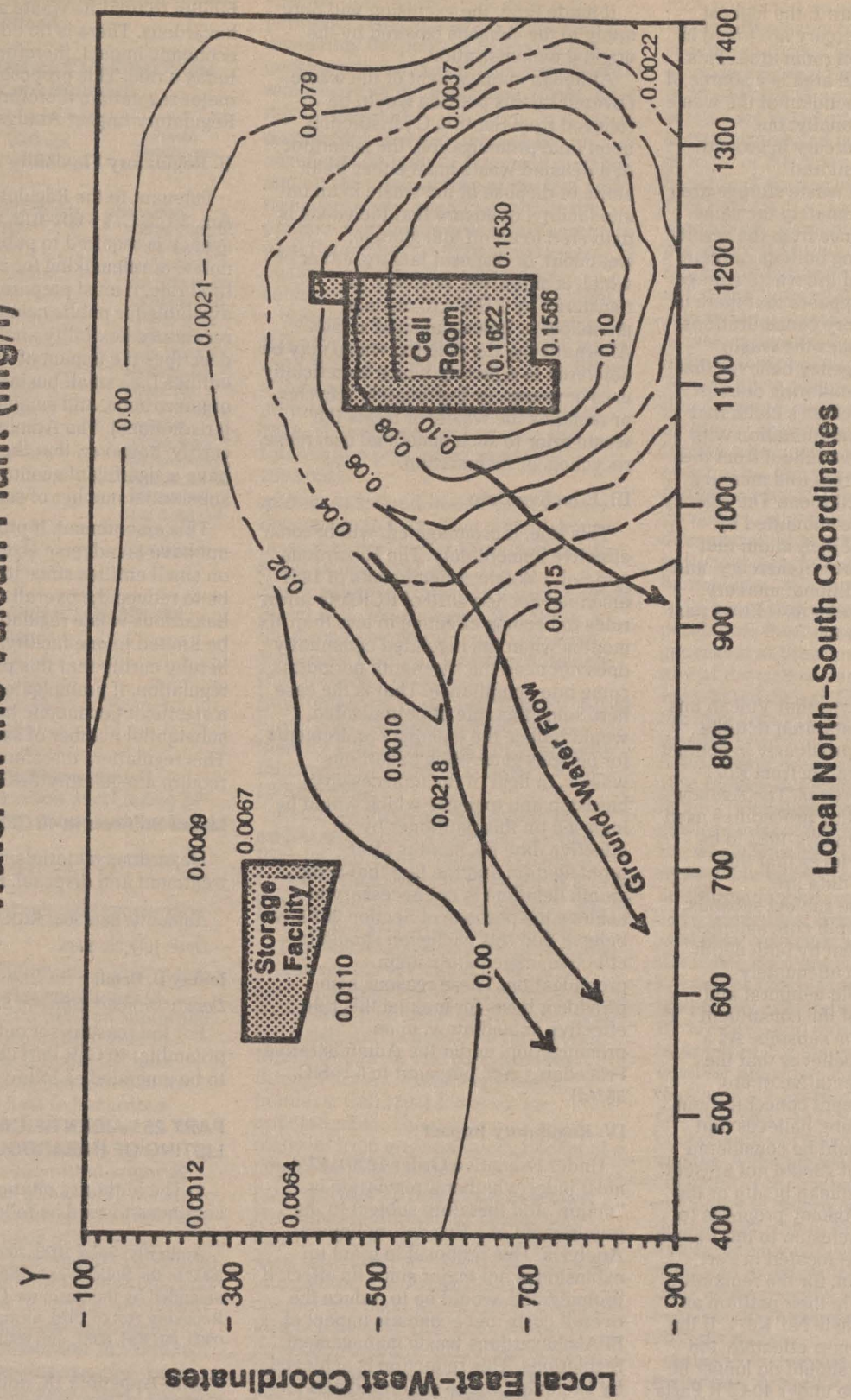
[1] See Hazardous Waste Management System; Land Disposal Restrictions: Notice of Availability and Request for Comment. 52 FR 29994. Proposed Health-Based levels for Nickel and Cyanide. August 12, 1987.

[2] See Verified Reference Doses of the U.S. Environmental Protection Agency. Office of Health and Environmental Assessment (OHEA), Environmental Criteria and Assessment Office, Cincinnati, Ohio, 1988.

[3] See "Interim Agency Thresholds for Toxic Gas Generation," July 12, 1985, Internal Agency Memorandum in the RCRA public docket.

Figure 1



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As indicated by Figure 1, the highest concentrations of mercury are found in the vicinity of the cell room area. This indicates that the cell area is a source of contamination independent of the waste storage area. Additionally, the concentrations of mercury in ground water both upgradient and downgradient of the waste storage area appear to be approximately the same. (This conclusion comes from the results of the well monitoring both upgradient and downgradient of the waste storage pad.) Therefore, it appears that there is no increase in mercury concentrations as ground water passes the waste storage area. The Agency believes that the ground-water monitoring data for mercury supports Vulcan's claim that the ground-water contamination with mercury resulted from fallout from the cell room air discharges and mercury brine spills in the cell room. The Agency accepts the evidence submitted by Vulcan in support of their claim that there is another source of mercury, and believes that no additional mercury enters the ground water as it flows past the waste storage area.

5. Conclusion

The Agency believes that Vulcan has successfully demonstarated that the remaining subsoils previously in contact with leachate originating from K071 waste are non-hazardous. The Agency considers the sampling procedures used by Vulcan during January 1987 to be adequate, and it believes that the reported analytical data are representative of the subject subsoils. By collecting full-depth core samples and compositing them by both depth and section, Vulcan adequately assessed the possible temporal and spatial variability of the constituent concentrations in the subsoils. As a result, the Agency believes that the samples are representative of any variation in constituent concentrations. The Agency, therefore, believes that Vulcan's waste should be considered non-hazardous, as it should not present a hazard to either human health or the environment. The Agency proposes to grant a one-time exclusion to the Vulcan Materials Company, located in Port Edwards, Wisconsin, for the remaining subsoils described in their petition as EPA Hazardous Waste No. K071. If the proposed rule becomes effective, the remaining subsoils should no longer be subject to regulation under 40 CFR Parts 262 through 268 and the permitting standards of 40 CFR Part 270.

If made final, the exclusion will only apply to the subsoils covered by the original demonstration.

Although management of the waste covered by this petition would be relieved from Subtitle C jurisdiction upon final promulgation, the generator of a delisted waste must either treat, store, or dispose of the waste in an on-site facility, or ensure that the waste is delivered to an off-site storage, treatment, or disposal facility, either of which is permitted, licensed, or registered by a State to manage municipal or industrial solid waste. Alternatively, the delisted waste may be delivered to a facility which beneficially uses or reuses, or legitimately recycles or reclaims the waste; or treats the waste prior to such beneficial use, reuse, recycling, or reclamation.

III. Effective Date

This rule, if promulgated, will become effective immediately. The Hazardous and Solid Waste Amendments of 1984 amended Section 3010 of RCRA to allow rules to become effective in less than six months when the regulated community does not need the six-month period to come into compliance. That is the case here since this rule, if promulgated, would reduce the existing requirements for persons generating hazardous wastes. In light of the unnecessary hardship and expense which would be imposed on this petitioner by an effective date six months after promulgation and the fact that a six-month deadline is not necessary to achieve the purpose of Section 3010, we believe that this exclusion should be effective immediately upon promulgation. These reasons also provide a basis for making this rule effective immediately, upon promulgation, under the Administrative Procedures Act, pursuant to 5 U.S.C. 553(d).

IV. Regulatory Impact

Under Executive Order 12291, EPA must judge whether a regulation is "major" and therefore subject to the requirement of a Regulatory Impact Analysis. This proposal to grant an exclusion is not major since its effect, if promulgated, would be to reduce the overall costs and economic impact of EPA's hazardous waste management regulations. This reduction is achieved by excluding waste generated at a specific facility from EPA's lists of hazardous wastes, thereby enabling this facility to treat its waste as non-hazardous. There is no additional economic impact, therefore, due to today's rule. This proposal is not a major regulation, therefore, no Regulatory Impact Analysis is required.

V. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act, 5 U.S.C. §§ 601–612, whenever an agency is required to publish a general notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis which describes the impact of the rule on small entities (*i.e.*, small businesses, small organizations, and small governmental jurisdictions). The Administrator may certify, however, that the rule will not have a significant economic impact on a substantial number of small entities.

This amendment, if promulgated, will not have an adverse economic impact on small entities since its effect would be to reduce the overall costs of EPA's hazardous waste regulations and would be limited to one facility. Accordingly, I hereby certify that this proposed regulation, if promulgated, will not have a significant economic impact on a substantial number of small entities This regulation, therefore, does not require a regulatory flexibility analysis.

List of Subjects in 40 CFR Part 261

Hazardous materials, Waste treatment and disposal, Recycling.

Authority: Sec. 3001 RCRA, 42 U.S.C 6921

Date: July 25, 1988.

Jeffery D. Denit,

Deputy Director Office of Solid Waste

For the reasons set out in the preamble, 40 CFR Part 261 is proposed to be amended as follows:

PART 261—IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

1. The authority citation for Part 261 continues to read as follows:

Authority: Secs. 1006, 2002(a), 3001, and 3002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. 6905, 6912(a), 6921, and 6922).

2. In Appendix IX, add to table 2 the following wastestreams in alphabetical order:

Appendix IX—Wastes Excluded Under §§ 260.20 and 260.22

TABLE 2.—WASTES EXCLUDED FROM SPECIFIC SOURCES

Facility	Address	Waste Description
•	•	•
Vulcan Materials Co.	Port Edwards, WI	Remaining subsoils which had been in contact with leachate from a storage pad holding brine purification muds (EPA Hazardous Waste No. K071) This one-time exclusion for the remaining subsoils will be effective after (insert date of final rule's publications)

[FR Doc. 88-17334 Filed 8-1-88; 8:45 am]
BILLING CODE 6560-50-M

40 CFR Part 261

[SW-FRL-3423-3]

Hazardous Waste Management System; Identification and Listing of Hazardous Waste; Proposed Exclusion

AGENCY: Environmental Protection Agency

ACTION: Proposed rule and request for comment.

SUMMARY: The Environmental Protection Agency (EPA or Agency) today is proposing to grant a petition submitted by CF&I Steel Corporation, Pueblo, Colorado, to conditionally exclude certain solid wastes generated at its facility from the lists of hazardous wastes contained in 40 CFR 261.31 and 261.32. This action responds to a delisting petition submitted under 40 CFR 260.20, which allows any person to petition the Administrator to modify or revoke any provision of Parts 260 through 268, 124, 270, and 271 of Title 40 of the Code of Federal Regulations, and under 40 CFR 260.22, which specifically provides generators the opportunity to petition the Administrator to exclude a waste on a "generator-specific" basis from the hazardous waste lists. Today's proposed decision is based on an evaluation of waste-specific information provided by the petitioner.

The Agency is also proposing the use of a fate and transport model and its application in evaluating the waste-specific information provided by the petitioner. This model has been used in evaluating the petition to predict the concentration of hazardous constituents released from the petitioned waste, once it is disposed of.

DATES: EPA is requesting public comments on today's proposed decision and on the applicability of the fate and transport model used to evaluate the petition. Comments will be accepted until September 16, 1988. Comments postmarked after the close of the comment period will be stamped "late.".

Any person may request a hearing on this proposed decision and/or the model used in the petition evaluation by filing a request with Bruce Weddle, whose address appears below, by August 17, 1988. The request must contain the information prescribed in 40 CFR 260.20(d).

ADDRESSES: Send three copies of your documents to EPA. Two copies should be sent to the Docket Clerk, Office of Solid Waste (WH-562), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. A third copy should be sent to Jim Kent, Variances Section, Assistance Branch, PSPD/OSW (OS-343), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. Identify your comments at the top with this regulatory docket number: "F-88-CFEP-FFFFF."

Requests for a hearing should be addressed to Bruce Weddle, Director, Permits and State Programs Division, Office of Solid Waste (OS-340), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460.

The RCRA regulatory docket for this proposed rule is located at the U.S. Environmental Protection Agency, 401 M Street SW. (sub-basement), Washington, DC 20460, and is available for viewing from 9:00 a.m. to 4:00 p.m., Monday through Friday, excluding Federal holidays. Call (202) 475-9327 for appointments. The public may copy material from any regulatory docket at a cost of $0.15 per page.

FOR FURTHER INFORMATION CONTACT: For general information, contact the RCRA Hotline, toll free at (800) 424-9346, or at (202) 382-3000. For technical information concerning this notice, contact Mr. Scott Maid, Office of Solid Waste (OS-343), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460, (202) 382-4783.

SUPPLEMENTARY INFORMATION:

I. Background

A. Authority

On January 16, 1981, as part of its final and interim final regulations implementing section 3001 of RCRA, EPA published an amended list of hazardous wastes from non-specific and specific sources. This list has been amended several times, and is published in 40 CFR 261.31 and 261.32. These wastes are listed as hazardous because they typically and frequently exhibit one or more of the characteristics of hazardous wastes identified in Subpart C of Part 261 (*i.e.*, ignitability, corrosivity, reactivity, and extraction procedure (EP) toxicity) or meet the criteria for listing contained in 40 CFR 261.11 (a)(2) or (a)(3).

Individual waste streams may vary, however, depending on raw materials, industrial processes, and other factors. Thus, while a waste that is described in these regulations generally is hazardous, a specific waste from an individual facility meeting the listing description may not be. For this reason, 40 CFR 260.20 and 260.22 provide an exclusion procedure, allowing persons to demonstrate that a specific waste from a particular generating facility should not be regulated as a hazardous waste.

To have their wastes excluded, petitioners must show that wastes generated at their facilities do not meet any of the criteria for which the wastes were listed. See 40 CFR 260.22(a) and the background documents for the listed wastes. In addition, the Hazardous and Solid Waste Amendments (HSWA) of 1984 require the Agency to consider any factors (including additional constituents) other than those for which the waste was listed, if there is a reasonable basis to believe that such additional factors could cause the waste to be hazardous. Accordingly, a petitioner also must demonstrate that the waste does not exhibit any of the hazardous characteristics (*i.e.*, ignitability, reactivity, corrosivity, and EP toxicity), and must present sufficient information for the Agency to determine whether the waste contains any other toxicants at hazardous levels. See 40 CFR 260.22(a), 42 U.S.C. 6921(f), and the background documents for the listed wastes. Although wastes which are "delisted" (*i.e.*, excluded) have been evaluated to determine whether or not they exhibit any of the characteristics of a hazardous waste, generators remain obligated to determine whether or not their waste remains non-hazardous based on the hazardous waste characteristics.

In addition to wastes listed as hazardous in 40 CFR 261.31 and 261.32, residues from the treatment, storage, or disposal of listed hazardous wastes and mixtures containing hazardous wastes also are eligible for exclusion and remain hazardous wastes until excluded. See 40 CFR 261.3 (c) and (d)(2). The substantive standard for

"delisting" a treatment residue or a mixture is the same as previously described for listed wastes.

B. Approach Used To Evaluate This Petition

In making a delisting determination, the Agency evaluates each petitioned waste against the listing criteria and factors cited in 40 CFR 261.11 (a)(2) and (a)(3). If the Agency believes that the waste remains hazardous based on the factors for which the waste was originally listed, EPA will propose to deny the petition. If, however, the Agency agrees with the petitioner that the waste is non-hazardous with respect to the original listing criteria, EPA then will evaluate the waste with respect to other factors or criteria, if there is a reasonable basis to believe that such additional factors could cause the waste to be hazardous. The Agency considers whether the waste is acutely toxic, and considers the toxicity of the constituents, the concentration of the constituents in the waste, their tendency to migrate and to bioaccumulate, their persistence in the environment once released from the waste, plausible and specific types of management of the petitioned waste, the quantities of waste generated, and any other additional factors which may characterize the petitioned waste.

The Agency is proposing to use such information to identify plausible exposure routes for hazardous constituents present in the waste, and is proposing to use a fate and transport model to predict the concentration of hazardous constituents that may be released from the petitioned waste after disposal and to determine the potential impact of the unregulated disposal of CF&I Steel Corporation's petitioned waste on human health and the environment. Specifically, the model will be ued to predict compliance-point concentrations which will be compared directly to the levels of regulatory concern for particular hazardous constituents.

EPA believes that this model represents a reasonable worst-case waste disposal scenario for the petitioned waste, and that a reasonable worst-case scenario is appropriate when evaluating whether a waste should be relieved of the protective management constraints of RCRA Subtitle C. Because a delisted waste is no longer subject to hazardous waste control, the Agency is generally unable to predict and does not control how a waste will be managed after delisting. Therefore, EPA currently believes that it is inappropriate for the Delisting Program to consider extensive site-specific factors. For example, a generator may petition the Agency for delisting of a metal hydroxide sludge which is currently being managed in an on-site landfill and provide data on the nearest drinking water well, permeability of the aquifer, dispersivities, etc. If the Agency were to base its evaluation solely on these site-specific factors, the Agency might conclude that the waste, at that specific location, cannot affect the closest well, and the Agency might grant the petition. Upon promulgation of the exclusion, however, the generator is under no obligation to continue to manage the waste at the on-site landfill. In fact, it is likely that the generator will either choose to send the delisted waste off-site immediately, or will eventually reach the capacity of the on-site facility and subsequently send the waste off-site to a facility which may have very different hydrogeological and exposure conditions.

The Agency also considers the applicability of ground-water monitoring data to its evaluation of delisting petitions. In this case, the Agency determined that, because CF&I Steel Corporation is seeking an upfront delisting (*i.e.*, an exclusion for wastes generated from a laboratory-scale treatment process), ground-water monitoring data collected from the area where the petitioner plans to dispose of the waste is not necessary. Because the petitioned waste stream is not currently generated or disposed of, ground-water data would not characterize the effects of the petitioned waste on the underlying aquifer at the disposal site, and, thus, would serve no propose.

CF&I Steel Corporation petitioned the Agency for an upfront exclusion (for wastes that have not yet been generated) based on a laboratory-scale waste treatment process (*i.e.*, a scaled-down version of a proposed treatment system), untreated waste characteristics, and process descriptions. Additionally, the Agency is proposing that verification testing requirements (*i.e.*, required analytical testing of representative samples obtained from the full-scale treatment system verifying that the treatment system is one-line and operating as described in the petition) be made conditions of the exclusion. These conditions, if the exclusion is granted, will be implemented in order to show that, once on-line, the treatment system can render the waste non-hazardous by meeting the Agency's verification testing limitations (*i.e.*, the maximum allowable levels of the hazardous constituents of concern present in the waste, below which, the waste would not be considered hazardous).

From the evaluation of CF&I Steel Corporation's upfront delisting petition, a list of constitutents was developed for the verification testing. Tentative maximum allowable treated waste concentrations for these constituents then were derived by back calculating from the regulatory standards through the use of the proposed fate and transport model for a landfill management scenario. These levels (*i.e.*, "delisting levels") are proposed conditions of the delisting.

The Agency encourages the use of upfront delisting petitions because they have the advantage of allowing the applicant to know what treatment levels for constituents should be sufficient to render specific wastes non-hazardous, before investing in new or modified waste treatment systems. Therefore, upfront delisting will allow new facilities to receive exclusions prior to generating wastes which, without upfront exclusions, would unnecessarily have been considered hazardous. Upfront delistings for existing facilities can be processed concurrently during construction or permitting activities; therefore, new or modified treatment systems should be capable of producing wastes that are considered non-hazardous sooner than otherwise would be possible. At the same time, conditional batch testing requirements to submit data verifying that the delisting levels are achieved by the fully operational manufacturing/treatment systems will maintain the integrity of the delisting program and will ensure that only non-hazardous wastes are removed from Subtitle C control.

Finally, the Hazardous and Solid Waste Amendments of 1984 specifically require the Agency to provide notice and an opportunity for comment before granting or denying a final exclusion. Thus, a final decision will not be made on this petition proposed today until all public comments (including those at requested hearings, if any) are addressed.

II. Disposition of Petition

CF&I Steel Corporation, Pueblo, Colorado

1. Petition for Exclusion

CF&I Steel Corporation (CF&I), located in Pueblo, Colorado, produces rails, associated rail products, reinforcing bars, billets, rounds, seamless tube, wire, and bars. CF&I petitioned the Agency to exclude its chemically stablized electric arc furnace dust (CSEADF), presently listed as EPA

Hazardous Waste No. K061—"Emission control dust/sludge from the primary production of steel in electric furnaces." The listed constituents of concern for EPA Hazardous Waste No. K061 are cadmium, chromium, and lead. CF&I petitioned to exclude its waste because it does not believe that the waste will meet the Criteria for which it was listed. CF&I also believes that its treatment process will generate a non-hazardous waste because the constituents of concern, although present in the waste, will be in an essentially immobile form. CF&I further believes that the waste will not be hazardous for any other reason (*i.e.*, there are no additional constituents or factors that could cause the waste to be hazardous). Review of this petition included consideration of the original listing criteria, as well as the additional factors required by the Hazardous and Solid Waste Amendments of 1984. See section 222 of the Amendments, 42 U.S.C. 6921(f), and 40 CFR 260.22(d)(2)–(4). Today's proposal to grant this petition for delisting is the result of the Agency's evaluation of CF&I's petition.

2. Background

CF&I petitioned the Agency to exclude its CSEAFD on November 20, 1987 and subsequently provided additional information to complete its petition. In support of its petition, CF&I submitted (1) detailed descriptions of its manufacturing and proposed Solifix waste treatment processes; [1] (2) a list of all the raw materials used in both the manufacturing and treatment processes; (3) results from total constituent analyses for all the EP toxic metal, nickel, cyanide, and total sulfide from representative samples of the untreated EAF dust; (4) results from the EP toxicity and the multiple extraction procedure (MEP) analyses (required for stabilized wastes) for all the EP toxic metals, nickel, and cyanide from representative samples of the fully-cured (*i.e.*, hardened) CSEAFD derived from a bench-scale treatment system; (5) results from total oil and grease analyses on representative samples of the untreated EAF dust; and (6) test results for the hazardous waste characteristics of ignitability, corrosivity, and reactivity. Once CF&I's full-scale treatment system is on-line, EPA proposes that CF&I be required to perform analyses for EP leachate concentrations of all the EP toxic metals, nickel, and cyanide, and total constituent concentrations of total reactive sulfide and total reactive cyanide on batches of treated waste (see section 6—*Verification Testing Conditions*).

CF&I produces the products noted above by processing steel scraps in two electric arc furnaces (EAFs). The scrap steel is melted and refined in the furnace when an electric arc surges between the electrodes and scrap. When the molten steel reaches 3,000 degrees Fahrenheit, it is poured into a ladle and cast into ingot molds.

The EAFs produce dust during (1) melting of scrap, (2) pouring molten steel, (3) pneumatic injection of additives, (4) oxygen blowing, and (5) meltdown/refining periods. The EAF dust is conveyed pneumatically from the EAF dust baghouses to the storage silo.

The EAF dust is then mixed with specific amounts of certain chemicals in a prescribed ratio in accordance with the Solifix proprietary processing sequence. CF&I tested laboratory-scale levels of fully-cured stabilized waste derived from an experimental treatment unit. Data from this unit were submitted as the basis for an upfront delisting petition. CF&I plans to construct a full-scale mixing and stabilization facility if their laboratory-scale system produces treated wastes that support an upfront delisting decision. The fully-cured chemically stablized EAF dust would be disposed of at a non-harzardous dedicated landfill, if the exclusion is granted.

To collect representative samples from EAF baghouses like CF&I's, petitioners are normally requested to collect a minimum of four composite samples comprised of independent grab samples collected over time (*e.g.*, grab samples collected every hour and composited by shift, etc.). See "Test Methods for Evaluating Solid Wastes: Physical/Chemical Methods," U.S. EPA Office of Solid Waste and Emergency Response, Publication SW–846 (third edition), November 1986, and "Petitions to Delist Hazardous Wastes—A Guidance Manual," U.S. EPA, Office of Solid Waste, (EPA/530–SW–85–003), April 1985.

Over a 40 day period, between July 10, 1987 and August 19, 1987, CF&I collected a total of sixty grab samples of the EAF dust from the two EAF dust hoppers prior to the pneumatic transfer of the EAF dust to the storage silo. Each sample was collected in a one gallon container on a staggered schedule rotating between mid-morning, mid-day, and mid-afternoon during the daily melt cycle. The two daily samples (one from each EAF dust hopper) were mixed to produce thirty daily composite samples. The thirty daily composite samples were further composited to produce fifteen sequential daily composite samples (*i.e.*, day 1 and day 2, day 3 and day 4, day 5 and day 6, etc.). The fifteen sequential daily composite samples were analyzed for total constituent concentrations (*i.e.*, mass of a particular constituent per mass of waste) of all the EP toxic metals, nickels, and cyanide, the total constituent concentration of sulfide, and total oil and grease content. The fifteen samples then were ranked by the total constituent concentrations of cadmium, chromium, and lead, and the three highest composite samples were segregated for direct Solifix process fixation. The remaining twelve composite samples were divided into three groups of four and further composited to produce three additional composite samples for Solifix process fixation. EP and MEP leachate analyses were performed on the six fully-cured CSEAFD samples to quantify the leachate concentrations of all the EP toxic metals, nickel, and cyanide (*i.e.*, mass of a particular constituent per unit volume of extract). CF&I claims that due to a consistent manufacturing and treament process, the analyses from samples collected over a five-week period are representative of any variation in fully-cured CSEAFD constituent concentrations.

3. Agency Analysis

CF&I used SW–846 method numbers 7061–7760, 9010, and 9030 to quantify the total constituent concentrations of all the EP toxic metals, nickel, cyanide, and sulfide in the untreated EAF dust. CF&I used SW–846 method numbers 1310 (standard EP) and 1320 (MEP) to quantify the leachable concentrations of the EP toxic metals, nickels, and cyanide in the fully-cured CSEAFD. Table 1 presents the maximum total constituent concentrations of the EP toxic metals, nickel, cyanide, and sulfide. Tables 2 and 3 present the maximum EP leachate values and maximum MEP leachate values, respectively, of the EP toxic metals, nickel, and cyanide. (Analysis for EP or MEP leachable concentrations of sulfide (or reactive sulfide) is not necessary since the Agency's level of regulatory concern is based on the total constituent concentration of reactive sulfide.) Detection limits represent the lowest concentrations quantifiable by CF&I when using the appropriate SW–846 analytical methods to analyze its waste. (Detection limits may vary according to the waste and waste matrix

[1] CF&I has claimed that the Solifix treatment process is confidential and proprietary; therefore, the Agency is handling information on the Solifix treatment process as Confidential Business Information (CBI).

being analyzed, *i.e.*, the "cleanliness" of waste matrices varies, and "dirty" waste matrices may cause interferences, thus raising the detection limit.)

TABLE 1.—MAXIMUM TOTAL CONSTITUENT CONCENTRATIONS UNTREATED EAF DUST

Constituents	Total constituent concentrations (mg/kg)
Arsenic	ND (below detection limit of 1.0).
Barium	224.0.
Cadmium	410.0.
Chromium	1360.0.
Lead	5170.0.
Mercury	29.0.
Selenium	ND (below detection limit of 1.0).
Silver	85.0.
Nickel	260.0.

TABLE 1.—MAXIMUM TOTAL CONSTITUENT CONCENTRATIONS UNTREATED EAF DUST—Continued

Constituents	Total constituent concentrations (mg/kg)
Cyanide	ND (below detection limit of 0.2).
Sulfide	ND (below detection limit of 10.0).

ND: Not Detected. Donotes concentrations below the detection limits.

TABLE 2.—MAXIMUM EP LEACHATE CONCENTRATIONS FULLY-CURED CSEAFD

Constituents	EP leachate concentrations (mg/1)
Arsenic	0.05.[1]
Barium	1.47.

TABLE 2.—MAXIMUM EP LEACHATE CONCENTRATIONS FULLY-CURED CSEAFD—Continued

Constituents	EP leachate concentrations (mg/1)
Cadmium	0.061.
Chromium	0.282.
Lead	0.251.
Mercury	ND (below detection limit of 0.005).
Selenium	0.050.[1]
Silver	0.041.
Nickel	0.252.
Cyanide	ND (below detection limit of 0.020).

ND: Not Detected. Donotes concentrations below the detection limits.

[1] Calculated by assuming a dilution factor of twenty times (based on 100 grams of sample and dilution of 2000 ml of water) and a theoretical worst-case leaching of 100 percent.

TABLE 3.—MAXIMUM MEP LEACHATE CONCENTRATIONS FULLY-CURED CSEAFD (MG/1)

Constituent	Concentration days								
	1	2	3	4	5	6	7	8	9
Arsenic [1]	—	—	—	—	—	—	—	—	—
Barium	<1.00	<1.00	<1.00	<1.00	<1.00	<1.00	<1.00	<1.00	<1.00
Cadimum	<0.020	<0.020	<0.020	<0.020	<0.020	<0.020	<0.020	<0.020	<0.020
Chromium	0.091	0.093	0.041	<0.020	<0.020	<0.020	<0.020	<0.020	<0.020
Lead	0.052	0.231	0.151	0.181	0.021	0.052	<0.020	<0.020	<0.020
Mercury	<0.005	<0.005	<0.005	<0.005	<0.005	<0.005	<0.005	<0.005	<0.005
Nickel	0.021	<0.020	<0.020	<0.020	<0.020	<0.020	<0.020	<0.020	<0.020
Seleninum [1]	<0.020	<0.020	<0.020	<0.020	<0.020	<0.020	<0.020	<0.020	<0.020
Cyanide	<0.020	<0.020	<0.020	<0.020	<0.020	<0.020	<0.020	<0.020	<0.020

<: Denotes that the actual concentration is below the detection limit specified in the above table.

[1] MEP's were not completed due to the sufficiently law total constituent concentrations (*i.e.*, assuming the 20:1 liquid to solid ratio of the EP toxicity test and 100 percent leaching, the worst-case extract concentration would be below the level of regulatory concern).

CF&I used SW–846 method number 9071 to determine that its waste had a maximum oil and grease content of 0.107 percent; therefore, the EP analyses did not have to be modified in accordance with the Oily Waste EP methodology (*i.e.*, wastes having more than one percent total oil and grease may have significant concentrations of the constituent of concern in the oil phase, which may not be assessed using the standard EP leachate procedure, or the concentration of oil and grease may be sufficient to coat the phase of the sample and interfere with the leaching out of metals from the sample). See SW–846 method number 1330. CF&I also submitted test results for the characteristics of ignitability, corrosivity, and reactivity. See 40 CFR 261.21, 261.22, and 261.23.

CF&I submitted a signed certification stating that, based on the current annual waste generation and the laboratory-scale mixing ratio of reagent of EAF dust, its maximum annual generation rate of CSEAFD will be 35,000 tons. The Agency reviews a petitioner's estimates and, on occasion, has requested a petitioner to re-evaluate estimated waste volume. EPA accepts CF&I's certified estimate of 35,000 tons (approximately 34,500 cubic yards).

EPA does not generally verify submitted test data before proposing delisting decisions, and has not verified the data upon which it purposes to grant CF&I's exclusion. The sworn affidavit submitted with this petition binds the petitioner to present truthful and accurate results. The Agency, however, has previously conducted a spot-sampling and analysis program to verify the representative nature of the date for some percentage of the submitted petitions, and may elect to visit this facility in the future for spot-sampling.

4. Agency Evaluation

The Agency considered the appropriateness of alternative disposal scenarios for stabilized wastes and decided that a landfill scenario is the most reasonable, worst-case scenario for this waste. Under a landfill disposal scenario, the major exposure route of concern for any hazardous constituents would be ingestion of contaminated ground water. The Agency, therefore, evaluated the petitioned waste using its vertical and horizontal spread (VHS) landfill mode which predicts the potential for ground-water contamination from wastes that are landfilled. See 50 FR 7882 (February 26, 1985), 50 FR 48896 (November 27, 1985), and the RCRA public docket for these notices for a detailed description of the VHS model and its parameters. This modeling approach, which includes a ground-water transport scenario, was used with conservative, generic parameters, to predict reasonable worst-case contaminant levels in ground water at a hypothetical receptor well (*i.e.*, the model estimates the ability of an aquifer to dilute the toxicant from a specific volume of waste). The Agency requests comments on the use of the VHS model as applied to the evaluation of CF&I's waste.

Specifically, the Agency used the VHS model to evaluate the mobility of all the inorganic constituents (except mercury and cyanide—see explanation below) from CF&I's fully-cured CSEAFD waste. The Agency's evaluation, using the CSEAFD volume of 34,500 cubic yards and the maximun EP leachate

concentrations of all the inorganic constituents of concern in the VHS model, generated the compliance-point concentrations shown in Table 4. The Agency did not evaluate the mobility of the remaining inorganic constituents (*i.e.*, mercury and cyanide) from CF&I's waste because they were not detected in the EP extract using the appropriate SW–846 analytical test methods (see Table 2). The Agency believes that it is inappropriate to evaluate non-detectable concentrations of a constituent of concern in its modeling effort if the non-detectable value was obtained using the appropriate analytical method. Specifically, if a constituent cannot be detected (when using the appropriate analytical method) the Agency assumes that the constituent is not present and therefore does not present a threat to either human health or the environment.

TABLE 4

VHS: Calculated Complicance-Point Concentrations Listed and Non-Listed Constituents Fully-Cured CSEAFD

Constituents	Compliance-point concentrations (mg/l)	Regulatory standards (mg/l) [1]
Arsenic	0.0079	0.05
Barium	0.2330	1.0
Cadmium	0.0097	0.01
Chromium	0.0447	0.05
Lead	0.0398	0.05
Nickel	0.3990	0.5
Selenium	0.0079	0.01
Silver	0.0065	0.05

[1] See "Docket Report on Health-Based Regulatory Levels and solubilities Used in the Evaluation of Delisting Petitions," June 8, 1988, located in the RCRA public docket.

The fully-cured CSEAFD exhibited arsenic, barium, cadmium, chromium, lead, nickel, selenium, and silver levels at the compliance point below the Agency's health-base levels used in delisting decision making.

The Agency used the MEP test to assess the long-term stability of CF&I's fully-cured stabilized waste. In this procedure, a sample of CF&I's fully-cured stabilized waste was ground and passed through a 100x mesh screen in order to determine whether the metals are chemically bound in the waste matrix. Once a sample was prepared, a series of nine synthetic acid rain extractions was performed in order to determine whether the metals would leach from the waste matrix over time. The MEP data reported in Table 3 indicate that the fully-cured CSEAFD treatment residue exhibits long-term stability by leaching non-hazardous levels of metals after multiple extractions.

Because the concentration of total cyanide is less than 0.2 mg/kg, the Agency believes that the concentration of reactive cyanide will be below the Agency's interim standard of 250 ppm. See "Interim Agency Threshold for Toxic Gas Generation," July 12, 1985, internal Agency memorandum, in the RCRA public docket. Lastly, because the total constituent concentration of total sulfide is less than 10 mg/kg, the Agency believes that the concentration of reactive sulfide will be below the Agency's interim standard of 500 ppm. See "Interim Agency Threshold for Toxic Gas Generation," July 12, 1985, internal Agency memorandum, in the RCRA public docket.

The Agency concluded, after reviewing CF&I's processes and raw materials list, that no other hazardous constituents of concern are being used by CF&I, and that no other constituents of concern are likely to be present or formed as reaction products or by-products of CF&I's waste. On the basis of test results submitted by the petitioner pursuant to § 260.22, the Agency concludes that the waste does no exhibit any of the characteristics of ignitability, corrosivity, or reactivity. See 40 CFR 261.21, 261.22, and 261.23.

5. Conclusion

The Agency believes that CF&I's Solifix treatment system can render the K061 wastes non-hazardous. The Agency believes that the analyzed samples of the fully-cured treated waste reflect the day-to-day variations in manufacturing and treatment processes for both the particular grades of scrap used and the particular grades of steel produced during the demonstration period and that are intended to be used and produced, thereafter. The Agency, therefore, is proposing that CF&I's fully-cured CSEAFD waste, if it meets certain verification testing requirements, be considered non-hazardous, as it should not present a hazard to either human health or the environment. The Agency proposes to grant a conditional exclusion to the CF&I Steel Corporation, located in Pueblo, Colorado, for its fully cured chemically stabilized electric arc furnace dust treatment residue described in their petition as EPA Hazardous Waste No. K061. If the proposed rule becomes effective, the fully cured treatment residue would no longer be subject to regulation under 40 CFR Parts 262 through 268 and the permitting standards of 40 CFR Part 270.

6. Verification Testing Conditions

As stated earlier, the proposed exclusion contains verification testing requirements. If the final exclusion is granted, the petitioner will be required both to verify that the treatment system is on-line and operating as described in the petition, and to show that, once on-line, the treatment system can meet the Agency's verification testing limitations (i.e., "delisting levels"). These proposed conditions are specific to the upfront exclusion petitioned for by CF&I.

This proposed exclusion is conditional upon the following:

(1) *Testing:*

(A) *Initial Testing.* During the first four weeks of operation of the full-scale treatment system, CF&I must collect representative grab samples of each treated batch of the CSEAFD and composite the grab samples daily. The daily composites, prior to disposal, must be analyzed for the EP leachate concentrations of all the EP toxic metals, nickel, and cyanide (using distilled water in the cyanide extractions), and the total constituent concentrations of reactive sulfide and reactive cyanide. Analyses must be performed according to SW–846 methodologies. CF&I must report the analytical test data obtained during this initial period no later than 90 days after the treatment of the first full-scale batch.

(B) *Subsequent Testing.* The daily testing requirements of (1)(A) shall continue and the analytical test data must be reported every 90 days following the initial report required in (1)(A).

(2) *Delisting levels:* If the EP extract concentrations for chromium, lead, arsenic, or silver exceed 0.315 mg/1; for barium exceeds 6.3 mg/1; for cadmium or selenium exceed 0.063 mg/1; for mercury exceeds 0.0126 mg/1; for nickel exceeds 3.15 mg/1; or for cyanide exceeds 4.42 mg/1, or total reactive cyanide or total reactive sulfide levels exceed 250 mg/kg and 500 mg/kg, respectively, the waste must either be re-treated until it meets these levels or managed and disposed of in accordance with Subtitle C of RCRA.

(3) *Termination of Testing.* The requirements of condition (1)(B) shall be terminated by EPA when the results of four consecutive daily composites for the petitioned waste show the maximum allowable levels in condition (2) are not exceeded and the Chief, Variances Section, notifies CF&I that the conditions have been lifted.

The Agency has determined, through its review of similar petitions from the iron and steel industry, that approximately four weeks are required for a facility to train operators and to collect sufficient data to verify that a full-scale stabilization process is operating correctly. Accordingly, the Agency is proposing an initial testing condition and a subsequent testing condition.

The proposed initial testing condition would require CF&I to collect daily composite samples during the first four weeks of operation of the full-scale treatment system. The Agency proposed

this initial testing condition both to gather data obtained from the full-scale treatment system and to ensure that the full-scale treatment system is closely monitored during the start-up period.

The proposed subsequent testing condition would be effective once the initial testing period is completed. It would provide the Agency with final verification data showing that the full-scale treatment system is operating as described in the petition. As proposed, the subsequent testing condition would require a CF&I to continue the daily testing and reporting requirements of the initial testing condition until EPA received the results from four consecutive daily composites of the petitioned waste showing that the maximum allowable levels (*i.e.*, the delisting levels of condition (2)) were not exceeded and the Chief, Variances Section, notified CF&I that the conditions had been lifted.

The Agency is proposing a mechanism to terminate the testing and reporting requirements of the subsequent testing condition for the following reasons: (1) Based on the laboratory-scale data submitted by CF&I, the Agency believes that consistently non-hazardous wastes can be generated from the CSEAFD treatment process and thus continued testing would be excessive; and (2) termination of this condition after four consecutive daily composites meeting the delisting levels of condition (2) is consistent with existing policy that testing may be terminated for continuously generated wastes after taking a minimum of four representative samples if those wastes are well mixed and uniformly produced. (EPA normally requests a minimum of four samples of a continuously generated waste.) See "Test Methods for Evaluating Solid Wastes: Physical/Chemical Methods," U.S. EPA Office of Solid Waste and Emergency Response, Publication SW-846 (third edition), November 1986, and "Petitions to Delist Hazardous Wastes—A Guidance Manual," U.S. EPA, Office of Solid Waste (EPA/530-SW-85-003), April 1985.

Future upfront delisting proposals and decisions issued by the Agency may include different testing and reporting requirements based on an evaluation of the uniformity of the process and of the waste, of the waste volume (including whether there is a fixed volume of waste or an infinite source), and of other factors normally considered in the petition review process. For example, wastes with variable constituent concentrations, discussed in previous delisting decisions (*e.g.*, see 51 FR 41323, November 14, 1986), may require continuous batch testing.

(4) *Data submittals:* All data must be submitted to the Chief, Variances Section, PSPD/OSW (WH-563), U.S. EPA, 401 M Street, S.W., Washington, DC 20460 within the time period specified in (1)(A) and (1)(B), respectively. Failure to submit the required data will be considered by the Agency sufficient basis to revoke CF&I's exclusion to the extent directed by EPA. All data must be accompanied by the following certification statement:

"Under civil and criminal penalty of law for the making or submission of false or fraudulent statements or representations (pursuant to the applicable provisions of the Federal Code which include, but may not be limited to, 18 U.S.C. § 6928), I certify that the information contained in or accompanying this document is true, accurate and complete.

As to the (those) identified section(s) of this document for which I cannot personally verify its (their) truth and accuracy, I certify as the company official having supervisory responsibility for the persons who, acting under my direct instructions, made the verification that this information is true, accurate and complete.

In the event that any of this information is determined by EPA in its sole discretion to be false, inaccurate or incomplete, and upon conveyance of this fact to the company, I recognize and agree that this exclusion of wastes will be void as if it never had effect or to the extent directed by EPA and that the company will be liable for any actions taken in contravention of the company's RCRA and CERCLA obligations premised upon the company's reliance on the void exclusion."

(Name of Certifying Person)

(Title of Certifying Person)

Date

If made final, the proposed exclusion will only apply to the processes covered by the original demonstration. The facility would require a new exclusion if either its manufacturing or treatment processes are altered or if the percentage of each different type of scrap metal (*i.e.*, molds and stools, cast scrap, haystack and pot buttons, mill scrap, ferro process scrap, borings and turnings, miscellaneous furnace scrap, and roll scale briquettes) used to charge the furnace falls outside the percent range of each type of scrap metal historically used to charge the furnaces (as documented in the petition). Accordingly, CF&I would need to file a new petition. The facility must treat waste generated from changed processes as hazardous until a new exclusion is granted.

Although management of the waste covered by this petition would be relieved from Subtitle C jurisdiction upon final promulgation of an exclusion, the generator of a delisted waste must either treat, store, or dispose of the waste in an on-site facility, or ensure that the waste is delivered to an off-site treatment, storage, or disposal facility, either of which is permitted, licensed, or registered by a State to manage municipal or industrial solid waste. Alternatively, the delisted waste may be delivered to a facility that beneficially uses or reuses, or legitimately recycles or reclaims the waste, or treats the waste prior to such beneficial use, reuse, recycling, or reclamation.

III. Effective date

This rule, if promulgated, will become effective immediately. The Hazardous and Solid Waste Amendments of 1984 amended section 3010 of RCRA to allow rules to become effective in less than six months when the regulated community does not need the six-month period to come into compliance. That is the case here, because this rule, if promulgated, would reduce the existing requirements for persons generating hazardous wastes. In light of the unnecessary hardship and expense that would be imposed on this petitioner by an effective date six months after promulgation and the fact that a six-month deadline is not necessary to achieve the purpose of section 3010, EPA believes that this exclusion should be effective immediately upon promulgation. These reasons also provide a basis for making this rule effective immediately, upon promulgation, under the Administrative Procedures Act, pursuant to 5 U.S.C. 553(d).

IV. Regulatory Impact

Under Executive Order 12291, EPA must judge whether a regulation is "major" and therefore subject to the requirement of a Regulatory Impact Analysis. This proposal to grant an exclusion is not major, since its effect, if promulgated, would be to reduce the overall costs and economic impact of EPA's hazardous waste management regulations. This reduction would be achieved by excluding waste generated at a specific facility from EPA's lists of hazardous wastes, thereby enabling this facility to treat its waste as non-hazardous. There is no additional economic impact, therefore, due to today's rule. This proposal is not a major regulation, therefore, no Regulatory Impact Analysis is required.

V. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601-612, whenever an agency is required to publish a general notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a

regulatory flexibility analysis which describes the impact of the rule on small entities (*i.e.*, small businesses, small organizations, and small governmental jurisdictions). The Administrator may certify, however, that the rule will not have a significant economic impact on a substantial number of small entities.

This amendment, if promulgated, will not have an adverse economic impact on small entities since its effect would be to reduce the overall costs of EPA's hazardous waste regulations and would be limited to one facility. Accordingly, I hereby certify that this proposed regulation, if promulgated, will not have a significant economic impact on a substantial number of small entities. This regulation, therefore, does not require a regulatory flexibility analysis.

List of Subjects in 40 CFR Part 261

Hazardous materials, Waste treatment and disposal, recycling.

Authority: Sec. 3001 RCRA, 42 U.S.C. 6921.

Date: July 25, 1988.

Jeffery D. Denit,

Deputy Director, Office of Solid Waste.

For the reasons set out in the preamble, 40 CFR Part 261 is proposed to be amended as follows:

PART 261—IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

1. The authority citation for Part 261 continues to read as follows:

Authority: Secs. 1006, 2002(a), 3001, and 3002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. 6905, 6912(a), 6921, and 6922).

2. In Appendix IX, add to table 2 the following wastestreams in alphabetical order:

Appendix IX—Wastes Excluded Under §§ 260.20 and 260.22

TABLE 2. WASTES EXCLUDED FROM SPECIFIC SOURCES

Facility	Address	Waste description
*	*	*
CF&I Steel Corp	Pueblo, CO	Fully-cured chemically stabilized electric arc furnace dust/sludge (CSEAFD) treatment residue (EPA Hazardous Waste No. K061) generated from the primary production of steel after [insert date of final rule's publication]. This exclusion is conditioned upon the data obtained from CF&I's full-scale CSEAFD treatment facility because CF&I's original data were obtained from a laboratory-scale CSEAFD treatment process. To ensure that hazardous constituents are not present in the waste at levels of regulatory concern once the full-scale treatment facility is in operation, CF&I must implement a testing program for the petitioned waste. This testing program must meet the following conditions for the exclusion to be valid: (1) *Testing:* (A) *Initial Testing:* During the first four weeks of operation of the full-scale treatment system, CF&I must collect representative grab samples of each treated batch of the CSEAFD and composite the grab samples daily. The daily composites, prior to disposal, must be analyzed for the EP leachate concentrations of all the EP toxic metals, nickel, and cyanide (using distilled water in the cyanide extractions), and the total constituent concentrations of reactive sulfide and reactive cyanide. Analyses must be performed according to SW-846 methodologies. CF&I must report the analytical test data obtained during this initial period no later than 90 days after the treatment of the first full-scale batch. (B) *Subsequent Testing:* The daily testing requirements of (1)(A) shall continue and the analytical test data must be reported every 90 days following the initial report required in (1)(A). (2) *Delisting levels:* If the EP extract concentrations for chromium, lead, arsenic, or silver exceed 0.315 mg/l; for barium exceeds 6.3 mg/l; for cadmium or selenium exceed 0.063 mg/l; for mercury exceeds 0.0126 mg/l; for nickel exceeds 3.15 mg/l; or for cyanide exceeds 4.42 mg/l, or total reactive cyanide or total reactive sulfide levels exceed 250 mg/kg and 500 mg/kg, respectively, the waste must either be re-treated until it meets these levels or managed and disposed of in accordance with Subtitle C of RCRA. (3) *Termination of Testing:* The requirements of condition (1)(B) shall be terminated by EPA when the results of four consecutive daily composites for the petitioned waste show the maximum allowable levels in condition (2) are not exceeded and the Chief, Variances Section, notifies CF&I that the conditions have been lifted. (4) *Data submittals:* All data must be submitted to the Chief, Variances Section, PSPD/OSW (WH-563), U.S. EPA, 401 M Street, SW., Washington, DC 20460 within the time period specified in (1)(A) and (1)(B), respectively. Failure to submit the required data will be considered by the Agency sufficient basis to revoke CF&I's exclusion to the extent directed by EPA. All data must be accompanied by the following certification statement: "Under civil and criminal penalty of law for the making or submission of false or fraudulent statements or representations (pursuant to the applicable provisions of the Federal Code which include, but may not be limited to, 18 U.S.C. § 6928), I certify that the information contained in or accompanying this document is true, accurate and complete. As to the (those) identified section(s) of this document for which I cannot personally verify its (their) truth and accuracy, I certify as the company official having supervisory responsibility for the persons who, acting under my direct instructions, made the verification that this information is true, accurate and complete. In the event that any of this information is determined by EPA in its sole discretion to be false, inaccurate or incomplete, and upon conveyance of this fact to the company, I recognize and agree that this exclusion of wastes will be void as if it never had effect or to the extent directed by EPA and that the company will be liable for any actions taken in contravention of the company's RCRA and CERCLA obligations premised upon the company's reliance on the void exclusion."
*	*	*

[FR Doc. 88-17336 Filed 8-1-88; 8:45 am]

BILLING CODE 6560-50-M

Notices

Federal Register
Vol. 53, No. 148
Tuesday, August 2, 1988

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

Federal Grain Inspection Service

Designation Renewal of the Denver, CO, and East Indiana, IN, Agencies and the State of Kansas, KS

AGENCY: Federal Grain Inspection Service (Service).

ACTION: Notice.

SUMMARY: This notice announces the designation renewal of Hutchings, Inc., dba Denver Grain Inspection (Denver), East Indiana Grain Inspection, Inc. (East Indiana), and Kansas State Grain Inspection Department (Kansas) as official agencies responsible for providing official services under the U.S. Grain Standards Act, as Amended (Act).

EFFECTIVE DATE: September 1, 1988.

ADDRESS: James R. Conrad, Chief, Review Branch, Compliance Division, FGIS, USDA, Room 1647 South Building, P.O. Box 96454, Washington, DC 20090–6454.

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 1412–1; therefore, the Executive Order and Departmental Regulation do not apply to this action.

The Service announced that Denver's East Indiana's, and Kansas' designations terminate on August 31, 1988, and requested applications for official agency designation to provide official services within specified geographic areas in the March 1, 1988, **Federal Register** (53 FR 6168). Applications were to be postmarked by March 31, 1988. Denver and Kansas were the only applicants for designation and each applied for designation renewal in the entire area currently assigned to that agency. There were two applications for the East Indiana designation; East Indiana applied for designation renewal in the entire area currently assigned to that agency, except for Williams County, Ohio, and a neighboring official agency, Lima Grain Inspection Service, Inc., applied for designation only in that County.

The Service announced the applicant names in the May 3, 1988, **Federal Register** (53 FR 15720) and requested comments on the applicants' designation. Comments were to be postmarked by June 20, 1988; none were received for Denver or East Indiana. One favorable comment was received from a trade group, recommending the designation renewal of Kansas.

The Service evaluated all available information regarding the designation criteria in section 7(f)(1)(A) of the Act; and, in accordance with section 7(f)(1)(B), determined that Denver, East Indiana, and Kansas are able to provide official services in the geographic area for which the Service is renewing their designations. Effective September 1, 1988, and terminating August 31, 1991, Denver and Kansas will provide official inspection services in their specified geographic areas, previously described in the March 1 **Federal Register**. Effective September 1, 1988, and terminating August 31, 1991, East Indiana will provide official inspection services in the specified geographic area previously described in the March 1 **Federal Register**, with the exception of Williams County, Ohio. Lima is able to provide official services in Williams County, Ohio, for which the Service is selecting it for designation. Lima will provide official inspection services in Williams County effective September 1, 1988, and terminating January 31, 1989, when that agency's current designation terminates.

Interested persons may obtain official services by contacting the agencies at the following telephone number: Denver at (303) 287–0167; East Indiana at (317) 289–1206; Kansas at (913) 296–3451; and Lima at (419) 223–7866.

Pub. L. 94–582, 90 Stat. 2867, as amended, (7 U.S.C. 71 *et seq.*)

Date: July 27, 1988.

J.T. Abshier,

Director, Compliance Division.

[FR Doc. 88–17355 Filed 8–1–88; 8:45 am]

BILLING CODE 3410– EN–M

Request for Comments on Designation Applicants in the Geographic Area Currently Assigned to the Idaho, ID, and Lewiston, ID, Agencies and the State of Utah, UT

AGENCY: Federal Grain Inspection Service (Service).

ACTION: Notice.

SUMMARY: This notice requests comments from interested parties on the applicants for official agency designation in the geographic areas currently assigned to the Idaho Grain Inspection Service, Inc. (Idaho), Lewiston Grain Inspection Service, Inc. (Lewiston), and Utah Department of Agriculture (Utah).

DATE: Comments to be postmarked on or before September 15, 1988.

ADDRESS: Comments must be submitted in writing to Lewis Lebakken, Jr., RM, FGIS, USDA, Room 0628 South Building, P.O. Box 96454, Washington, DC 20090–6454.

Telemail users may respond to [LLEBAKKEN/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 located at 1400 Independence Avenue SW., during regular business hours (7 CFR 1.27(b)).

FOR FURTHER INFORMATION CONTACT: Lewis Lebakken, Jr., telephone (202) 475–3428.

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 the specified geographic areas in the June 1, 1988, **Federal Register** (53 FR 19976). Applications were to be postmarked by July 1, 1988. Idaho, Lewiston, and Utah were the only applicants for designation in those areas and each applied for designation renewal in the entire area currently assigned to that agency.

This notice provides interested persons the opportunity to present their comments concerning the applicants'

designation. Commenters are encouraged to submit reasons for support or objection to these designation actions and include pertinent data to support their views and comments. All comments must be submitted to the 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.*).

Date: July 27, 1988.

J.T. Abshier

Director, Compliance Division.

[FR Doc. 88–17356 Filed 8–1–88; 8:45 am]

BILLING CODE 3410–EN–M

Request for Designation Applicants To Provide Official Services in the Geographic Area Currently Assigned to the Lima, OH Agency and the State of Virginia, VA

AGENCY: Federal Grain Inspection Service (Service).

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 two agencies will terminate, in accordance with the Act, and requests applications from parties 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 the Lima Grain Inspection Service, Inc. (Lima), and Virginia Department of Agriculture and Consumer Services (Virginia).

DATE: Applications to be postmarked on or before September 1, 1988.

ADDRESS: Applications must be submitted to James R. Conrad, Chief, Review Branch, Compliance Division, FGIS, USDA, Room 1647 South Building, P.O. Box 96454, Washington, DC 20090–6454. All applications received will be made available for public inspection at this address located at 1400 Independence Avenue SW., 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.

Lima, located at 2242 Arcadia Avenue, Lima, OH 45805; and Virginia, located at 1100 Bank Street, 704 Washington Building, Richmond, VA 23209; were each designated under the Act as an official agency on February 1, 1986. Lima was designated to provide official inspection functions, and Virginia was designated to provide official inspection and weighing functions.

Each official agency's designation terminates on January 31, 1989. Section 7(g)(1) of the Act states that designations of official agencies 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 Lima, in the State of Ohio, 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 the northern and eastern Williams County lines; the northern and eastern Defiance County lines south to U.S. Route 24; U.S. Route 24 northeast to State Route 108;

Bounded on the East by State Route 108 south to Putnam County; the northern and eastern Putnam County lines; the eastern Allen County line; the northern Hardin County line east to U.S. Route 68; U.S. Route 68 south to U.S. Route 47;

Bounded on the South by U.S. Route 47 west-southwest to Interstate 75; Interstate 75 south to the Shelby County line; the southern and western Shelby County lines; the southern Mercer County line; and

Bounded on the West by the Ohio-Indiana State line from the southern Mercer County line to the northern Williams County line.

This area includes Williams County, Ohio, which was assigned to Lima effective September 1, 1988, as published in the Federal Register on the same date as this notice.

An exception to Lima's assigned geographic area is the following location inside Lima's area which has been and will continue to be serviced by the following official agency:

East Indiana Grain Inspection, Inc.: Payne Cooperative Association, Payne, Paulding County.

The geographic area presently assigned to Virginia, pursuant to section 7(f)(2) of the Act, which may be assigned to the applicant selected for designation, is the entire State of Virginia, except those export port locations within the State.

Interested parties, including Lima and Virginia, 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 February 1, 1989, and ending January 31, 1992. 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 applicent will be designated to provide official services of a geographic area.

Pub. L. 94–582, 90 Stat. 2867, as amended (7 U.S.C. 71 *et seq.*).

Dated: July 27, 1988.

J.T. Abshier,

Director, Compliance Division.

[FR Doc. 88–17357 Filed 8–1–88; 8:45 am]

BILLING CODE 3100–M

COMMISSION ON CIVIL RIGHTS

Oklahoma Advisory Committee Meeting

Notice is hereby given, pursuant to the provisions of the Rules and Regulations of the U.S. Commission on Civil Rights, that the Oklahoma Advisory Committee to the Commission will convene at 1:00 p.m. and adjourn at 4:00 p.m., on August 15, 1988 at the Lincoln Plaza Hotel Conference Center, Seminole Room, 4445 North Lincoln Boulevard, Oklahoma City, Oklahoma 73105. The purpose of the meeting is to plan future program activities and to discuss current civil rights issues affecting the State.

Persons desiring additional information, or planning a presentation to the Committee, should contact Committee Chairperson, Charles Fagin or Philip Montez, Director of the

Western Regional Division (213) 894–3437, (TDD 213/894–0508). Hearing impaired persons who will attend the meeting and require the services of a sign language interpreter, should contact the Regional Division at least five (5) working days before the scheduled date of the meeting.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washington, DC, July 20, 1988.

Susan J. Prado,

Acting Staff Director.

[FR Doc. 88–17313 Filed 8–1–88; 8:45 am]

BILLING CODE 6335-01-M

DEPARTMENT OF COMMERCE

International Trade Administration

[C-201-402]

Lime From Mexico

Initiation of Changed Circumstances Countervailing Duty Administrative Review

AGENCY: International Trade Administration/Import Administration, Department of Commerce.

ACTION: Notice of initiation of changed circumstances countervailing duty administrative review.

SUMMARY: The Department of Commerce is initiating a changed circumstances administrative review of the countervailing duty order on lime from Mexico. In this review, we will determine whether bounties or grants received by Sonocal continue to provide benefits to Bomintzha. This review will be conducted for the purpose of determining whether the deposit rate of estimated countervailing duties for exports by Bomintzha should be changed.

EFFECTIVE DATE: August 2, 1988.

FOR FURTHER INFORMATION CONTACT: Terri Ann Benny or Paul McGarr, Office of Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 377–3337.

SUPPLEMENTARY INFORMATION:

Background

On September 11, 1984, the Department of Commerce ("the Department") published in the **Federal Register** (49 FR 35672) a notice of final affirmative countervailing duty determination and countervailing duty order on lime from Mexico. The order, which excluded seven firms, established rates of cash deposit of estimated countervailing duties of 55.89 percent for Sonocal and 1.21 percent for all other firms. On April 14, 1987, after receiving information that lime produced at the Sonocal facility was being exported under a new company name, Bomintzha, the Department instructed the U.S. Customs Service to collect estimated countervailing duties on exports by Bomintzha at the same 55.89 percent rate applicable to Sonocal. We had also received some information concerning the purchase of Sonocal by Bomintzha along with a claim that the purchase was an arm's-length transaction. But, given our final determination that Sonocal had benefited from substantial bounties or grants, we could not consider Bomintzha a new company, eligible for the 1.21 percent "all other" rate, absent an administrative review. In such a review we could determine whether Bomintzha had benefited from a pass through of benefits received by Sonocal or whether, absent such benefits, Bomintzha should be subject to a country-wide countervailing duty rate.

On September 30, 1987, the Government of Mexico requested in accordance with 19 CFR 355.10 an administrative review of the order for calendar year 1986. We published the initiation of the administrative review on October 20, 1987. On April 15 and July 7, 1988, we received requests from Bomintzha that the ongoing review covering 1986 exports be expanded to include 1987 exports because Bomintzha, which exported in 1987 but not in 1986, could not demonstrate that it did not receive countervailable benefits without the inclusion of the 1987 period. Under our normal procedures, the opportunity to request a review for calendar year 1987 would not occur until September 1988. On July 21, 1988, we received a request from the Government of Mexico for a changed circumstances administrative review of this order in accordance with section 751(b) of the Tariff Act of 1930.

The Government of Mexico requested the section 751(b) review because of the unusual circumstances present in this case and because the huge difference between the 55.89 percent rate and the 1.21 percent "all other" rate imposed a considerable burden on Bomintzha. As a way to remedy this sitution as soon as possible, the Mexican government requested that the section 751(b) review address the issue of the potential pass through of benefits in the Sonocal/Bomintzha transaction and, pending completion of the 1986 and 1987 reviews, establish a cash deposit of estimated countervailing duties for Bomintzha at the 1.21 percent "all other" rate.

Initiation of Review

In accordance with section 751(b) of the Tariff Act of 1930, we are initiating a changed circumstances administrative review of the countervailing duty order on lime from Mexico. In this review, we will determine whether bounties or grants received by Sonocal continue to provide benefits to Bomintzha. The review will be conducted to determine whether the deposit rate of estimated countervailing duties for exports by Bomintzha should be changed to the "all other" rate. We still intend to complete the section 751(a) review for the 1986 period and, if requested during the anniversary month, for the 1987 period.

We believe that there are "changed circumstances sufficient to warrant review," as defined by section 355.41(b) of the Commerce Regulations, for the following reasons: (1) Information submitted by Bomintzha in the section 751(a) review of calendar year 1986 provides a sufficient basis for examining the circumstances associated with the sale of Sonocal to Bomintzha; (2) because Bomintzha did not export during 1986, completion of the section 751(a) review for that period will not result in the determination of assessment and estimated countervailing duty deposit rates based on Bomintzha's exports; (3) maintaining an estimated duty deposit rate that includes benefits received by Sonocal until completion of the 1987 section 751(a) review may constitute an excessive burden on Bomintzha; (4) a review under section 751(b) provides an expeditious means by which to examine the nature of the Sonocal/Bomintzha transaction and the impact on Bomintzha of bounties and grants received by Sonocal; and (5) conduct of this review would not impose an administrative burden on the Department.

This initiation and notice are in accordance with section 751(b) of the Tariff Act of 1930 (19 U.S.C. 1675(b)) and 19 CFR 355.41(b).

Date: July 27, 1988.

Jan W. Mares,

Assistant Secretary, Import Administration.

[FR Doc. 88–17378 Filed 8–1–88; 8:45 am]

BILLING CODE 3510-DS-M

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Adjustment of Import Limits for Certain Cotton, Silk Blend and Other Vegetable Fiber Textiles and Textile Products Produced or Manufactured in Macau

July 28, 1988.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing directives for the Commissioner of Customs reducing limits.

EFFECTIVE DATE: August 4, 1988.

AUTHORITY: Executive Order 11651 of March 3, 1972, as amended; Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

FOR FURTHER INFORMATION CONTACT: Jerome Turtola, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 377–4212. For information on the quota status of these limits, refere to the Quota Status Report posted on the bulletin boards of each Customs port or call (202) 323–6495. For information on embargoes ad quota re-openings, call (202) 377–3715.

SUPPLEMENTARY INFORMATION: The current aggregate limit and limits for Categories 333/334/335/833/834/835, 338, 339, 340, 341, 347/348/847 and 345 are being reduced for carry forward applied to corresponding limits during the previous agreement year.

A description of the textile categories in terms of T.S.U.S.A. numbers is available in the CORRELATION: Textile and Apparel Categories with Tariff Schedules of the United States Annotated (see **Federal Register** notice 52 FR 47745, dated December 11, 1987). Also see 52 FR 49466, published on December 31, 1987.

The letter to the Commssioner of Customs and the actions taken pursuant to it is not designed to implement all of the provisions of the bilateral agreement, but are designed to assist only in the implementation of certain of its provisions.

James H. Babb,

Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

July 28, 1988

Commissioner of Customs,
Department of the Treasury, Washington, DC 20229

This directive amends, but does not cancel, the directive issued to you on December 28, 1987 by the Chairman, Committee for the Implementation of Tetile Agreements, concerning imports into the United States of certain cotton, wool, man-made fiber, silk blend and other vegetable fiber textiles and textile products, produced or manufactured in Macau and exported during the period which began on January 1, 1988 and extends through December 31, 1988.

Effective on August 4, 1988, the directive of December 28, 1987 is hereby amended to reduce the limits for the following categories, as provided under the terms of the current bilateral agreement between the Governments of the United States and Macau:

Category	Adjusted 12-month limit [1]
200–239, 300–369, 400–469, 600–670 and 800–899, as a group.	85,968,158 square yards equivalent.
Sublevels in Group I	
333/334/335/833/834/835.	138,345 doz.
338	181,111 doz.
339	784,855 doz.
340	169,195 doz.
341	112,506 doz.
345	31,749 doz.
347/348/847	438,190 doz.

[1] The limits have not been adjusted to account for any imports exported after December 31, 1987.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

James H. Babb,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 88–17361 Filed 8–1–88; 8:45 am]

BILLING CODE 3510-DR-M

DEPARTMENT OF EDUCATION

Office of Postsecondary Education

Guaranteed Student Loan Program, SLS Program, Plus Program, and Consolidation Loan Program

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Notice of Special Allowance for Quarter Ending June 30, 1988.

The Assistant Secretary for Postsecondary Education announces a special allowance to holders of eligible loans made under the Guaranteed Student Loan Program (GSLP), the Supplemental Loans for Students (SLS) Program, the PLUS Program and the Consolidation Loan Program. This special allowance is provided for under section 438 of the Higher Education Act of 1965 (the Act), as amended (20 U.S.C. 1087–1).

Except for loans subject to section 438(b)(2)(B) of the Act, 20 U.S.C. 1087–1(b)(2)(B), for the quarter ending June 30, 1988, the special allowance will be paid at the following rates:

Applicable interest rate (percent)	Annual special allowance rate (percent)	Special allowance rate percent for quarter ending June 30, 1988
I. GSLP, PLUS or Consolidation loans made prior to October 1, 1981:		
7	3.00	0.75
9	1.00	.25
II. GSLP, SLS or PLUS loans made on or after October 1, 1981, but prior to November 16, 1986, for periods of enrollment beginning prior to November 16, 1986; Consolidation loans made on or after October 1, 1981, but prior to November 16, 1986:		
7	2.94	.735
8	1.94	.485
9	.94	.235
12	0	0
14	0	0
III. GSLP loans made on or after November 16, 1986, or made for periods of enrollment beginning on or after November 16, 1986; SLS or PLUS loans made at a fixed rate of interest either on or after November 16, 1986, or for periods of enrollment beginning on or after November 16, 1986; Consolidation loans made on or after November 16, 1986:		
7	2.69	.6725
8	1.69	.4225
9	.69	.1725
10	0	0
11	0	0
12	0	0
13	0	0
14	0	0

The Assistant Secretary determines the special allowance rate in the manner specified in the Act, for loans at each applicable interest rate, by making the following four calculations:

(a) *Step 1.*

Determine the average bond equivalent rate of the 91-day Treasury bills auctioned during the quarter for which this notice applies (6.44 percent for the quarter ending June 30, 1988);

(b) *Step 2.*

Subtract from that average the applicable interest rate of loans for which a holder is requesting payment;

(c) *Step 3.*

(1) Add 3.5 percent to the remainder, and, in the case of loans made before October 1, 1981, round the sum upward to the nearest one-eighth of one percent; or

(2) Add 3.25 percent in the case of (i) GSLP loans made on or after November 16, 1986, or made for periods of enrollment beginning on or after November 16, 1986, (ii) SLS or PLUS loans made at a fixed rate of interest either on or after November 16, 1986, or made for periods of enrollment beginning on or after November 16, 1986,

or (iii) Consolidation loans made on or after November 16, 1986; and

(d) *Step 4.*

Divide the resulting percent in Step 3 (either (c)(1) or (c)(2), as applicable) by four.

FOR FURTHER INFORMATION CONTACT: Ralph B. Madden, Program Analyst, Guaranteed Student Loan Branch, Division of Policy and Program Development, Department of Education on (202) 732–4242.

(Catalog of Federal Domestic Assistance No. 84.032, Guaranteed Student Loan Program and PLUS Program)

Dated: July 13, 1988.

Kenneth D. Whitehead,

Acting Assistant Secretary for Postsecondary Education.

[FR Doc. 88–17377 Filed 8–1–88; 8:45 am]

BILLING CODE 4000–01–M

DEPARTMENT OF ENERGY

Financial Assistance Award Intent To Award Grant to The Combustion Institute

AGENCY: Department of Energy.

ACTION: Notice of Non-Competitive Financial Assistance Award.

SUMMARY: The Department of Energy announces that pursuant to 10 CFR 600.7(b)(2), it is making a noncompetitive financial assistance award under Grant Number DE–FG01–88FE61626 to the Combustion Institute for the Twenty-Second International Symposium on Combustion.

Scope: This grant will partially fund the Twenty-Second International Symposium on Combustion. The technical program will consist of sessions formed from contributed papers and poster sessions of work-in-progress. Colloquia will be organized on topics of special interest, including but not limited to: reaction kinetics in combustion, turbulent reacting flow, combustion-generated particulates, and combustion diagnostics.

This symposium is of great importance in encouraging workers at universities and other institutions to take an interest in the combustion field in order to provide scientific training in the field and to maintain the flow and interchange of basic combustion information. The Combustion Institute encourages outstanding young scientists and engineers to participate in the Symposia and assists young investigators in attending the Symposia.

In accordance with 10 CFR 600.7(b)(2)(i)(B), negotiations will be conducted only with the Combustion Institute. The conference will be conducted by the Combustion Institute; however, DOE support would enhance the public benefits by increasing the cooperative information exchange among key DOE and industrial participants. There is no known other entity which is conducting or is planning to conduct such a conference on combustion in the near future.

The term of this grant shall be from August 14 through August 19, 1988, and the project cost is estimated at $544,560, of which the share contributed by DOE will be $20,000.

FOR FURTHER INFORMATION CONTACT: U.S. Department of Energy, Office of Procurement Operations, ATTN: Lisa Jones, MA–452.1, 1000 Independence Ave., SW., Washington, DC 20585.

Robert J. Walsh,

Acting Director, Contract Operations Division "A" Office of Procurement Operations.

[FR Doc. 88–17389 Filed 8–1–88; 8:45 am]

BILLING CODE 6450–01–M

Assistant Secretary for International Affairs and Energy Emergencies

Proposed Subsequent Arrangement; Atomic Energy Agreements

Pursuant to section 131 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2160) notice is hereby given of a proposed "subsequent arrangement" under the Agreement for Cooperation between the Government of the United States of America and the Government of Switzerland concerning Civil Uses of Atomic Energy, as amended, and the Additional Agreement for Cooperation between the Government of the United States of America and the European Atomic Energy Community (EURATOM) concerning Peaceful Uses of Atomic Energy, as amended.

The subsequent arrangement to be carried out under the above-mentioned agreements involves approval of the following retransfer: RTD/SD(EU)–53, for the transfer of mixed-oxide fuel samples containing 18.5 grams of uranium enriched to approximately 5 percent in the isotope uranium–235 and 0.12 grams of plutonium from Belgonucleaire, Mol, Belgium to the Swiss Federal Institute for Reactor Research, Wuerenlingen, Switzerland, for destructive post-irradiation examination.

In accordance with section 131 of the Atomic Energy Act of 1954, as amended, it has been determined that this subsequent arrangement will not be inimical to the common defense and security.

This subsequent arrangement will take effect no sooner than fifteen days after the date of publication of this notice.

For the Department of Energy.

Date: July 28, 1988.

George J. Bradley, Jr.,

Principal Deputy Assistance Secretary for International Affairs and Energy Emergencies.

[FR Doc. 88–17387 Filed 8–1–88; 8:45 am]

BILLING CODE 6450–01–M

Proposed Subsequent Arrangement; Atomic Energy Agreements

Pursuant to section 131 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2160) notice is hereby given of a proposed "subsequent arrangement" under the Agreement for Cooperation between the Government of the United States of America and the Government of Switzerland concerning Civil Uses of Atomic Energy, as amended.

The subsequent arrangement to be carried out under the above-mentioned agreement involves the post-irradtiation examination of irradiated mixed uranium-plutonium oxide fuel samples at the Swiss Institute for Reactor Research (EIR), Wuerlingen, Switzerland. This subsequent arrangement records the joint determination of the Government of the United States of America and the Government of Switzerland that safeguards may be effectively applied to the post-irradiation examination at the EIR facility in Switzerland for the said samples.

In accordance with section 131 of the Atomic Energy Act of 1954, as amended, it has been determined that this subsequent arrangement will not be inimical to the common defense and security.

This subsequent arrangement will take effect no sooner than fifteeen days after the date of publication of this notice.

For the Department of Energy.

Date: July 28, 1988.

George J. Bradley, Jr.,

Principal Deputy Assistance Secretary for International Affairs and Energy Emergencies.

[FR Doc. 88–17388 Filed 8–1–88; 8:45 am]

BILLING CODE 6450–01–M

Conservation and Renewable Energy

National Energy Extension Service Advisory Board; Renewal

Notice is hereby given that the National Energy Extension Service Advisory Board, established in

accordance with the National Energy Extension Service Act, Pub. L. 95–39, has been renewed for a 2-year period ending June 14, 1990.

The Board will continue to operate in accordance with the provisions of the Federal Advisory Committee Act (Pub. L. 92–463), the National Energy Extension Service Act (Pub. L. 95–39), the Department of Energy Organization Act (Pub. L. 95–91), the General Services Administration Final Rule on Federal Advisory Committee Management, 41 CFR Part 101–6, and other directives and instructions issued in implementation of those acts.

Further information regarding this advisory board may be obtained from Susan Heard, 202–586–8290.

Issued in Washington, DC, on July 28, 1988.

Howard H. Raiken,

Advisory Committee Management Officer.

[FR Doc. 88–17391 Filed 8–1–88; 8:45 am]

BILLING CODE 6450–01–M

Economic Regulatory Administration

[ERA Docket No. 88–13–NG]

Pentex Petroleum, Inc.; Order Granting Blanket Authorization To Import Natural Gas

AGENCY: Economic Regulatory Administration; Department of Energy.

ACTION: Order granting blanket authorization to Import Natural Gas from Canada.

SUMMARY: The Economic Regulatory Administration (ERA) of the Department of Energy (DOE) gives notice that it has issued an order granting Pentex Petroleum, Inc. (Pentex), blanket authorization to import natural gas from Canada. The order issued in ERA Docket No. 88–13–NG authorizes Pentex to import up to 7.3 Bcf over a two-year period for sale in the domestic spot market.

A copy of this order is available for inspection and copying in the Natural Gas Division Docket Room, GA–076, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–9478. The docket room is open between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

Issued in Washington, DC, July 27, 1988.

Constance L. Buckley,

Acting Director, Office of Fuels Programs, Economic Regulatory Administration.

[FR Doc. 88–17390 Filed 8–1–88; 8:45 am]

BILLING CODE 6450–01–M

Energy Information Administration

Coal Survey Forms

AGENCY: Energy Information Administration, Department of Energy.

ACTION: Solicitation of comments concerning proposed changes to the Coal Survey Forms.

SUMMARY: The Energy Information Administration (EIA), as part of its continuing effort to reduce paperwork and respondent burden (required by the Paperwork Reduction Act of 1980), conducts a consultation program to provide the general public with an opportunity to comment on proposed and continuing reporting forms. This program ensures that requested data can be provided in the desired format, reporting burden is minimized, reporting forms are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, EIA is soliciting comments on the extension of its coal forms for 3 years. These forms include: EIA–1, "Weekly Coal Monitoring Report—General Industries and Blast Furnaces"; EIA–3, "Quarterly Coal Consumption Report—Manufacturing Plants"; EIA–4, "Weekly Coal Monitoring Report—Coke Plants"; EIA–5, "Coke Plant Report—Quarterly"; EIA–6, "Coal Distribution Report"; EIA–7A, "Coal Production Report"; EIA–7A (Supp), "Coal Production Report (Supplement)"; and EIA–20, "Weekly Telephone Survey of Coal Burning Utilities."

DATE: Written comments must be submitted on or before September 1, 1988.

ADDRESS: Send written comments to: Thelda McMillian, Office of Coal, Nuclear, Electric and Alternate Fuels, Energy Information Administration, Mail Stop 2G–090, 1000 Independence Avenue SW., Washington, DC 20585. Telephone (202) 586–2982.

FOR FURTHER INFORMATION OR TO OBTAIN COPIES OF THE PROPOSED FORMS AND INSTRUCTIONS: To obtain additional information or copies of the proposed forms, contact Ms. McMillian at the address or telephone number listed above.

SUPPLEMENTARY INFORMATION:

I. Background

In order to fulfill its responsibilities under the Federal Energy Act of 1974 (Pub. L. 93–275), and the Department of Energy (DOE) Organization Act (Pub. L. 95–91), the Energy Information Administration (EIA) is obliged to publish, and otherwise make available to the public, high-quality statistical data that accurately reflect national and regional coal supply, distribution and consumption activity.

To meet this responsibility, as well as internal DOE requirements that are dependent on accurate data, the EIA conducts statistical surveys that encompass each significant coal supply, distribution and consumption activity in the United States.

II. Current Actions

EIA proposes only minor changes and modifications to the forms. These changes will have little impact on respondent burden, better reflect current industry operations and respond to congressional, Federal and public data users requirements. The proposed changes are summarized below:

1. *EIA–3:*

a. Reduced the two receipts categories (contract and spot) to one (total). These two categories were not published and their percentage of total receipts had remained fairly consistent over time.

b. Added an adjustment column to cover stock changes/re-estimates and company transfers. This was previously reported in the Remarks section of the form and, prior to that, was on the form itself.

c. Set a reporting threshold of 1,000 short tons of coal consumption annually. This will remove approximately 100 plants and represents less than .01 percent of annual coal consumption by manufacturing plants.

2. *EIA–5:*

a. Reduced the two coal receipts categories (open and captive) to one (total). These two categories were not published and, due to changes in the structure of steel company operations, the captive portion of coal receipts is not an important data parameter.

b. Added an adjustment column to coal and coke sections to cover stock changes/re-estimates and company transfers. This was previously reported in the Remarks section of the form and, prior to that, was on the form itself.

3. *EIA–6:*

a. Respondents will report by coal-producing district and State in 1989, and then just by State in 1990. There is almost unanimous agreement among congressional, Federal and public coal distribution data users that origin information should be by State and that the coal-producing districts are no longer relevant.

b. Deleted the reporting of mine level production and purchases (Sections II A and B). This removes a duplication of

production data reported on both the EIA–6 and EIA–7A forms.

c. Added to the reporting of parent company information the name, address, and telephone number of the parent company point of contact.

d. Added a section to report the identification of a change in ownership, including when it occurred and the name, address, and telephone number of the new owner, if applicable (Section I C).

e. Deleted in Section III G (Other Uses) the separate identification of coal gasification and liquefaction use. It is now identified in the instructions as part of manufacturing.

4. *EIA–7A:*

a. Added to Section I G (Kind of Mining Operation) an identification of the underground method of mining (continuous, convention, longwall, shortwall). This identification of the underground mining method is needed to effectively evaluate and identify the productivity effects of advanced underground mining methods.

b. Added to Section II A an identification of average raw coal quality, as mined, and average coal quality, as sold or used, by coal seam in pounds of sulfur per million BTU. In conjunction with these data, added an identification of blended (versus by seam) quality of used or sold coal and a question to indicate the source(s) of the blend. This section responds to a requirement for more up-to-date coal reserves quality data for use in assessing the impacts of proposed legislation and to better evaluate and estimate coal supplies and prices. It also responds to the National Coal Council's June 1987 report to the Secretary of Energy that cited the need for additional coal reserves quality data. The simplest and most cost-effective way to collect the data is through the EIA–7A survey.

c. Delete the Coal Stocks Section (Section III). This section duplicated data collected by company on Form EIA–6.

5. *EIA–7A (supplement):* No change. This form is on standby status only.

6. *Coal Strike Monitoring Forms (EIA–1, 4, 20):* No change. These forms are on standby status only.

III. Request for Comments

The EIA invites the public to comment on these proposed changes within 30 days of the publication of this notice. The following guidelines are provided to assist in the preparation of responses. When providing comments, please indicate the form(s) to which each comment applies.

As a potential respondent:

A. Are the instructions and definitions clear and sufficient? If not, which instructions require clarification?

B. Can the data be submitted using the definitions included in the instructions?

C. Can the data be submitted in accordance with the response specified in the instructions?

D. Public reporting burden (estimated average hours per response) for the collections in the Coal Program Package are listed below. How much time, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information, do you estimate it will require you to complete and submit the required forms?

EIA survey form	Burden hours per response
1. EIA–1	1.0
2. EIA–3	0.5
3. EIA–4	1.0
4. EIA–5	1.0
5. EIA–6	2.5
6. EIA–7A	1.21
7. EIA–7A (Supp)	2.0
8. EIA–20	1.0

E. What is the estimated cost of completing the form(s), including the direct and indirect costs associated with the data collection? Direct costs should include all costs, such as administrative costs, development, assembly, equipment, ADP, and any other one-time or recurring costs.

F. Estimate the cost in subsequent years of reporting.

G. How can the form(s) be improved?

H. Do you know other Federal, State, or local agencies that collect similar data? If yes, specify the agency, the data elements, and the means of collection.

As a potential data user:

A. Can you use data at the levels of detail indicated on the form(s)?

B. For what purposes would you use the data? Be specific.

C. How could the form(s) be improved to better meet your specific needs?

D. Are there alternate sources of data and do you use them? What are their deficiencies and/or strengths?

The EIA is also interested in receiving comments from persons regarding their views on the need for the collection of the information contained in the Coal Surveys.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of these data surveys and will become a matter of public record.

Statutory Authority: Sections 5(a), 5(b), 13(b), and 52 of Pub. L. 93–275, Federal Energy Adminstration Act of 1974, as amended (15 U.S.C. 764(a), 764(b), 772(b), and 790a).

Issued in Washington, DC, on July 27, 1988.

Yvonne M. Bishop,

Director, Statistical Standards, Energy Information Administration.

[FR Doc. 88–17386 Filed 8–1–88; 8:45 am]

BILLING CODE 6450–01–M

Manufacturing Energy Consumption Survey (MECS) Forms

AGENCY: Energy Information Administration, Department of Energy.

ACTION: Request for comments on the 1988 MECS survey forms.

SUMMARY: The Energy Information Administration (EIA) of the Department of Energy (DOE) is seeking comments on the proposed survey forms for the 1988 Manufacturing Energy Consumption Survey (MECS). The MECS is a general purpose statistical survey conducted for nonregulatory purposes. The survey is mandatory under Title 3, Subtitle B, of the Omnibus Budget Reconciliation Act of 1986, Pub. L. 99–509. The MECS is being designed by EIA and will be administered and compiled by the U.S. Bureau of the Census (Census). By having Census administer the survey, responses are kept strictly confidential under section 9 of Title 13, U.S. Code. Responses and other identifiable data may be seen only by sworn Census employees.

The 1985 MECS was conducted in two different parts during 1986. The first, sent out in July of 1986 and utilizing Form EIA–846F, collected basic annual consumption data for combustible and noncombustible energy sources. For combustible energy sources, data items included purchases and expenditures, onsite production, fuel use, nonfuel use, and storage capacity. For noncombustible energy sources (e.g., electricity and stream), the data collected were purchases and expenditures, net transfers, and for electricity only, different types of onsite generation and sales to utilities. The second of the MECS, conducted in November 1986 and utilizing Form EIA–846S, collected data on the short-term capability of manufacturers to have switched energy sources based on their actual consumption in 1985.

The sample design for the 1985 MECS was a probability sample of approximately 12,000 manufacturing establishments representing a universe of an estimated 220,000 establishments with five or more employees. The sample was subselected from the

sample for Census' 1985 Annual Survey of Manufacturers (ASM). It was stratified by Standard Industrial Classification (SIC) two-digit major groups from 20 to 39 and the ten four-digit industries known to be the most consumptive of energy. The design for the 1988 MECS sample will be basically the same except that all ASM manufacturing establishments that generate electricity will be sampled with certainty and added to the sample.

The proposed 1988 MECS is not substantially different from the 1985 survey in its basic data requirements. Some changes were made, however, in order to make the collection more efficient, improve reliability, and reduce respondent burden. To minimize complexity, three separate forms have been prepared to meet the special needs of various groups of manufacturers. Both the consumption and the fuel-switching sections appear on each of the forms.

ADDRESS: To obtain additional information or copies of the proposed forms, contact Mr. John L. Preston, Energy End Use Division, Energy Information Administration, Department of Energy, Mail Stop 1H-053, 1000 Independence Avenue SW., Washington, DC 20585. Telephone: 202-586-1128.

DATE: Written responses on the proposed forms should be submitted to John L. Preston, Energy End Use Division at the above address on or before September 1, 1988.

SUPPLEMENTARY INFORMATION:

I. Background
II. Current Actions
III. Written Comments

I. Background

Comments on the 1985 MECS were solicited in a March 21, 1985, **Federal Register** Notice (50 FR 11486). That version of the MECS was modified on the basis of those comments and the results of a pilot test. The proposed 1988 MECS design utilizes experience gained from the administration and processing of the 1985 MECS, and consultations with respondents, trade association representatives, and data users.

II. Current Actions

EIA proposes to make the changes described below to the 1985 MECS survey forms for use in 1988. These changes are being made to better serve the needs of data users, streamline the administration and processing of the survey, and reduce respondent burden where possible.

For the 1988 MECS, the fuel-switching and consumption sections will be consolidated on each of three forms. That change will facilitate collection and processing of the data and will reduce respondent burden as record-gathering and respondent analysis will only be necessary once during the MECS cycle. Thus each survey form will contain three sections: Section I, Non-Combustible Energy Sources; Section II, Combustible Energy Sources; and Section III, Fuel Switching Capability.

Separate forms have been designed to meet the special needs of three groups of manufacturers. EIA-846A will be sent to the majority of the manufacturing establishments; EIA-846B will be sent to establishments in SIC 2911 (Petroleum Refining); and EIA-846C will be sent to all other establishments in SIC 29 (Petroleum Refining and Related Industries), as well as establishments in SIC 28 (Chemicals and Allied Products) and SIC 3312 (Blast Furnaces and Steel Mills). EIA-846A is the most general form and collects the basic consumption and fuel-switching data. EIA-846B minimizes burden for the refining industry by taking advantage of data already collected by other EIA surveys. Finally, EIA-846C is very similar to EIA-846A except that it contains an additional question on energy source shipments.

Specific changes in data items from the 1985 MECS are discussed section by section below.

Section I (Noncombustible energy sources): This section will not differ among the three forms. There will be a minor change in format from the 1985 version of the MECS. For clarity of presentation, questions will be asked in the form of a table, with the noncombustible energy sources (electricity, steam, other) as the column headings and the desired quantities forming the rows. Of greater importance is the addition of four new questions relating to the cogeneration of electricity. Because of a number of data user requests concerning cogeneration, the following questions now must be answered if the respondent had a non-zero entry for the amount of cogenerated electricity at the establishment:

1. Enter the total nameplate capacity of all cogeneration units that were in place at this establishment on December 31, 1988.

2. What is the maximum additional quantity of electricity that you could have cogenerated during 1988 over and above that which you actually produced at your establishment?

3. Enter the quantity of each energy source that was consumed for the purpose of cogeneration in 1988. (Space is provided for possible energy sources.)

4. Was this establishment designated as a Qualifying Facility under the Public Utility Regulatory Policies Act of 1978 as of December 31, 1988? (Yes/No)

In order to increase the reliability of the electricity cogeneration estimates, the MECS sample will be supplemented by those establishments known to be generators of electricity, from data submitted on the previous year's ASM.

Section II (Combustible energy sources): Form EIA-846C will be sent to respondents in SIC 28, 3312, and 29 (but not in 2911) and will contain an additional question on the Btu content of all energy source product shipments. The industries in those SIC's produce energy sources from other energy source inputs. Processing of those inputs would normally be counted as nonfuel use and thus contribute to total consumption at the establishment. Any resulting energy sources that are shipped and consumed elsewhere would duplicate the Btu of the energy source inputs. By subtracting the energy source shipments from total consumption, EIA can obtain a more accurate measure for actual consumption at the establishment.

Form EIA-846B will require petroleum refiners (SIC 2911) to be cognizant of the division between the refinery part of the establishment and the nonrefinery (i.e., petrochemical) part and how that division is reflected in reporting on the ASM. The MECS will take advantage of data reported on other EIA forms covering refinery operations in order to minimize respondent burden.

Section III (Fuel Switching): This section is very similar to the 1985 EIA-846S survey, "Part II—Fuel Switching." One change is that liquid petroleum gases (LPG) will also be included as a fuel for which to report substitution. The other change involves the reporting of the lead time to switch fuels. The time to make each potential switch will be obtained rather than just the time for switching to the primary replacement fuel. That change represents a very small increase in reporting burden but will greatly enhance the data analysis, because ambiguity in relating lead times to alternate energy sources will be eliminated.

III. Written Comments

The following general guidelines are provided to assist in the preparation of comments. When providing comments, please indicate the form to which the comment applies (EIA-846A, B, or C).

As a potential data user:

A. Can you use data at the levels of detail indicated on the forms (or at higher levels of aggregation, if necessary)?

B. For what purpose would you use these data? Please be specific.

C. How could the forms be improved to better meet your specific data needs?

D. Are there alternative sources for these data? What are they? Do you use them? What are their deficiencies?

As a potential respondent:

A. Are the instructions clear and sufficient?

B. How can the forms be improved?

C. Can the data be submitted using the definitions included in the instructions?

D. Public reporting burden for this collection is estimated to average 8 hours per response for each of the three forms. How much time, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information, do you estimate it will require you to complete and submit the required form?

E. Do you know of other Federal, State, or local agencies that collect similar data? If so, specify the agency and the means of collection.

In addition to receiving comments to the general questions listed above, the EIA would like to receive comments specifically related to the changes mentioned previously in the data collection.

1. If by your SIC code you would be required to complete EIA–846C, how difficult would it be to answer the question on the Btu value of energy source shipments? How much time would it take you to answer?

2. If you would be required to complete EIA–846B, can you easily make the division between the refinery portion and the petrochemical portion of your establishment? Are you aware of the establishment boundaries used for your response on the Census Bureau's Annual Survey of Manufacturers?

3. On all three forms, are the new questions on cogeneration easily understood and answerable?

The EIA is also interested in receiving comments from persons regarding their views on the need for the collection of the information contained in this survey.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this survey and will become a matter of public record.

Statutory Authority: Sections 5(a), 5(b), 13(b), and 52 of Pub. L. 93–275, Federal Energy Administration Act of 1974, as amended (15 U.S.C. S764(a), 764(b), 772(b), and 790(a)).

Issued in Washington, DC, on July 27, 1988.

Yvonne M. Bishop,

Director, Statistical Standards, Energy Information Administration.

[FR Doc. 88–17385 Filed 8–1–88; 8:45 am]

BILLING CODE 6450–01–M

Federal Energy Regulatory Commission

[Docket No. RP88–127–003]

Carnegie Natural Gas Co.; Compliance Filing

July 28, 1988.

Take notice that Carnegie Natural Gas Company ("Carnegie"), on July 22, 1988, tendered for filing proposed changes in its FERC Gas Tariff, Volume No. 1. Specifically, Carnegie filed the following tariff sheets:

Second Revised Sheet No. 91
Third Revised Sheet No. 92
First Revised Sheet No. 92a
First Revised Sheet No. 92b
First Revised Sheet No. 92c
First Revised Sheet No. 92d
First Revised Sheet No. 92e
Original Sheet No. 92f
Original Sheet No. 92g
Original Sheet No. 92h

Carnegie states that these tariff sheets, which contain portions of its purchased gas cost adjustment ("PGA") clause, are being filed in compliance with a Letter Order issued June 15, 1988. The Letter Order indicated that certain enumerated changes in Carnegie's April 29, 1988, tariff filing in this Docket No. RP88–127–000 were necessary to bring that filing into compliance with Order Nos. 483 and 483–A.

Copies of the filing were served upon Carnegie's jurisdictional customers and interested state regulatory commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with §§ 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests should be filed on or before August 4, 1988. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 88–17318 Filed 8–1–88; 8:45 am]

BILLING CODE 6717–01–M

[Docket Nos. RP88–143–001 and TQ88–2–47–001]

MIGC, Inc., Compliance Filing

July 28, 1988.

Take notice that on July 20, 1988, MIGC, Inc. (MIGC) filed Substitute First Revised Sheet No. 26, Substitute Second Revised Sheet No. 28, Substitute First Revised Sheet No. 31, and Substitute Forty-Eighth Revised Sheet No. 32 to its FERC Gas Tariff, Original Volume No. 1.

MIGC states that Sheet Nos. 26, 28, and 31 are filed in compliance with the Commission's Letter Order of June 23, 1988 concerning MIGC's filing of revised purchased gas cost adjustment (PGA) provisions in accordance with the Commission's new PGA Regulations promulgated by Order Nos. 483, *et seq.* MIGC states that Sheet No. 32 is filed correcting a pagination error.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 214 and 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.214, 385.211 (1987)). All such motions or protests should be filed on or before August 4, 1988. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 88–17319 Filed 8–1–88; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RP88–220–000]

Mississippi River Transmission Corp.; Tariff Filing

July 28, 1988.

Take notice that on July 20, 1988 Mississippi River Transmission Corporation (MRT) tendered for filing Twenty-Fifth Revised Sheet No. 4 to its FERC Gas Tariff, Second Revised

Volume No. 1. Such sheet is proposed to be made effective October 1, 1988.

MRT states that its filing is being submitted for the purpose of reclassifying in MRT's jurisdictional rates costs which are presently reflected as sales demand charges paid by MRT to Natural Gas Pipeline Company of America (Natural). Pursuant to the provisions of Natural's pending Gas Supply Charge settlement in Docket No. CP88–291–000, MRT has indicated to Natural that it desires to convert its entire firm sales contract demand to firm transportation service, effective October 1, 1988. MRT states that following this conversion, charges currently paid by MRT as sales demand charges will continue to be paid Natural in the form of firm transportation reservation fees, and approval of MRT's filing will permit MRT to continue to reflect these costs in its rates, appropriately reclassified as charges attributable to the transportation of gas by others.

MRT states that the filing will produce no rate increase or change in rate level for any customer or class of customers of MRT, and may in fact result in cost savings through the avoidance of Natural's proposed gas supply charge or purchasing Natural's system supply gas. MRT further states that to the extent it incurs charges from Natural which are less than the costs reflected in the subject filing, either through the operation of Natural's PGA or modification of the billing adjustment provision of Natural's pending Gas Supply Charge settlement, it will credit such differences to Account No. 191. MRT also proposes that the filing be made subject to downward adjustment from and after January 1, 1989, to reflect any reduction in firm transportation charges paid Natural as a result of a final Commission order in Natural's pending rate proceedings at Docket No. RP88–209–000.

MRT requests waiver of § 154.22 of the Commission's Regulations in order to permit this filing to be submitted more than sixty days in advance of its proposed October 1, 1988 effective date, such date corresponding with the effective date of MRT's desired conversion of firm sales service from Natural.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Sections 385.211 and 385.214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). All such motions or protests should be filed on or before August 4, 1988. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 88–17320 Filed 8–1–88; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. SA88–12–000]

Pine Tree Independent School District Well No. 2, Working Interest Owners; Petition for Adjustment

Issued: July 28, 1988.

On June 13, 1988, the current working interest owners in the Pine Tree Independent School District Well No. 2 located in Gregg County, Texas, filed with the Commission, pursuant to section 502(c) of the Natural Gas Policy Act of 1978 (NGPA), a petition for adjustment from the filing requirement of § 271.805(f)(1) of the Commission's regulations. The requested adjustment, if granted, would excuse petitioners from refunding a portion of the NGPA section 108 stripper well prices collected for gas sold from the Pine Tree well during the period December 1983 through October 1987.

The Pine Tree well qualified as an NGPA section 108 stripper well on April 25, 1984. In August 1983, the last month of the required 90-day test period for stripper well status, a compressor was connected to the well by the operator, Clemco, Inc. As a result, the average production rate for the succeeding 90-day production period exceeded the 60 Mcf per day production limit to qualify as stripper well under § 271.804 of the Commission's regulations. The well disqualified as a stripper well on November 1, 1983. Petitioners allege that neither Clemco nor the purchaser, United Gas Pipeline Company (United), filed a notice of disqualification as required under § 271.805(d) of the Commission's regulations. [1] Petitioners state that they did not discover Clemco's failure to file an enhanced recovery application pursuant to § 271.805(e) until Octoer 1987. According to the petitioners, filing such an application would have allowed the well to continue to qualify as a section 108 stripper well. The petitioners contend that imposition of a refund obligation, as requested by United, would cause them to incur a special hardship.

Petitioners request the Commission to grant the petition for adjustment by exempting them from the filing requirement of § 271.805 and allowing them to file a notice of disqualification within 15 days after the issuance of an order granting this petition for adjustment.

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. [2] Federal Energy Regulatory Commission, 825 North Capitol Street NW., 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.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 88–17321 Filed 8–1–88; 8:45 am]

BILLING CODE 6717-1-M

[Docket No. RP88–67–005]

Texas Eastern Transmission Corp.; Proposed Changes in FERC Gas Tariff

July 28, 1988.

Take notice that Texas Eastern Transmission Corporation (Texas Eastern) on July 22, 1988 tendered for filing as part of its FERC Gas Tariff, Fifth Revised Volume No. 1 and Original Volume No. 2, tariff sheets listed on Appendix A. Texas Eastern requests the Commission to accept these tariff sheets to be effective subject to refund on September 1, 1988, the end of the suspension period for tariff sheets originally filed on March 1, 1988 in this proceeding.

Texas Eastern states that these tariff sheets are being filed in compliance with a letter order issued by the Director of the Office of Pipeline and Producer Regulation on June 28, 1988 in Docket No. RP88–67–003. The letter order rejected tariff sheets filed by Texas Eastern in purported compliance with Commision orders dated March 31, 1988

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[1] This section requires the operator and any purchaser to serve notice on the Commission, the operator and any purchasers, as appropriate, if a well has been disqualified by producing more than 60 Mcf of gas per production day for any 90-day production period.

[2] 18 CFR 385.214 and 385.211 (1987).

and April 21, 1988, pertaining to Texas Eastern's March 1, 1988 filing for a rate increase pursuant to section 4 of the Natural Gas Act. Texas Eastern states that it will appeal the June 28 letter order but that it will withdraw the appeal if the Commission permits, pursuant to final non-appealable order, the revised tariff sheets submitted herewith to become effective, subject to refund on September 1, 1988 as requested.

Texas Eastern states that the rates in the revised tariff sheets are based upon a projected total volume for sales and interruptible transportation of 941,524,916 dth, consisting of 783,133,896 dth of sales and 158,391,020 dth of interruptible transportation. It further states that these rates are in excess of the D–2 and commodity rates set forth in Texas Eastern's original rate filing on March 1, 1988.

Texas Eastern has not updated the tariff sheets proposed for filing herein for tariff changes approved by the Commission since Texas Eastern's March 1, 1988 filing. In addition, Texas Eastern states that further revisions may be required when it moves to place these rates into effect on September 1, 1988 to reflect gas plant in service and an updated capitalization structure and also to reflect tariff changes approved by the Commission prior to September 1, 1988. Texas Eastern states that it intends to supplement its Statement P by September 18, 1988 to reflect these revised tariff sheets to file revised statements and schedules to the extent necessary.

Copies of this filing are being served upon all parties of record in Docket No. RP88–67, *et al.*

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 214 and 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.214, 385.211 (1987)). All such motions or protests should be filed on or before August 4, 1988. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 88–17322 Filed 8–1–88; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP88–161–001]

Texas Eastern Transmission Corp.; Proposed Changes in FERC Gas Tariff

July 28, 1988.

Take notice that Texas Eastern Transmission Corporation (Texas Eastern) on July 22, 1988 tendered for filing as part of its FERC Gas Tariff, Fifth Revised Volume No. 1, six copies each of the following tariff sheets:

Substitute First Revised Sheet No. 447
Substitute Second Revised Sheet No. 448
Substitute Second Revised Sheet No. 449
Substitute First Revised Sheet No. 450
Substitute Second Revised Sheet No. 451
Substitute Second Revised Sheet No. 452
Substitute Second Revised Sheet No. 453
Substitute Second Revised Sheet No. 455
Substitute Second Revised Sheet No. 456
Substitute Second Revised Sheet No. 457

The purpose of this filing is to make the revisions to Texas Eastern's May 2, 1988 tariff filing in Docket No. RP88–161 as required by the Commission's June 23, 1988 Order. The proposed effective date of the tariff sheets listed above is June 1, 1988, the effective date of the initial tariff sheets filed in this proceeding.

Copies of the filing were served on Texas Eastern's jurisdictional customers and interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commision, 825 North Capitol Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure. All such motions or protests should be filed on or before August 4, 1988. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 88–17323 Filed 8–1–88; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP88–221–000]

Texas Eastern Transmission Corp.; Proposed Changes in FERC Gas Tariff

July 28, 1988.

Take notice that Texas Eastern Transmission Corporation (Texas Eastern) on July 22, 1988 tendered for filing as part of its FERC Gas Tariff, Fifth Revised Volume No. 1, six copies each of the following tariff sheets:

Revised First Revised Sheet No. 104
Revised First Revised Sheet No. 118
Revised First Revised Sheet No. 119
Revised First Revised Sheet No. 129
Revised First Revised Sheet No. 130
Revised First Revised Sheet No. 133
Revised First Revised Sheet No. 137
Revised First Revised Sheet No. 138
Revised Second Revised Sheet No. 400
Revised Second Revised Sheet No. 484
Revised Second Revised Sheet No. 489

Texas Eastern states that these tariff sheets exclude references to the minimum commodity bills that are proposed to be deleted in a filing made by Texas Eastern on July 19, 1988 in Docket Nos. RP85–177 and RP85–176. The proposed effective date of these tariff sheets is September 1, 1988, the date of the D–2 nominations reflected in Texas Eastern's compliance filing in Docket No. R–88–67 which was made on July 22, 1988.

Texas Eastern states the purpose of this filing is to establish, separate and apart from Texas Eastern's Docket No. R–88–67, charges for gas taken in excess of a customer's D–2 nomination (Section 32.2 of Texas Eastern's General Terms and Conditions). Under proposed § 32.2, if quantities taken in any contract year by a Buyer under Texas Eastern's sales rate schedules DCQ, GS, SGS, ACQ, or WS are in excess of 102% up to and including 104% of the D–2 nomination under the applicable rate schedule, the Buyer shall pay $5.00 per dekatherm for all gas in excess of 100% under said rate schedule. If quantities taken in any contract year are in excess of 104% of the D–2 nomination, the Buyer shall pay $10.00 per dekatherm for all gas in excess of 104%.

Copies of the filing were served on Texas Eastern's jurisdictional customers and interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure. All such motions or protests should be filed on or before August 4, 1988. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the

Commission and are available for public inspection.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 88-17324 Filed 8-1-88; 8:45 am]

BILLING CODE 6717-01-M

Western Area Power Administration

Boulder Canyon Project Proposed Power Rate

AGENCY: Western Area Power Administration, DOE.

ACTION: Notice of extension of consultation and comment period for a Proposed Power Rate Adjustment.

SUMMARY: The Western Area Power Administration (Western) announced in the **Federal Register** published June 22, 1988 (53 FR 23446), a proposed adjustment of the rates for power and energy from the Boulder Canyon Project (BCP). In that notice, Western scheduled a public information forum for June 30, 1988, with the consultation and comment period to end August 8, 1988. Western also stated that consideration would be given to an extension of the consultation and comment period if requested by customers or interested parties.

Western received several requests for an extension of 45 days to the originally published consultation and comment period. The basis for the extension is to allow all interested parties an opportunity to review and analyze a new energy forecast, a new method of forecasting future replacement requirements, and new rate calculations.

Western has reviewed these requests for extension and hereby concurs with the requests. Therefore, Western rescheduled the public comment forum previously scheduled for July 22, 1988, in addition to rescheduling the ending date of the consultation and comment period.

Also, the effective date of the rate adjustment is no longer the beginning of the October 1988 billing period but will be at some later date.

DATES: The consultation and comment period which began with the notification of the BCP rate adjustment (53 FR 23446, June 22, 1988) will end September 22, 1988. A public comment forum will be held at 10 a.m. on September 7, 1988.

ADDRESSES: The public comment forum will be held at the Boulder City Area Office, 3 miles south on Buchanan Road, Boulder City, Nevada, on the dates and times cited above. Written comments may be sent to:

Mr. Thomas A. Hine, Area Manager, Boulder City Area Office, Western Area Power Administration, P.O. Box 200, Boulder City, NV 89005, (702) 477-3255.

FOR FURTHER INFORMATION CONTACT: Mr. Earl W. Hodge, Assistant Area Manager for Power Marketing, Boulder City Area Office, Western Area Power Administration, P.O. Box 200, Boulder City, NV 89005, (702) 477-3255.

Issued at Golden, Colorado, July 26, 1988.

William H. Clagett,

Administrator.

[FR Doc. 88-17384 Filed 8-1-88; 8:45 am]

BILLING CODE 6450-01-M

ENVIRONMENTAL PROTECTION AGENCY

[ECAO-R-053; FRL-3424-3]

Draft Health Assessment Document for Mineral Fibers

AGENCY: Environmental Protection Agency.

ACTION: Notice of public meeting.

SUMMARY: This notice announces a workshop to be held by the Environmental Criteria and Assessment Office of EPA's Office of Health and Environmental Assessment to facilitate preparation of an external review draft of a Health Assessment Document for Mineral Fibers. The conference site is the Pickett Hotel, 2515 Meridian Parkway, Research Triangle Park, North Carolina.

DATES: The workshop will be held on August 29, 30, and 31, 1988, from 8:30 a.m. to 5:00 p.m. Members of the public are invited to attend as observers.

FOR FURTHER INFORMATION CONTACT: Dr. Dennis J. Kotchmar, Project Manager for Mineral Fibers, U.S. Environmental Protection Agency, Environmental Criteria and Assessment Office, MD-52, Research Triangle Park, North Carolina 27711, (919) 541-4158 or (FTS-629-4158).

SUPPLEMENTARY INFORMATION: EPA's Office of Air Quality Planning and Standards (OAQPS) requested that the Environmental Criteria and Assessment Office (ECAO), Office of Health and Environmental Assessment (OHEA), prepare a health assessment document for mineral fibers. The document will be used by EPA in the decision-making process to possibly regulate mineral fibers under the Clean Air Act, 42 U.S.C., 7401 *et seq.*

ECAO is now assembling a panel of scientifically and technically qualified persons to review the draft document at the workshop. Copies of the workshop draft will be made available to the public at the meeting, and observers will have an opportunity to make brief oral statements. The draft document subsequently will be revised and released as an external review draft. Ample opportunity will be provided for public review and submission of written comments upon release of the first external review draft. The public comment period will be announced in a subsequent Federal Register notice.

Dated: July 26, 1988.

Charles Brunot,

Acting Assistant Administrator for Research and Development.

[FR Doc. 88-17339 Filed 8-1-88; 8:45 am]

BILLING CODE 6560-50-M

[FRL-3522-9]

Availability of Report; Municipal Solid Waste; 1988 Update

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability.

SUMMARY: The U.S. Environmental Protection Agency (EPA) today is announcing the availability of a document entitled, "Characterization of Municipal Solid Waste in the United States 1960-2000 (Update 1988)." This report updates the June 1986 report entitled "Characterization of Municipal Solid Waste in the United States 1960-2000," which provided information for the waste characterization portion of the overall Subtitle D Phase I Study released in October 1986. The 1988 update provides additional estimates of historical quantities and composition of municipal solid waste from 1984-1986 and revises projections to the year 2000. This report is one of several prepared in response to a Congressionally-mandated study of the existing Part 257 Criteria. The study was conducted under the authority of section 4010 of the 1984 Amendments to the Resource Conservation and Recovery Act (RCRA). (U.S.C. 6949a).

DATE: August 2, 1988.

ADDRESSES: The document is available for review at all EPA libraries and in the RCRA Docket Room, LG-100, U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC, 20460. Monday through Friday, except legal holidays; phone (202) 475-9327. The public may copy a maximum of 50 pages of material from any one regulatory docket at no cost. Additional copies cost 20 cents per page. This document also is available through the National Technical Information Service (NTIS), 5835 Port Royal Road, Springfield, VA 22161, phone (703) 487-4650, Order No. PB88-232 780, cost $12.95.

FOR FURTHER INFORMATION CONTACT: For general information, call the RCRA/CERCLA Hotline at (202) 382–3000 or toll free at (800) 424–9346 outside the Washington DC metropolitan area. For technical information on the "Characterization of Municipal Solid Waste in the United States 1960–2000 (Update 1988)," contact Gerry Dorian, Office of Solid Waste (WH–565E), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460, phone (202) 475–7700.

SUPPLEMENTARY INFORMATION:

1. Background

In the 1984 Amendments to RCRA, Congress required EPA to examine the existing Part 257 Criteria for solid waste disposal facilities and revise them as necessary. Section 4010 of RCRA requires EPA to "conduct a study of the extent to which the guidelines and criteria * * * applicable to solid waste management and disposal facilities are adequate to protect human health and the environment."

In response to this Congressional mandate, EPA initiated a two-phase study of existing Subtitle D Criteria for solid waste disposal facilities. Phase I involved collecting and analyzing existing data and Phase II included filing the information gaps identified during Phase I through the collection of additional data. The Subtitle D Study Phase I Report, NTIS issued in October 1986, presents information on Subtitle D wastes, facilities, and State programs.

As part of the Phase I study, EPA sponsored a report characterizing municipal solid waste (MSW) that provided historical MSW quantities and composition from 1960–1984 and projections to the year 2000. In 1988, EPA sponsored a second study to update and revise the 1986 report. This report provides data for 1985 and 1986 and revise existing data where necessary. Results of this study are being used to assist in evaluating and revising the current Criteria for solid waste disposal found at 40 CFR Part 257.

II. Notice of Availability

This document includes the methodology used to derive municipal solid waste estimates, materials and products in the municipal waste stream, and trends in municipal solid waste. EPA used a materials flow methodology, which is based on the U.S. production of the various components of the waste stream, to prepare these estimates. For this report, products were grouped as durable goods, nondurable goods, containers and packaging, and other wastes.

Trends discussed include gross and net discards of municipal solid waste, materials recovery, and energy recovery.

Municipal solid waste, as defined for this report, includes residential, commercial solid waste (after materials and energy recovery) are estimated to have increased from 81.7 million tons in 1960 to 131.2 million tons in 1986. Net discards are projected to be 136.8 million tons in 2000. Paper and paperboard comprise the largest material component of municipal solid waste—about 36 percent of total (after recycling) in 1986. The largest product category is containers and packaging at about 30 percent of total (after recycling) in 1986. Gross discards grew from 87.5 million tons in 1960 to 157.7 million tons in 1986. Materials recovery increased from 5.8 million tons in 1960 to 16.9 million tons in 1986. Energy recovery from incineration of municipal solid waste was negligible in 1960, but increased to 9.6 million tons in 1986.

Date: July 19, 1988.

J. Winston Porter,

Assistant Administrator for Solid Waste and Emergency Response.

[FR Doc. 88–17333 Filed 8–1–88; 8:45 am]

BILLING CODE 6560–50–M

[OPTS–59262; FRL–3423–8]

Toxic and Hazardous Substances; Test Market Exemption Applications

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA may upon application exempt any person from the premanufacturing notification requirements of section 5(a) or (b) of the Toxic Substance Control Act (TSCA) to permit the person to manufacture or process a chemical for test marketing purposes under section 5(h)(1) of TSCA Requirements for test marketing exemption (TME) applications, which must either be approved or denied within 45 days of receipt are discussed in EPA's final rule published in the **Federal Register** of May 13, 1983 (48 FR 21722). This notice, issued under section 5(h)(6) of TSCA, announces receipt of two applications for exemption, provides a summary, and requests comments on the appropriateness of granting this exemption. Written comments by:

T 88–15, July 31, 1988.

T 88–16, August 10, 1988.

ADDRESS: Written comments, identified by the document control number "(OPTS–59262)" and the specific TME number should be sent to: Document Processing Center (TS–790), Office of Toxic Substances, Environmental Protection Agency Rm. L–100, 401 M Street, SW., Washington, DC 20460, (202) 554–1305.

FOR FURTHER INFORMATION CONTACT: Stephanie Roan, Premanufacture Notice Management Branch, Chemical Control Division (TS–794), Office of Toxic Substances, Environmental Protection Agency, Rm. E–611, 401 M Street SW., Washington, DC 20460 (202) 382–3725.

SUPPLEMENTARY INFORMATION: The following notice contains information extracted from the nonconfidential version of the submission provided by the manufacturer on the TME received by EPA. The complete nonconfidential document is available in the Public Reading Room NE–G004 at the above address between 8:00 a.m. and 4:00 p.m., Monday through Friday, excluding legal holidays.

T 88–15

Close of Review Period. August 14, 1988.

Manufacturer. Confidential.

Chemical. (G) Tolutriazole compound.

Use/Production. (S) Antioxidant for hydraulic oil systems. Prod. range: Confidential.

T 88–16

Close of Review Period. August 24, 1988.

Manufacturer. Confidential.

Chemical. (G) Halo-sulfo aromatic ester, sodium salt.

Use/Production. (S) Isolated intermediate. Prod. range: Confidential.

Date: July 27, 1988.

Steve Newburg-Rinn,

Chief, Public Data Branch, Information Management Division, Office of Toxic Substances.

[FR Doc. 88–17341 Filed 8–1–88; 8:45 am]

BILLING CODE 6560–50–M

[OPTS–59847; FRL–3423–7]

Toxic and Hazardous Substances; Certain Chemicals Premanufacture Notices

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Section 5(a)(1) of the Toxic Substances Control Act (TSCA) requries any person who intends to manufacture or import a new chemcial substance to submit a premanufacture notice (PMN) to EPA at least 90 days before manufacture or import commences.

Statutory requirements for section 5(a)(1) premanufacture notices are discussed in the final rule published in the **Federal Register** of May 13, 1983, (48 FR 21722). In the **Federal Register** of November 11, 1984, (49 FR 46066) (40 CFR 723.250), EPA published a rule which granted a limited exemption from certain PMN requirements for certain types of polymers. Notices for such polymers are reviewed by EPA within 21 days of receipt. This notice announces receipt of eighteen such PMNs and provides a summary of each.

DATES: Close of Review Periods:

Y 88–211, 88–212—July 19, 1988.
Y 88–213—July 25, 1988.
Y 88–214, 88–215, 88–216, 88–217, 88–218, 88–219, 88–220, 88–221—July 26, 1988.
Y 88–222—July 28, 1988.
Y 88–223—July 31, 1988.
Y 88–224—August 4, 1988.
Y 88–225, 88–226, 88–227, 88–228—August 7, 1988.

FOR FURTHER INFORMATION CONTACT: Stephanie Roan, Premanufacture Notice Management Branch, Chemical Control Division (TS–794), Office of Toxic Substances, Environmental Protection Agency, Rm. E–611, 401, M Street SW., Washington, DC 20460 (202) 382–3725.

SUPPLEMENTARY INFORMATION: The following notice contains information extracted from the non-confidential version on the submission provided by the manufacturer of the PMNs received by EPA. The complete non-confidential document is available in the Public Reading Room NE–G004 at the above address between 8:00 a.m. and 4:00 p.m., Monday through Friday, excluding legal holidays.

Y 88–211

Manufacturer. Reichhold Chemicals, Inc.
Chemical. (G) Polyester-base resin.
Use/Production. (S) Intermadiate for use as a reactant in the production of polyester resins. Prod. range: Confidential.

Y 88–212

Manufacturer. Confidential.
Chemical. (G) Polyvinyl alcohol poly(alkyleneoxy) acrylate copolymer.
Use/Production. (G) polymer for water-soluble biodegradable packaging. Prod. range: 10,000–200,000 kg/yr.

Y 88–213

Manufacturer. S.C. Johnson & Son, Inc.
Chemical. (G) Aqueous styyrene/acrylic copolymer.
Use/Production. (G) Aqueous acrylic emulsion copolymer for the application of overprint vehicles. Prod. range: Confidential.

Y 88–214

Manufacturer. NL Chemical, Inc.
Chemical. (G) Polyester resin.
Use/Production. (G) Open nondispersive use. Prod. range: Confidential.

Y 88–215

Importer. Reichhold Chemicals, Inc.
Chemical. (G) Polyurethane.
Use/Import. (G) General laminating adhesive. Import range: Confidential.

Y 88–216

Importer. Richhold Chemicals. Inc.
Chemical. (G) Urethane modified polyester resin.
Use/Import. (S) Resin for sheet molding compounds in the automotive industry. Import range: Confidential.

Y 88–217

Manufacturer. Valchem Polymer, Div. of Merchants & Man.
Chemical. (G) 2-Propenoic acid, 2-methyl-, polymer with butyl 2-propenoate, (1-methyl ethyl) benzene and methyl 2-methyl-2-propenoate, sodium salt.
Use/Production. (S) Printing ink additive Prod. range: Confidential.

Y 88–218

Manufacturer. Valchem Polymers, Div. of United Merchant.
Chemical. (G) 2-Propenoic acid, 2-methyl-, polymer with butyl 2-propenoate, (1-methyl ethenyl) benzene and methyl 2-methyl-2-propenoate.
Use/Production. (S) Printing ink additive. Prod. range: Confidential.

Y 88–219

Manufacturer. Valchem Polymers, Div. of United Merchant.
Chemical. (G) 2-propenoic acid, 2-methyl-, polymer with butyl 2-propenoate, (1-methyl ethyl) benzene and methyl 2-methyl-2 propenoate, sodium salt.
Use/Production. (S) Printing ink additive. Prod. range: Confidential.

Y 88–220

Manufacturer. Valchem Polymers, Div. of United Merchant.
Chemical. (G) 2-propenoic acid, 2-methyl-, polymer with ethylbenzene, ethyl 2-propenoate and methyl 2-methyl-2-propenoate ammonium salt.
Use/Production. (S) Ink binder for paper coating. Prod. range: Confidential.

Y 88–221

Manufacturer. Valchem Polymers, Div. of United Merchant.
Chemical. (G) 2-propenoic acid, 2-methyl-, polymer with ethylbenzene, ethyl 2-propenate and methyl 2-methyl-2 propenoate, ammonium salt.
Use/Production. (S) Ink binder for paper coatings. Prod. range: Confidential.

Y 88–222

Manufacturer. Confidential.
Chemical. (G) Water reducible alkyd.
Use/Production. (G) Water-reducible resin for coating. Prod. range: Confidential.

Y 88–223

Manufacturer. Confidential.
Chemical. (G) Oil-free polyester resin.
Use/Production. (G) . Prod. range: 131,250–393,750 kg/yr.

Y 88–224

Manufacturer. Aristech Chemical Corporation.
Chemical. (G) Saturated polyester resin.
Use/Production. (G) Polyester resin (shrinkage reducer). Prod. range: Confidential.

Y 88–225

Manufacturer. Confidential.
Chemical. (G) Norbornene copolymer.
Use/Production. (G) Injection molding. Prod. range: Confidential.

Y 88–226

Manufacturer. Confidential.
Chemical. (G) Acrylate copolymer.
Use/Production. (G) Dispersive, water treatment. Prod. range: Confidential.

Y 88–227

Manufacturer. Confidential.
Chemical. (G) Norbornene copolymer.
Use/Production. (G) Injection molding. Prod. range: Confidential.

Y 88–228

Manufacturer. Confidential.
Chemical. (G) Aliphatic polyester urethane.
Use/Production. (G) Industrial coating. Prod. range: Confidential.

Date: July 27, 1988.

Steve Newburg-Rinn,

Chief, Public Data Branch, Information Management Division, Office of Toxic Substances.

[FR Doc 88–17343 Filed 8–1–88; 8:45 am]

BILLING CODE 6560–50–M

FEDERAL EMERGENCY MANAGEMENT AGENCY

Agency Information Collection Submitted to the Office of Management and Budget for Clearance.

The Federal Emergency Management Agency (FEMA) has submitted to the Office of Management and Budget the following information collection package for clearance in accordance with the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Type: Extension of 3067–0180.

Title: Civil Rights Higher Education and Rehabilitation Act Survey.

Abstract: Annually evaluates compliance with nondiscrimination regulations by State emergency management agencies. Administered by FEMA program personnel. Areas covered: administrative procedures, training, construction, and planning. Will be used to provide technical assistance to accomplish voluntary compliance and as basis for budgetary recommendations to the Director of FEMA.

Type of Respondents: State or local governments.

Estimate of Total Annual Reporting and Recordkeeping Burden: 138

Number of Respondents: 55.

Estimated Average Burden Hours Per Response: 1.5 hours.

Frequency of response: Annually.

Copies of the above information collection request and supporting documentation can be obtained by calling or writing the FEMA Clearance Officer, Linda Shiley, (202) 646–2624, 500 C Street, SW., Washington, DC 20472.

Direct comments regarding the burden estimate or any aspect of this information collection, including suggestions for reducing this burden, to the FEMA Clearance Officer at the above address; and to Francine Picoult, (202) 395–7231, Office of Management and Budget, 3235 NEOB, Washington, D.C. 20503 within two weeks of this notice.

Date: July 25, 1988.

Wesley C. Moore,

Director, Office of Administrative Support.

[FR Doc. 88–17331 Filed 8–1–88; 8:45 am]

BILLING CODE 6718–01–M

FEDERAL MARITIME COMMISSION

Security for the Protection of the Public To Meet Liability Incurred for Death or Injury to Passengers or Other Persons on Voyages; Issuance of Certificate (Casualty)

Notice is hereby given that the following have been issued a Certificate of Financial Responsibility to Meet Liability Incurred for Death or Injury to Passengers or Other Persons on Voyages pursuant to the provisions of section 2, Pub. L. 89–777 (80 Stat. 1356, 1357) and Federal Maritime Commission General Order 20, as amended (46 CFR Part 540)

Aloha Pacific Cruises Limited/S.S. Monterey Limited Partnership, 510 King Street, Suite 501, Alexandria, Virginia 22314–3132

Date: July 28, 1988.

Joseph C. Polking,

Secretary.

[FR Doc. 88–17392 Filed 8–1–88; 8:45 am]

BILLING CODE 6730–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of Human Development Services

Federal Council on the Aging; Meeting

Agency Holding the Meeting: Federal Council on the Aging, HHS.

Time and Date: Meeting begins at 9:00 a.m. and ends at 5:00 p.m. on Wednesday, August 24, 1988 and begins at 9:00 a.m. and ends at 3:00 p.m. on Thursday, August 25, 1988.

Place: On Wednesday, August 24 from 9:00 to 12:00 noon, The Jupiter Room, Holiday Inn-Capitol, 550 C Street, SW., Washington, DC 20024, and from 2:00 to 4:00 p.m., Congressional Conference Room S–126, U.S. Capitol. On Thursday, August 25, from 9:00 to 3:00 p.m., meeting will be held in The Jupiter Room, Holiday Inn-Capitol, 550 C Street, SW., Washington, DC 20024.

Status: Meeting is open to the public.

Contact Person: Pete Conroy, Room 4545, Wilbur J. Cohen North Building, 330 Independence Avenue, SW., Washington, DC 20201; Phone: 245–2451.

The Federal Council on the Aging was established by the 1973 Amendments to the Older Americans Act of 1965 (Pub. L. 93–29, 42 U.S.C. 3015) for the purpose of advising the President, the Secretary of Health and Human Services, the Commissioner on Aging and the Congress on matters relating to the special needs of older Americans.

Notice is hereby given pursuant to the Federal Advisory Committee Act (PL 92–453, 5 U.S.C. App. 1, Sec. 10, 1976) that the Council will hold a meeting on August 24 and 25, 1988 from 9:00 a.m.–5:00 p.m. and from 9:00 a.m.–3:00 p.m. respectively. On August 24, the afternoon session from 2 p.m.–4 p.m., will be a Conference on Targeting Older Americans Act Funds, in Congressional Conference Room S–126, U.S. Capitol. On August 25 the meeting will be held all day in The Jupiter Room, Holiday Inn-Capitol, 550 C Street, SW., Washington, DC 20024.

The agenda will include: A Conference on Targeting Older Americans Act Funds. Participants are as follows: Members of the Federal Council on the Aging; Dr. Robert Binstock, Case Western Reserve Uniersity; Cynthia M. Taeuber, Bureau of the Census; Joan F. Van Nostrand, National Center for Health Statistics; Carol Fraser Fisk, Commissioner, Administration on Aging; Margaret Lynn Dugger, Director, Florida Aging Adult Services, and House and Senate Aging Committee staff members. The rest of the two-day meeting will include discussion of Current Projects, Committee Reports, 1988–1989 Budget and Agenda Projects including the 1991 White House Conference on Aging Plan project.

Dated: July 28, 1988.

Ingrid Azvedo,

Chairperson, Federal Council on the Aging.

[FR Doc. 88–17376 Filed 8–1–88; 8:45 am]

BILLING CODE 4130–01–M

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Receipt of Petition for Federal Acknowledgment of Existence as an Indian Tribe; Cherokees of Southeast Alabama, Inc.

July 21, 1988.

This is published in the exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by 209 Dm 8.

Pursuant to 25 CFR 83.8(a) (formerly 25 CFR 54.8(a) notice is hereby given that the Cherokees of Southeast Alabama, Inc., c/o Mr. Deal Wambles, 510 S. Park Avenue, Dothan, Alabama 36301, have filed a petition for acknowledgment by the Secetary of the Interior that the group exists as an Indian tribe. The petition was received by the Bureau of Indian Affairs on February 22, 1988, and was signed by member of the group's governing body.

This a notice of receipt of petition and does not constitute notice that the petition is under active consideration. Notice of active consideration will be sent by mail to the petitioner and other interested parties at the appropriate time.

Under § 83.8(d) (formerly § 54.8(d) of the Federal regulations, interested parties may submit factual and/or legal arguments in support of or in opposition to the group's petition. Any information submitted will be made available on the same basis as other information in the Bureau of Indian Affairs' files. Such submissions will be provided to the petitioner upon receipt by the Bureau. The petitioner will be provided an opportunity to respond to such submissions prior to a final determination regarding the petitioner's status.

The petition may be examined by appointment in the Department of the Interior, Bureau of Indian Affairs, Branch of Acknowledgment and Research, Mail Stop 4627–MIB, 18th and C Streets, NW., Washington, DC 20240, Phone: (202) 343–3592.

W.P. Ragsdale,

Acting Assistant Secretary—Indian Affairs.

[FR Doc 88–17312 Filed 8–1–88; 8:45 am]

BILING CODE 4310–0213–M

Plan for the Use of the Navajo Tribe's Indian Judgment Funds in Dockets 69 and 299, 256–69 and 377–70, and 588–83L Before the United States Claims Court

July 22, 1988.

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 on June 11, 1988.

FOR FURTHER INFORMATION CONTACT: Terry Lamb, Historian, Bureau of Indian Affairs, Branch of Acknowledgment and Research, MS 4627–MIB, 18th and C Streets, NW., Washington, DC 20240.

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 February 27, 1987, in satisfaction of the award granted to the Navajo Tribe before the United States Claims Court in Dockets 69 and 299, 256–69 and 377–70, and 588–83L. The plan for the use of the funds was submitted to Congress with a letter dated February 24, 1988, and was received (as recorded in the Congressional Record) by the Senate on March 14, 1988, and by the House of Representatives on February 25, 1988. The plan became effective on June 11, 1988, 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 of the Judgment Funds Awarded to the Navajo Tribe in Dockets 69 and 299, 256–69 and 377–70 and 588–83L Before the United States Claims Court

The funds appropriated February 27, 1987, in satisfaction of the judgment granted to the Navajo Tribe in Dockets 69 and 299, 256–69 and 377–70 and 588–83L before the United States Claims Court, less attorney fees and litigation expenses, and including all interest and investment income accrued, shall be used as follows.

The funds shall be transferred to the Navajo Tribe to be managed under an investment plan; such transfer will take place following approval of the investment plan by the Secretary of the Interior. The investment plan will contain or be subject to the following requirements. The investment plan shall be made for the Trust Fund for Chapter Government Nation Building in accordance with accepted tribal procedures for the investment and administration of trust funds. The Division of Community Development shall administer the investment fund.

The fund principal shall consist of the judgment funds, any additional appropriations made by the Navajo Tribal Council, and contributions from other sources.

The fund income shall consist of all interest and investment income accrued.

Five percent (5%) of the interest earned annually shall be reinvested with the fund principal, to provide for reasonable fund growth and inflation.

Ninety-five percent (95%) of the interest earned annually shall be allocated on a budgetary basis to each certified Navajo chapter based upon the latest updated and certified list of registered Navajo voters. Each chapter shall determine the most appropriate use of its apportioned share of the funds, provided that the funds are used in accordance with the approved guidelines, for the common benefit of chapter members for general, social, and economic development programs.

Guidelines for utilization of funds to be allocated to the certified Navajo chapters will be developed and require approval by the Navajo Tribal Council.

The trust fund shall be audited annually. Within ninety (90) days of the end of each fiscal year, an audit report shall be distributed to the members of the Navajo Tribal Council, certified Navajo chapters, and interested members of the Navajo Tribe. The report shall include a statement of the fund's performance and information relevant to the management of the fund, including but not limited to financial statements, the amount of interest earned from each investment during the reporting period, and a statement of the investments of the fund with an appraisal at market value.

Any proposed change in the use of the fund principal shall be pursuant only to a two-thirds vote of the full membership of the Navajo Tribal Council to place a referendum on the ballot of any primary, general, or special election. The tribal referendum will require adoption by a two-thirds vote of all registered Navajo voters.

With the exception of the referendum requirement for the use of the fund principal, provisions of this plan may be amended by a majority vote of the Navajo Tribal Council.

All annual expenses associated with the administration and management of the fund shall be paid from the fund income, prior to the allocation of the ninety-five percent (95%) interest income among the chapters.

All responsibility of the United States for the judgment funds or the investment or use of the judgment funds after their transfer to the tribe pursuant to the investment plan shall cease at the time the funds are transferred to the Navajo Tribe.

None of the funds shall be distributed as per capita or dividend payments.

General Provisions

None of the funds distributed per capita or made available under this plan for programing 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 in excess of $2,000, any Federal or federally assisted program.

W.P. Ragsdale,

Acting Assistant Secretary—Indian Affairs.

[FR Doc 88-17311 Filed 8-1-88; 8:45 am]

BILING CODE 4310-02-M

Bureau of Land Management

[WY-040-08-4300-90]

Rock Springs District Grazing Advisory Board; Meeting

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of meeting of the Rock Springs District Grazing Advisory Board.

SUMMARY: This notice sets forth the schedule and proposed agenda of a meeting of the Rock Springs District Grazing Advisory Board. Notice of this meeting is required under Pub. L. 92-463.

DATE: September 8, 1988, 9:30 a.m. until 4 p.m.

ADDRESS: Bureau of Land Management, Rock Springs District Office, Highway 191 North, Rock Springs, Wyoming 82901.

FOR FURTHER INFORMATION CONTACT: Donald H. Sweep, District Manager, Rock Springs District, Bureau of Land Management, P.O. Box 1869, Rock Springs, Wyoming 82902-1869, (307) 382-5350.

SUPPLEMENTARY INFORMATION: The agenda for the meeting will include:

1. Introduction and opening remarks.
2. Approval of minutes of the August 7, 1987 meeting.
3. Election of a Chairman and Vice Chairman.
4. Improvements proposed for completion in FY 89 with range betterment (8100) funds.
5. Update on wild horse gathering.
6. South LaBarge Common AMP.
7. Smith's Fork AMP.
8. Pine Mountain AMP.
9. Public comment period.
10. Arrangements for the next meeting.

The meeting is open to the public. Interested persons may make oral statements to the Board between 3:00-3:30 p.m., or file written statements for the Board's consideration. Anyone wishing to make an oral statement should notify the District Manager, Bureau of Land Management, Highway 191 North, P.O. Box 1869, Rock Springs, Wyoming 82902-1869, by September 7, 1988. Depending on the number of persons wishing to make oral statements, a per person time limit may be established by the District Manager.

A transcript of the meeting will be maintained in the District Office and be available for public inspection and reproduction (during regular business hours) within 30 days following the meeting.

Donald H. Sweep,

District Manager.

[FR Doc. 88-17310 Filed 8-1-88; 8:45 am]

BILLING CODE 4310-22-M

[CO-940-08-4220-10; COC-48691]

Proposed Withdrawal; Proposed Public Meeting; Colorado

July 27, 1988.

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The U.S. Department of Agriculture, Forest Service, proposes to withdraw National Forest System land near Vail, Colorado, for 20 years to protect recreational facilities and resource values at the Vail Ski Area. This notice closes the land to location and entry under the mining laws for up to 2 years. The land remains open to mineral leasing and to Forest Service management.

DATE: Comments on this proposed withdrawal must be received on or before October 31, 1988.

ADDRESS: Bureau of Land Management, Colorado State Office, 2850 Youngfield Street, Lakewood, Colorado 80215.

FOR FURTHER INFORMATION CONTACT: Doris E. Chelius, (303) 236-1768.

SUPPLEMENTARY INFORMATION: On July 26, 1988, the Department of Agriculture, Forest Service, filed application to withdraw the following described National Forest System land from location and entry under the mining laws, subject to valid existing rights:

Sixth Principal Meridian

White River National Forest

T. 5 S., R. 80 W.,
Sec. 7, lot 2 S½NE¼, SE¼NW¼, S½;
Sec. 8, SW¼NW¼, S½ (all Federal land within the section);
Sec. 13, SW¼SW¼;
Sec. 14, S½NW¼, S½;
Sec. 15, all;
Sec. 16, all;
Sec. 17, all;
Sec. 18, lots 1 thru 4, E½W½, E½;
Sec. 19, lots 1 and 2, NE¼NW¼, N½NE¼, SE¼NE¼, SE¼;
Sec. 20, all;
Sec. 21, all;
Sec. 22, all;
Sec. 23, all;
Sec. 24, W½W½;
Sec. 25, NW¼;
Sec. 26, N½;
Sec. 27, all;
Sec. 28, N½;
Sec. 29, N½;
Sec. 30, NE¼NE¼.
T. 5 S., R. 81 W.,
Sec. 12, lots 1 and 2.

The areas described aggregates approximately 8,820 acres of National Forest System land in Eagle County, Colorado.

The purpose of this proposed withdrawal is to protect recreational facilities and high resource values within the Vail Ski Area.

For a period of 90 days from the date of publication of this notice, all persons who wish to submit comments, suggestions, or objections in connectin with this proposal may present their views in writing to the undersigned officer of the Bureau of Land Management.

A public meeting will be scheduled and held concerning the proposed withdrawal as required by regulations. Notice of time and location this meeting will be published in the **Federal Register** at least 30 days prior to the date of the meeting.

This application will be processed in accordance with the regulations set forth in 43 CFR 2310.

For a period of 2 years from the date of publication of this notice in the **Federal Register**, the land will be segregated from the mining laws as specified above unless the application is denied or cancelled or the withdrawal is approved prior to that date. During this period the Forest Service will continue to allow those discretionary uses that do not conflict with the ski area permit and use.

Evelyn W. Axelson,

Acting Chief, Branch of Adjudication.

[FR Doc. 88-17328 Filed 8-1-88; 8:45 am]

BILLING CODE 4310-JB-M

National Park Service

National Register of Historic Places; Notification of Pending Nominations

Nominations for the following properties being considered for listing in the National Register were received by the National Park Service before July 23, 1988. Pursuant to § 60.13 of 36 CFR Part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded to the National Register, National Park Service, P.O. Box 37127, Washington, DC

20013–7127. Written comments should be submitted by August 17, 1988.

Carol D. Shull,

Chief of Registration, National Register.

MISSOURI

Jackson County

Coca-Cola Building, 2101–2111 Grand Ave., Kansas City, 88001300

MONTANA

Ravalli County

Bean, Daniel V., House (Hamilton MRA), 611 N. Second, Hamilton, 88001288
Blood, Oliver, House (Hamilton MRA), 524 S. First St., Hamilton, 88001279
Conway House (Hamilton MRA), 805 S. Fourth St., Hamilton, 88001291
Drinkenberg's, F.H., First Home (Hamilton MRA), 701 N. Second, Hamilton, 88001289
Ellis, E.G., Houses (Hamilton MRA), 801 N. Third, Hamilton, 88001281
Foye Rental Houses (Hamilton MRA), 819 and 821 N. Fourth, Hamilton, 88001292
Gill, Sherman, House (Hamilton MRA), 605 N. Third, Hamilton, 88001282
Goff House (Hamilton MRA), 115 N. Fifth, Hamilton, 88001283
Gordon House (Hamilton MRA), 606 S. Fourth, Hamilton, 88001294
Granke, Charles, House (Hamilton MRA), 406 S. Seventh St., Hamilton, 88001278
Hamilton Commercial Historic District (Hamilton MRA), Main, N. Second, S. Second, S. Third, and State Sts., Hamilton, 88001273
Hamilton Southside Residential Historic District (Hamilton MRA), S. First, S. Second, S. Third, S. Fourth, and S. Fifth Sts., Hamilton, 88001272
Hoffman, Charles, House (Hamilton MRA), 807 S. Third, Hamilton, 88001277
Lagerquist, John, House (Hamilton MRA), 701 N. Forth St., Hamilton, 88001284
McGlauflin House (Hamilton MRA), 518 S. Eighth, Hamilton, 88001276
Pine Apartments (Hamilton MRA), 804 S. Fourth St., Hamilton, 88001295
Reinkeh, Allison, House (Hamilton MRA), 207 Adirondac St., Hamilton, 88001280
Rocky Mountain Laboratory Historic District (Hamilton MRA), 900 blk. of Fourth St., Hamilton, 88001274
Stout, John, House (Hamilton MRA), 1000 S. First, Hamilton, 88001290
Trosdahl, Erick, House (Hamilton MRA), 206 S. Seventh St., Hamilton, 88001275
VFW Club (Hamilton MRA), 930 Adirondac, Hamilton, 88001287
Wallin, Frank, House (Hamilton MRA), 608 N. Seventh St., Hamilton, 88001293
Wamsley, Other C., House (Hamilton MRA), 200 N. Fifth St., Hamilton, 88001285

NEW YORK

Otsego County

Wright, Roswell, House, 25 Main St., Unadilla, 88001271

NORTH CAROLINA

Granville County

Adoniram Masonic Lodge (Granville County MPS), Jct of NC 1410 and NC 1300, Cornwall vicinity, 88001253
Bobbitt–Rogers House and Tobacco Manufactory District (Granville County MPS), Address Restricted, Wilton vicinity, 88001262
Brassfield Baptist Church (Granville County MPS), NC 96 and NC 1700, Wilton vicinity, 88001267
Central Orphanage (Granville County MPS), Antioch Dr. and Raleigh Rd., Oxford, 88001257
First National Bank Building (Granville County MPS), 302 Main St., Creedmoor, 88001254
Harris–Currin House (Granville County MPS), Address Restricted, Wilton vicinity, 88001258
Hunt, Joseph P., Farm (Granville County MPS), NC 1514, Dexter vicinity, 88001265
Lawrence, John P., Plantation (Granville County MPS), NC 1700, Grisson vicinity, 88001264
Littlejohn, Joseph B., House (Granville County MPS), 219 Devin St., Oxford, 88001268
Mount Energy Historic District (Granville County MPS), NC 1636 and NC 56, Mount Energy, 88001266
Oliver–Morton Farm (Granville County MPS), NC 1417, Oak Hill vicinity, 88001269
Royster, John Henry, Farm (Granville County MPS), Address Restricted, Bullock vicinity, 88001260
Salem Methodist Church (Granville County MPS), NC 1522, Huntsboro vicinity, 88001259
Sherman, Elijah, Farm (Granville County MPS), US 158, Berea vicinity, 88001256
Stovall, John W., Farm (Granville County MPS), NC 1507, Stovall vicinity, 88001270
Tunstall, Eldon B., Farm (Granville County MPS), NC 1500, Bullock vicinity, 88001255
Winston, Obediah, Farm (Granville County MPS), NC 1638, Creedmoor vicinity, 88001261

OHIO

Cuyahoga County

Newton Avenue Historic District, 9700–10003 Newton Ave., Cleveland, 88001298

Greene County

Old, The, Hotel, 100–101½ W. Main St., Spring Valley, 88001296

Licking County

Pitzer, Anthony, Jr., House, 6019 White Chapel Rd., Newark vicinity, 88001297

Montgomery County

Dayton Young Men's Christian Association Building, 117 W. Monument Ave., Dayton, 88001299

PUERTO RICO

Caguas Municipality

Alcaldia de Caquas, Calle Munoz Rivera Num. 42, Caguas, 88001307

Dorado Municipality

Punta Boca Juana, Address Restricted, Dorado vicinity, 88001308

Manati Municipality

Brunet–Calaf Residence, Quinones corner of Patriota Pozo St., Manati, 88001306
La Colectiva Tabacelera, 18 Quinones St., Manati, 88001305
Plaza del Mercado de Manati, Quinones, Padial and Baldorioty Sts., Manati, 88001303

San Juan Municipality

Residencia Aboy—Lompre, Avenida Ponce de Leon #900, Santurce, 88001304

VERMONT

Bennington County

Bennington Railroad Station, Depot and River Sts., Bennington, 88001301
Henry, William, House, River Rd., Bennington, 88001301

[FR Doc. 88–17393 Filed 8–1–88; 8:45 am]

BILLING CODE 4310–70–M

Office of Surface Minning Reclamation and Enforcement

Availability of the Draft Environmental Impact Statement on the Proposed Area B Expansion of the Big Sky Mine, Rosebud County, Montana (Federal Coal Lease M–15965)

AGENCY: Office of Surface Mining Reclamation and Enforcement.

ACTION: Notice of availability of a draft environmental impact statement.

SUMMARY: The office of Surface Mining Reclamation and Enforcement (OSMRE) and the Montana Department of State Lands (DSL) are making available a jointly prepared draft environmental impact statement (EIS) on the proposed Big Sky Area B mine. The EIS has been prepared to assist the Department of the Interior and Montana DSL in making a decision on the application submitted by Peabody Coal Company (Peabody) for their proposed surface coal mine, located approximately 5 miles south-southwest of Colstrip, Montana. OSMRE and Montana DSL are requesting that any interested party submit written comments on the draft EIS to assist with the preparation of the final EIS OSMRE and Montana DSL may hold a public hearing in Billings, Montana, to receive oral comments if substantial interest is expressed.

DATES:

Comment Period: Written comments on the draft EIS must be received by 4:00 p.m. (MDT) on September 26, 1988 at one of the locations listed below, under **"ADDRESSES".**

Public Meetings: Expressions of interest in a public meeting should be submitted by 4:00 p.m. (MDT) on August 22, 1988 at one of the locations listed below, under **"ADDRESSES."**

ADDRESSES: Written comments, expressions of interest for a public

meeting, and/or requests for additional copies of the draft EIS: Hand-deliver or mail to either Raymond L. Lowrie, Assistant Director, Office of Surface Mining Reclamation and Enforcement, Western Field Operations, Brooks Towers, Second Floor, 11020—15th Street, Denver, Colorado 80202 (Attention: Floyd McMullen); or Dennis Hemmer, Commissioner, Montana Department of State Lands, Capital Station, Helena, Montana 59620 (Attention: Bonnie Lovelace).

FOR FURTHER INFORMATION, CONTACT: Floyd McMullen, Big Sky Area B EIS Project Leader (telephone: 303–844–3104) at the Denver, Colorado, location given under **"ADDRESSES"**.

SUPPLEMENTARY INFORMATION: Peabody's Big Sky mine is an existing surface coal mine located approximately 120 miles east of Billings, Montana, and 5 miles south-southwest of Colstrip, Montana. Peabody intends that mine to eventually cover 8,090 acres of land, of which approximately 2,500 acres have already been or are in the process of being mined within Area A of the mine.

Peabody is currently seeking approval to mine 64 million tons of coals at the Area B expansion of the mine over a 23-year period at an average rate of approximately 2.8 million tons per year. The proposed expansion would add 5,435 acres to the Big Sky mine in secs. 23, 24, and 25, T. 1 N., R. 40 E., and secs. 19, 21, 22, and 27 through 33, T. 1 N., R. 41 E., Montana Principle Meridian; 3,200 of these 5,435 acres would be disturbed by mining activities.

The draft EIS analyzes the probable impacts that would result should OSMRE and Montana DSL approve the application for, and Peabody subsequently expand into, the proposed mine. The EIS also analyzes the probable cumulative impacts that would result from surface coal mining operations not only at the proposed Big Sky Area B mine but also at the Big Sky Area A mine, and the other 4 existing and 3 proposed mines in its vicinity in southeastern Montana. Three alternatives that treat the available range of decision are evaluated in the EIS. These include: approval of the applicant's proposal with conditions; approval of the applicant's proposal with conditions and the addition of economic coal reserves in section 36; and disapproval of the applicant's proposal. OSMRE and Montana DSL have identified "approval of the applicant's proposal with conditions and the addition of economic coal reserves in section 36" as the preferred alternative.

If substantial interest is shown, OSMRE may hold a public meeting on the draft EIS during the comment period. If a public meeting is needed, notice will be given in the **Federal Register** and the Billing Gazette newspaper. Details regarding the meeting will be provided in the public notice.

Date: July 28, 1988.

Brent Walquist,

Assistant Director, Program Policy.

[FR Doc. 88–17358 Filed 8–1–88; 8:45 am]

BILLING CODE 4310–05–M

INTERSTATE COMMERCE COMMISSION

[Ex Parte No. 290 (Sub–No. 2)]

Railroad Cost Recovery Procedures

AGENCY: Interstate Commerce Commission.

ACTION: Extension of time to file comments.

SUMMARY: In a **Federal Register** notice of July 22, 1988 (53 FR 27773) the Commission established August 11, 1988 as the due date for comments concerning the proposal to revise the calculation of the fuel component of the all inclusive index of railroad input prices. The index is used to calculate the quarterly rail cost adjustment factor. At the request of the Association of American Railroads the due dates for filing comments has been postponed to September 12, 1988.

DATES: Comments are due September 12, 1988.

FOR FURTHER INFORMATION CONTACT: William T. Bono, (202) 275–7354. TDD for hearing impaired (202) 275–1721.

By the Commission, Heather J. Gradison, Chairman.

Dated: July 27, 1988.

Noreta R. McGee,

Secretary.

[FR Doc. 88–17359 Filed 8–1–88; 8:45 am]

BILLING CODE 7035–01–M

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Design Arts Advisory Panel (Challenge II Section); Meeting

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), as amended, notice is hereby given that a meeting of the Design Arts Advisory Panel (Challenge II Section) to the National Council on the Arts will be held on August 17, 1988, from 9:00 a.m.–5:30 p.m., and on August 18, 1988, from 9:00 a.m.–4:30 p.m., in room M–14 of the Nancy Hanks Center, 1100 Pennsylvania Avenue NW., Washington, DC 20506.

A portion of this meeting will be open to the public on August 18, 1988, from 3:30 p.m.–4:30 p.m. The topics for discussion will include guidelines and policy issues.

The remaining sessions of this meeting on August 17, 1988, from 9:00 a.m.–5:30 p.m., and on August 18, 1988, from 9:00 a.m.–3:30 p.m., are for the purpose of Panel review, discussion, evaluation, and recommendation on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including information given in confidence to the agency by grant applicants. In accordance with the determination of the Chairman published in the **Federal Register** of February 13, 1980, these sessions will be closed to the public pursuant to subsection (c) (4), (6) and (9)(B) of section 552b of Title 5, United States Code.

If you need special accommodations due to a disability, please contact the Office for Special Constituencies, National Endowment for the Arts, 1100 Pennsylvania Avenue NW., Washington, DC 20506, 202/682–5532, TTY 202/682–5496 at least seven (7) days prior to the meeting.

Further information with reference to this meeting can be obtained from Ms. Yvonne M. Sabine, Advisory Committee Management Officer, National Endowment for the Arts, Washington, DC 20506, or call 202/682–5433.

Yvonne M. Sabine,

Director, Council and Panel Operations, National Endowment for the Arts.

July 26, 1988.

[FR Doc. 88–17309 Filed 8–1–88; 8:45 am]

BILLING CODE 7537–01–M

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–397]

Washington Public Power Supply System; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License No. NPF–21 issued to Washington Nuclear Project No. 2 (WNP–2), located in Benton County, Washington.

Environmental Assessment

Identification of Proposed Action

The proposed amendment would revise Technical Specifications section 2.2 "Limiting Safety System Settings", section 3/4.2 "Power Distribution Limits", section 3/4.3.6 "Control Rod Block Instrumentation", 3/4.4.1 "Reactor Coolant System Recirculation System", and associated bases to incorporate limits applicable to operation of the unit up to 75% power with one recirculation pump unavailable to a fuel burnup of 35,000 MWD/MT.

It would also divide section 3/4.3.10 "Neutron Flux Monitoring Instrumentation" into two parts and relocate the two parts in the Technical Specifications. The two new parts would be section 3/4.2.6 "Power/Flow Instability" and 3/4.2.7 "Neutron Flux Noise Monitors."

The proposed action is in accordance with the licensee's application for amendment dated March 7, 1988, as supplemented by letter dated May 13, 1988.

The Need for the Proposed Action

The proposed change to the Technical Specifications will make it possible to operate the facility up to 75% power with one of the two recirculation pumps out of service at any time to the end of the station life. Under the current license, operation with one recirculation pump out of service (called "single loop operation") is only permitted to a fuel burnup of 15,000 MWD/MT. This burnup level will be reached in mid 1988. Without the amendment WNP-2 would be required to be shut down if one recirculation pump were taken out of service.

Environmental Impacts of the Proposed Action

The Commission has completed its evaluation of the proposed revisions to the Technical Specifications. The proposed revisions will allow the facility to continue to operate in the event that it becomes necessary to take one recirculation pump out of service for testing or for repair. The licensee has extensive experience with single loop operation gained during the first two fuel cycles because of mechanical problems with the pumps. Both pumps remained in service during the third fuel cycle. Operation with two pumps is preferred by the licensee because higher power production is achievable.

The current limitation on single loop operation exists because the licensee had not previously evaluated use of a single pump at the proposed power level at later periods in the station life.

The original operating license allowed single loop operation up to a 50% power level for the duration of the operating license. When mechanical problems with one recirculation pump made it evident that the unit would operate for an extended period with just one pump, the licensee performed an analysis which showed that the unit could operate safely at a power level higher than 50% with one pump. This analysis looked only at the early years of station operation, extending to an average fuel burnup of 15,000 MWD/MT. The license was amended to allow higher power operation with a single pump but was restricted to the conditions for which the safety analysis applied.

Analyses submitted in support of the amendment application provide limits which ensure safe operation for the life of the station, meeting all objectives of existing technical specifications. Operation with a single loop will be at a reduced power level and is within the scope of analyses in the Final Environmental Statement Related to the Operation of WPPSS Nuclear Project No. 2, dated December, 1981. The proposed changes do not increase the probability or consequences of any accident. No changes are proposed in the types of any effluents that may be released offsite, and there is no significant increase in the allowable individual or cumulative occupational radiation exposure. Accordingly, the Commission concludes that this proposed action would result in no significant radiological environmental impact.

With regard to potential non-radiological impacts, the proposed amendment to the Technical Specifications involves only the continued operation of systems located within the restricted area as defined in 10 CFR Part 20. It does not affect non-radiological plant effluents and had no other environmental impact. Therefore, the Commission concludes that there is no significant non-radiological environmental impact associated with the proposed amendment.

The Notice of Consideration of Issuance of Amendment and Opportunity for Hearing in connection with this action was published in the **Federal Register** May 10, 1988 (53 FR 16605). No request for hearing or petition for leave to intervene was filed following this notice.

Alternative to the Proposed Action

Since the Commission concluded that there is no significant environmental effect that would result from the proposed action, alternatives with equal or greater environmental impacts need not be evaluated.

The principal alternative would be to deny the requested amendment. Denial of the request would result in intermittent stopping of plant operation while the recirculation pump is being serviced. However comparable environmental impacts would be associated with the generation of replacement power at an alternative location.

Alternative Use of Resources

This action does not involve the use of any resources not previously considered in the Final Environmental Statement Related to the Operation of WPPSS Nuclear Project No. 2, dated December, 1981.

Agencies and Person 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 license amendment.

Based upon the foregoing environmental assessment, we conclude that the proposed action will not have a significant adverse effect on the quality of the human environment.

For further details with respect to this action, see the application for amendment dated March 7, 1988 and supplement dated May 13, 1988 which are available for public inspection at the Commission's Public Document Room, 1717 H Street, NW., Washington, DC and at the Richland City Library, Swift and Northgate Streets, Richland, Washington, 99352.

Dated at Rockville Maryland, this 27th day of July 1988.

For the Nuclear Regulatory Commission.

Harry Rood,

Acting Director, Project Directorate V, Division of Reactor Projects—III, IV, V and Special Projects, Office of Nuclear Reactor Regulation.

[FR Doc. 88-17369 Filed 8-1-88; 8:45 am]

BILLING CODE 7590-01-M

Advisory Committee on Nuclear Waste; Meeting; Revised

The **Federal Register** published Friday, July 15, 1988 (53 FR 26915) contained a notice of the third meeting of the Advisory Committee on Nuclear Waste (ACNW) to be held on August 3–5, 1988. On August 3rd the meeting will start at 4:00 p.m. and on August 4th

at 6:00 p.m. at the Holley Inn, 235 Richland Avenue and Laurens Street, Aiken, SC. On August 5 the meeting will start at 2:00 p.m. at the Fims Building, 2600 Bull Street, Room 405, Columbia, SC. Additional topics to be considered by the Committee include the following:

1. Letter to the Commission on Below Regulatory Concern.
2. Letter to the Commission on the term Anticipated Events and Processes and Unanticipated Events and Processes.
3. Agenda for the 4th ACNW meeting, September 13–14, 1988.
4. Agenda for the 5th ACNW meeting, November 3–4, 1988.
5. Administrative matters relating to the scheduling and operating of ACNW meetings.
6. Administrative matters relating to the structure and operation of the ACNW.

All other items pertaining to this meeting remained the same as previously published.

Dated: July 27, 1988.

Samuel J. Chilk,

Acting Advisory Committee Management Officer.

[FR Doc. 88–17368 Filed 8–1–88; 8:45 am]

BILLING CODE 7590–01–M

Advisory Committee on Reactor Safeguards, Subcommittee on TVA Organizational Issues; Meeting; Cancelled

The **Federal Register** published Friday, July 22, 1988 (53 FR 27782) contained notice of a meeting of the ACRS Subcommittee on TVA Organizational Issues scheduled for August 5, 1988. This meeting has been *cancelled.*

Dated: July 26, 1988.

Morton W. Libarkin,

Assistant Executive Director for Project Review.

[FR Doc. 88–17367 Filed 8–1–88; 8:45 am]

BILLING CODE 7590–01–M

NUREG/CR–5147, Fundamental Attributes of a Configuration Management Program for Nuclear Plant Design Control; Availability

The Nuclear Regulatory Commission has published a report the describes the results of an evaluation of findings identified during a number of NRC Safety System Functional Inspections and Safety System Outage Modification Inspections which are related to configuration management. Attributes were developed which are responsive to minimizing these types of inspection findings. Incorporation of these key attributes is considered good practice in the development of a configuration management program for nuclear plant design control.

NUREGs are available for inspection at the Commission's Public Document Room, 1717 H Street NW., Washington, DC. Copies of issued NUREGs may be purchased from the Government Printing Office at the current GPO price. Information of current GPO prices may be obtained by contacting the Superintendent of Documents, U.S. Government Printing Office, Post Office Box 37082, Washington, DC 20013–7082, telephone (202) 275–2060 or (202) 275–2171. Issued NUREGs may also be purchased from the National Technical Information Service on a standing order basis. Details on this service may be obtained by writing NTIS, 5285 Port Royal Road, Springfield, VA 22161.

(5 U.S.C. 552(a))

Dated at Rockville, Maryland, this 13th day of July 1988.

For the Nuclear Regulatory Commission.

Brian K. Grimes,

Acting Director, Division of Reactor Inspection and Safeguards, Office of Nuclear Reactor Regulation.

[FR Doc. 88–17372 Filed 8–1–88; 8:45 am]

BILLING CODE 7590–01–M

[Docket No. 50–335]

Florida Power and Light Co., et al., St. Lucie Plant, Unit No. 1; Correction to Denial of Amendment to Facility Operating License and Opportunity for Hearing

On July 20, 1988, the **Federal Register** published a Notice of Denial of Amendment to Facility Operating License and Opportunity for a Hearing for the Florida Power and Light Company, St. Lucie Unit No. 1. On page 27417 of that notice, second column, fifth paragraph, the date should have been August 19, 1988, instead of July 7, 1988.

Dated at Rockville, Maryland, this 25th day of July, 1988.

For the Nuclear Regulatory Commission.

E.G. Tourigny,

Acting Director, Project Directorate II–2, Division of Reactor Projects–I/II, Office of Nuclear Reactor Regulation.

[FR DOc. 88–17370 Filed 8–1–88; 8:45 am]

BILING CODE 7590–01–M

[Docket No. 50–416]

System Energy Resources, Inc., et al.; Consideration of Issuance of Amendment to Facility Operating License and Opportunity for Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License No. NPF–29 issued to Mississippi Power & Light Company, South Mississippi Electric Power Association and System Energy Resources, Inc., (the licensees) for operation of the Grand Gulf Nuclear Station (GGNS), Unit 1, located in Claiborne County, Mississippi.

The proposed amendment would change Attachment 1 to the GGNS Unit 1 Operating License by extending the implementation date for a neutron flux monitor meeting the requirements of Regulatory Guide 1.97 until the fourth refueling outage. The present implementation date is the third refueling outage which is scheduled to start in February 1989. With the planned 18-month fuel cycle, the fourth outage would start about August 1990.

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 September 1, 1988, the licensees 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 request for hearing and a petition for leave to intervene. Requests 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 interene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition, and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition

should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter, and the bases for each contention set forth with reasonable specificity. Contentions shall be limited to matters within the scope of the amendment under consideration. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention 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 ten (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 1–800–325–6000 (in Missouri 1–800–342–6700). The Western Union operator should be given Datagram Identification Number 3737 and the following message addressed to Elinor G. Adensam: 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, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and to Nicholas S. Reynolds, Esq., Bishop, Liberman, Cook, Purcell and Reynolds, 1200 17th Street, NW., Washington, DC 20036, attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the presiding Atomic Safety and Licensing Board, 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)–(v) and 2.714(d).

If a request for a hearing is received, the Commission's staff may issue the amendment after it completes its technical review and prior to the completion of any required hearing if it publishes a further notice for public comment of its proposed finding of no significant hazards consideration in accordance with 10 CFR 50.91 and 50.92.

For further details with respect to this action, see the application for amendment dated July 1, 1988, which is available for public inspection at the Commission's Public Document Room, 1717 H Street, NW., Washington, DC 20555, and at the Hinds Junior College, McLendon Library, Raymond, Mississippi 39154.

Dated at Rockville, Maryland, this 26th day of July 1988.

For the Nuclear Regulatory Commission.

Elinor G. Adensam,

Director, Project Directorate II–1, Division of Reactor Projects I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 88–17371 Filed 8–1–88; 8:45 am]

BILLING CODE 7590–01–M

OFFICE OF PERSONNEL MANAGEMENT

Federal Prevailing Rate Advisory Committee; Open Meeting

According to the provisions of section 10 of the Federal Advisory Committee Act (Pub. L. 92–463), notice is hereby given that meetings of the Federal Prevailing Rate Advisory Committee will be held on—

Wednesday, August 10, 1988
Wednesday, August 17, 1988.

These meetings will start at 10 a.m. and will be held in Room 5A06A, Office of Personnel Management Building, 1900 E Street NW., Washington, DC.

The Federal Prevailing Rate Advisory Committee is composed of a Chairman, representatives from five labor unions holding exclusive bargaining rights for Federal blue-collar employees, and representatives from five Federal agencies. Entitlement to membership of the Committee is provided for in 5 U.S.C. 5347.

The Committee's primary responsibility is to review the Prevailing Rate System and other matters pertinent to establishing prevailing rates under subchapter IV, chapter 53, 5 U.S.C., as amended, and from time to time advise the Office of Personnel Management.

These scheduled meetings will start in open session with both labor and management representatives attending. During the meeting either the labor members or the management members may caucus separately with the Chairman to devise strategy and formulate positions. Premature disclosure of the matters discussed in these caucuses would unacceptably impair the ability of the Committee to reach a consensus on the matters being considered and would disrupt substantially the disposition of its business. Therefore, these caucuses will be closed to the public because of a determination made by the Director of the Office of Personnel Management under the provisions of section 10(d) of the Federal Advisory Committee Act (Pub. L. 92–463) and 5 U.S.C. 552b(c)(9)(B). These caucuses may, depending on the issues involved, constitute a substantial portion of the meeting.

Annually, the Committee publishes for the Office of Personnel Management, the President, and Congress a comprehensive report of pay issues discussed, concluded recommendations, and related activities. These reports are available to the public, upon written request to the Committee's Secretary.

The public is invited to submit material in writing to the Chairman on Federal Wage System pay matters felt to be deserving of the Committee's attention. Additional information on these meetings may be obtained by contacting the Committee's Secretary, Office of Personnel Management, Federal Prevailing Rate Advisory Committee, Room 1340, 1900 E Street

NW., Washington, DC 20415 (202) 632-9710.

Thomas E. Anfinson,

Chairman, Federal Prevailing Rate Advisory Committee.

July 26, 1988.

[FR Doc. 88-17316 Filed 8-1-88; 8:45 am]

BILLING CODE 6325-01-M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-25947; File No. SR-DTC-88-11]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by Depository Trust Co.

The Depository Trust Company ("DTC") on July 7, 1988, filed a proposed rule change with the Commission under section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"). The proposal would authorize the DTC to convert certain municipal debt holdings from bearer form to registered form. The Commission is publishing this notice to solicit public comment on the proposal.

I. DTC's Description of the Proposal

DTC states in its filing that the approval by the Commission of proposed Rules G-12 and G-15 of the Municipal Securities Rulemaking Board ("MSRB") permits municipal securities which are issuable in both bearer and registered form ("interchangeables") to be delivered in either form, unless the parties agree to a specific form of delivery at the time of a trade.[1] DTC states that these rule changes by MSRB (which will become effective on Septemer 18, 1988) will elminate the existing presumption in favor of delivering bearer certificates for interchangeables.

DTC states that registered certificates provide numerous benefits and efficiencies over bearer certificates.[2] and that, accordingly, commencing with the effective date of the said MSRB rule changes, DTC plans to effect a comprehensive conversion of "almost all" of its inventory of interchangeable bearer certificates into registered form.[3] DTC notes in its filing that it has maintained a policy of carrying a portion of its inventory in each interchangeable issue in bearer form to service customer requests for delivery of bearer certificates.[4] However, DTC intends gradually to phase out this policy over the next one or two years and to convert virtually all of its inventory of interchangeable issues to registered form.[5]

II. DTC's Rationale for the Proposal

DTC states in its filing that the proposed conversion of the bulk of its interchangeable inventory from bearer to registered form would reduce operating expenses for itself and its participants and would provide improved services to public customers. DTC further states that the proposal is consistent with the Act in that it would promote the prompt and accurate clearance and settlement of transactions in municipal securities.

III. Proposal's Effectiveness and Solicitation of Comments

The rule change has become effective pursuant to section 19(b)(3)(A) of the Act and Rule 19b-4. The Commission may summarily abrogate the rule change at any time within 60 days of its filing if it appears to the Commission that abrogation is necessary of appropriate in the public interest, for the protection of investors, or in furtherance of the purposes of the Act.

Interested persons may submit written comments within 21 days after notice is published in the **Federal Register.** Six copies of such comments should be filed with the Secretary of the Commission, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, with accompanying exhibits, and all written comments, except for material that may be withheld from the public under 5 U.S.C. 552, are available at the Commission's Public Reference Room, 450 Fifth Street NW., Washington, DC. Copies of the filing also will be available for inspection and copying at the principal offices of the DTC. All submissions should refer to File No. SR-DTC-88-11 and should be submitted by August 23, 1988.

For the Commission, by the Division of Market Regulation pursuant to delegated authority.

Dated: July 27, 1988.

Jonathan G. Katz,

Secretary.

[FR Doc. 88-17379 Filed 8-1-88; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-25949; File No. SR-NASD-88-19]

Self-Regulatory Organizations; Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to the OTC Bulletin Board Display Service

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 June 9, 1988 the National Association of Securities Dealers, Inc. ("NASD") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the NASD. 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 NASD hereby files a proposed rule change, pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act") and Rule 19b-4 thereunder, to establish a new service, the OTC Bulletin Board Display Service ("Bulletin Board Service" or "Service"), respecting securities traded over-the-counter that are not included in the NASDAQ System nor listed on a national securities exchange (collectively referred to as "non-NASDAQ securities"). The new Service will permit eligible NASD member firms to enter, update and retrieve quotation information (as well as unpriced indications of interest) on a real-time basis in non-NASDAQ securities chosen by the participating market makers. The Service will utilize separate processing facilities from those used for NASDAQ, except for portions of the communications network that will

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[1] *See* Securities Exchange Act Release No. 25489 (March 18, 1980, 53 FR 9837

"Interchangeables" are municipal debt issues that may be held in registered or bearer form and may be coverted from one form to the other.

[2] DTC states that the benefits and efficiencies include: (1) For DTC itself, reduced processing expenses (*e.g.*, a reduction in labor-intensive coupon clipping and monitoring of newspapers for call notices) and reduced carrying expenses (*e.g.*, the ability to hold jumbo certificates instead of individual certificates); (2) for broker-dealers, lower depository fees and reduced risk of certificate loss or theft; and (3) for customers, reduced loss of interest revenues from missed call notices and reduced risk of lost or stolen certificates. *See, supra,* note 1, Securities Exchange Act Release No. 25489.

[3] *See* DTC's Important Notice, dated June 17, 1988.

[4] A small segment of public customers reportedly prefer bearer certificates for, among other reasons, the certificates' ease of transferability. *Id.*

[5] Telephone conversation between Richard Nesson, General Counsel, DTC, and Thomas C. Etter, Attorney, Securities and Exchange Commission, July 25, 1988. DTC has noted that, notwithstanding its preference for converting all interchangeables to registered form, certain obstacles (particularly nuances of state laws governing municipal securities) render it infeasible for DTC to convert absolutely 100% of all interchangeable issues in its inventory from bearer to registered form. *Id.*

support terminal access to NASD members.

During the pilot phase, real-time access to the Bulletin Board Service will be limited to NASD member firms utilizing their NASDAQ terminal devices and Workstation units authorized for Level 2 or Level 3 NASDAQ service. The Service is intended to be and is designed as a membership service for use by NASD broekr/dealers and market makers, not investors. Hence, firm/non-firm quotations, unpriced indications of interest, and the telephone numbers of participating market makers will appear on the NASD internal membership display. However, the NASD recognizes that independent vendors may have an interest in disseminating certain components of this information. If requested, Bulletin Board information will be made available to independent vendors of quotation information, subsequent to the pilot period, on terms that are fair and reasonable, and in a form that assures the integrity of the information.

Member firm participation by entry of quotations or other indications of interest in non-NASDAQ securities into the Service will be voluntary. Nonetheless, the Service is structured to encourage the entry of priced quotations in non-NASDAQ securities by allowing maximum flexibility to participating market makers. Specifically, a participating market maker has the option of entering a priced bid (and/or a priced offer) with the designation "*F*" indicating that the market maker's quotation is being held out as firm. Until that entry is modified by that market maker, the priced entry must be honored for one trading unit (*i.e.;* 100 shares). The NASD Board of Governors, in reviewing the parameters of the Service, has taken the position that a market maker's failure to honor a priced entry designated as "firm" shall constitute a violation of Article III, Section 1 of the NASD Ruels of Fair Practice. That provision requires that member firms conduct their business in accord with jsut and equitable principles of trade.

The NASD proposes to operate the Bulletin Board Service on a pilot basis for six months. A pilot program is particularly appropriate here because the NASD is uncertain of the degree of interest among member firms and vendors as well as the types of information that vendors would desire. The pilot will permit the NASD to test the system capabilities and to identify technological enhancements that should be made if the Service becomes permanent. Further, the experience gained from the pilot will enable the NASD to assess the economic viability of the Service and to formulate a cost-based fee to recover the costs of developing and operating the Service. During the pilot period, the NASD will work with interested vendors to solicit their cooperation in fashioning reasonable access terms and fees for distribution of Bulletin Board information through their respective networks. Those efforts will include definition of the scope of information to be supplied to vendors and the development of format specifications for displaying Bulletin Board information. For example, if vendors choose to market a service capable of showing all market makers' indications in a non-NASDAQ security, the ranking of market makers' entries should not deviate from one vendor service to another. Resolution of these basic issues is essential to avoid misleading displays of Bulletin Board information to public investors. Assuming Commission approval of the instant filing, the foregoing issues will be addressed in a subsequent filing to obtain permanent status for the Bulletin Board Service.

Finally, during the pilot phase of the Service, the NASD is prepared to provide an end-of-day static feed to any vendor that produces a printed medium compiling market makers' indications of interest in non-NASDAQ securities.

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 NASD included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The NASD 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 purpose of this filing is to obtain the Commission's approval to commence operation of the Bulletin Board Service, without charge, for a limited pilot term of six months. The Service is designed to capture and display quotation information (including unpriced indications of interest) entered by NASD member firms that function as market makers in non-NASDAQ securities. A member's ability to enter and update information displayed through the Service requires use of a NASDAQ terminal device or Workstation unit authorized for Level 3 NASDAQ service. NASD member firms will be able to retrieve Bulletin Board information, on a real-time basis, by means of NASDAQ terminal devices or Workstation units authorized either for Level 3 or Level 2 NASDAQ service. Providing access to Level 2 subscribers will facilitate the handling of retail orders in non-NASDAQ securities by member firms that do not function as market makers.

The principal aspects of the pilot operation of the Bulletin Board Service may be summarized as follows:

- The Service will operate on a real-time basis (during market hours) allowing eligible member firms to view, enter, and update information real-time on certain non-NASDAQ securities;
- Market makers' participation in the Service will be entirely voluntary;
- Market makers electing to participate will incur no minimum obligation as to time or the number of non-NASDAQ securities that they may select for inclusion in the Bulletin Board Service;
- Non-NASDAQ securities chosen for inclusion by participating market makers will be separately accessed and identified by utilization of the prefix "3" with the issue's four or five letter symbol code;[1]
- Participating market makers will be provided a scan function enabling them to view all securities in which they have registered;
- Access to the Service will be limited initially to registered broker dealers who are NASD members and subscribe to either Level 2 or Level 3 NASDAQ service.
- A participating market maker will be permitted to enter two-sided or one-sided quotes for one unit of trading (*i.e.,* 100 shares) at a specified price, to designate whether a priced bid or priced offer is firm, to solicit a bid or offer without stipulating a price, or to advertise a general interest in trading a particular security without specifying a price;
- The universe of securities eligible for quotation through the Service will exclude any security authorized for inclusion in the NASDAQ System or listed on a national securities exchange; and
- Separate processors from those supporting the NASDAQ System will

[1] The numeric perfix will differentiate a quotation display for a non-NASDAQ security from a quote display for a NASDAQ security

perform the data processing and storage functions for the Bulletin Board system.

The display of information contemplated by the Bulletin Board service can be demonstrated by the following example.

P 3ABCD	ABC Development Corp.				
BADR	10	F	11	F	800-250-1620
DBCC	10	F	11	F	212-646-1000
WALC	10⅛	F	11		202-898-1000
MATS	9.5	F	11.25		800-909-2100
BAGN	10		13		800-243-6120
BOTE	10½		11½		303-525-4230
RJAA	b.w.				800-126-1423
DANI					641-202-2087

This hypothetical display reflects the trading interests of eight market makers who have elected to participate in the Bulletin Board Service by entering information on the stock of ABC Development Corp., a non-NASDAQ issues. The sequencing of market maker information shown on the screen display is determined by an algorithm incorporated into the system design.[2] For example, market makers BADR and DBCC appear at the top because they have entered two-sided, firm quotes. Market makers WALC and MATS appear next because both have firm bids, but non-firm offers. Because WALC's firm bid is superior in price, WALC is listed a head of MATS.[3] BOTE Ad BAGN follow all market makers displaying a firm bid price because their priced bids are not designated as "firm". However, BAGN ranks ahead of BOTE on the basis of time priority. Finally, RJAA and DANI are listed below all other market makers because neither firm has made a price entry. Multiple firms with unpriced entires in a particular security will be listed by time priority. In this example, RJAA appears ahead of DANI solely because of the former's indication of "bid wanted" ("b.w."). Finally, it should be noted that all firms registering as market makers in non-NASDAQ securities must enter their respective telephone numbers. These will be displayed regardless of whether a firm inserts a priced entery.

[2] The algorithm for ranking the display of market makers' entries will work in the following manner: (i) All two-side firm quotes will be displayed first and ranked in price/time sequence; (ii) all one-sided firm quotes will be desplayed second and ranked in price/time sequence; (iii) all quotations ranked by price will be sequenced according to the bid price; (iv) all non-firm quotations will be displayed after the firm quotes (two-sided and one-sided) and will be sequenced solely on the basis of time; and (v) unpriced entries will appear last, with entries of "bid wanted"/"offer wanted" being displayed ahead of other unpriced entries; multiple unpriced entries will be sequenced on the basis of time.

[3] The priced entries of WALC and MATS illustrate the Service's capacity to accept quotation in fractions or in decimal form.

The NASD's submission of the filing is premised on its ability to ensure within its own systems that displays of Bulletin Board information can be differentiated from market data displays respecting NASDAQ issues. To accomplish this differentiation, the NASD will affix a special identifier to covered securities and assign a special key (*P*) to retrieve information on non-NASDAQ securities included in the Service. The NASD will require vendors to implement comparable procedures as a condition of their receiving Bulletin Board information from the NASD.

Regulatory Issues

The structure of the proposed Service is that of a quotation medium for unlisted securities traded outside the NASDAQ market. Several printed media already exist for the purposes of gathering and disseminating broker-dealers' indications of interest (*i.e.*, quotes and unprice entries) in non-NASDAQ securities. The NASD intends the Bulletin Board Service to be an electronic medium that provides for an intra-day, dynamic display of similar information. Like the printed media, the Bulletin Board Service will be dependent upon the voluntary participation of maket makers and their selection, based upon business considerations, of non-NASDAQ securities in which they choose to indicate trading interest. Given these factors, the NASD's Bulletin Board Service constitutes an additional quotation medium for unlisted securities, not another market center. The NASD regards its operation of the Service as performing the function of a non-exclusive, securities information processor.

On May 2, 1988, the Commission approved an NASD rule proposal, File No. SR-NASD-87-55, designed to intensify surveillance of member firms' trading in non-NASDAQ securities.[4] Initiation of the Bulletin Board Service will not alter the scope or application of the regulatory reporting requirements established by File No. SR-NASD-87-55. On the other hand, market makers participating in the Service will be obliged to consider the impact of such participation in relation to the information maintenance requirements established by Exchange Act Rule 15c2-11.[5] Generally, if a market maker now satisfies the information maintenance requirement of Rule 15c2-11 (which requirement applies on a security-by-security basis), the firm will not incur an additional compliance burden by entering quotes or other indications of interest in the proposed electronic medium However, market makers that now rely upon the so-called "piggyback" exemption to Rule 15c2-11 merit continuation of that exemption to promote their participation in the new Service.[6] Accordingly, upon approval of the instant filing, the NASD requests that the Commission sanction extension of the "piggyback" exemption to any market maker wishing to participate in the Service so long as that market maker is now entitled to invoke the exemption for publication of "quotations" [7] in particular non-NASDAQ securities via an existing quotation medium.[8]

Finally, the NASD notes that Rule 15c2-11(d) requires that a broker dealer proposing to initiate a quote in a non-NASDAQ security pursuant to paragraph (a)(5) (which primarily applies to non-reporting companies), submit a copy of the requisite issuer data to the entity operating the quotation medium. This submission is required at least two days before the broker dealer initiates quotes based upon compliance with the information maintenance requirement set forth in paragraph (a)(5). The NASD understands that this information is shared with the Commission staff for regulatory purposes. To the extent that a broker-dealer has previously supplied this information to support its quote entries (or unpriced indications) in another medium, the NASD requests confirmation that such a firm would not have to make a duplicative filing to initiate quotes in a covered security via the Service. Nonetheless, if a firm has not previously made such a filing and cannot qualify for the "piggyback" exemption, the NASD will provide a

[4] Securities Exchange Act Release No. 34-25637 (May 2, 1988).

[5] 17 CFR 240.15c2-11.

[6] The "piggyback" exemption is found in paragraph (f)(3) of Rule 15c2-11. That provision allows an exception to the Rule's information maintenance requirement if the particular security has been the subject of quotations, in an interdealer quotation system, on each of at least 12 days within the previous 30 calendar days, with no more than 4 business days in succession without a quotation. Unpriced entries "count" for purposes of invoking this exemption only if the interdealer quotation system or medium specifically identifies unsolicited indications of customer interest. Because the Bulletin Board Service is a new quotation medium, it has no quotation history for any eligible security. Therefor, exemptive relief is needed to extend the "piggyback" provision to the initiation of the Service.

[7] Paragraph (e)(3) of Rule 15c2-11 defines "quotation" to include priced entires, indications of interest in receiving a bid of offer, or a broker-dealer's advertising his "general interest in buying or selling a particular security."

[8] Paragraph (h) of Rule 15c2-11 provides ample authority for the Commission to grant the sort of exemptive relief being requested.

form for member firms' submission of paragraph (a)(5) information and develop procedures for supplying the data to the Commission.

Statutory Bases

The NASD cites sections 11A(a)(1) and 15A(b) (6) and (11) of the Act as the statutory bases for the proposed Bulletin Board Service.

Section 11A(a)(1) articulates the Congressional findings and policy goals respecting operational enhancements to the securities markets. Essentially, the Congress found that new data processing and communications techniques should be applied to improve the efficiency of market operations, broaden the distribution of market information, and promote competition among market participants. Implementation of the Bulletin Board Service will allow the market makers in non-NASDAQ securities to enter and update quotation information on a real-time basis. This capability should enhance the efficiency of pricing and foster competition within the inter-dealer market for a particular security. Similarly, order entry firms will have real-time access to the trading interest being displayed by market makers in each covered security. Such access will assist them in negotiating the execution of customer orders at the best available price. Because the Bulletin Board display includes the telephone numbers of participating market makers, this feature should expedite the retail firms' processing of market orders. Assuming the pilot is successful, the NASD envisions expanded access to Bulletin Board information through commercial services offered by vendors. That development will comport with the Congressional goal of broadening the distribution of market information to investors. Accordingly, the NASD believes that the proposed Service is fully consistent with the key provisions of section 11A(a)(1) of the Act.

Additionally, the NASD believes that implementation of the Service is supported by subsections (6) and (11) of Exchange Act section 15A(b). Subsection (6) requires, *inter alia*, that the NASD's rules promote just and equitable principles of trade, facilitate securities transactions, and protect public investors. The design and operational features of the Bulletin Board Service, particularly the on-line data entry and retrieval capabilities, serve to advance each of these statutory goals.

Subsection (11) under Exchange Act section 15A(b) authorizes the NASD to adopt rules governing the form and content of quotations for securities traded over-the-counter. Further, such rules should produce fair and informative quotations, prevent misleading quotations, and promote orderly procedures for collecting and disseminating quotations. Essentially, the Service's design and display features achieve the regulatory purposes contemplated by section 15A(b)(11) of the Act. For example, the preferential ranking of market makers entering two-sided, firm quotes reflects the NASD's effort to display quotation information for non-NASDAQ securities in a fair and informative manner. Similarly, the NASD's commitment to take enforcement action against any market maker who fails to honor quotes designated as "firm" should deter the entry of misleading or fictitious quotations by participating member firms. Therefore, the NASD believes that the display features incorporated into the Service satisfy the regulatory requirements of section 15A(b)(11) under the Act.

In sum, the NASD believes that sections 11A(a)(1) and 15A(b) (6) and (11) of the Act provide ample statutory bases for Commission approval of the Bulletin Board Service.

B. Self-Regulatory Organization's Statement on Burden on Competition

The NASD believes that Commission approval of the Bulletin Board Service, as described herein, will not create any competitive burden. Several factors support this belief. First, member firm participation by registration as a market maker in one or more non-NASDAQ securities is entirely voluntary. Second, registration as a market maker does not entail a minimum commitment as to time or the number of securities in which a firm may register. Third, a participating market maker may continue to insert quotes or indications of interest in the printed media that contain such information on non-NASDAQ securities. Fourth, participating market makers incur no obligation to insert priced entries or to designate a priced bid or offer as "firm".

The NASD views its operation of the Bulletin Board Service as the activity of a non-exclusive processor of securities information. The proposed Service simply provides another medium in which broker-dealers that make markets in non-NASDAQ securities can elect to advertise indications of interest (priced or unpriced). As such, the Bulletin Board Service differs markedly from other NASD systems/services that support the operations of the NASDAQ market. Nonetheless, the NASD acknowledges that some vendors may be interested in distributing applicable portions of Bulletin Board information to their subscribers. Assuming Commission approval of the pilot operation, the NASD will proceed to define the nature and scope of information to be provided to vendors and formulate a cost-based fee for expanded access to real-time data collected from participating market makers and distributed through vendors or the Bulletin Board Service. Simultaneously, the NASD will attempt to work with the vendors to establish reasonable terms of access covering the receipt and delivery of Bulletin Board information to their subscribers.

Finally, during the six-month pilot, the NASD has committed to provide an end-of-day transmission of static quotation information entered by participating market makers to any vendor that produces a printed medium compiling market makers' indications of interest in non-NASDAQ securities. The NASD will not assess a fee for access to this end-of-day information. However, vendors will be required to absorb the costs of developing the computer-to-computer interface needed to receive this transmission.

Accordingly, the NASD believes that no competitive burden will result from the Commission's approval of the Bulletin Board Service for a pilot term of six months.

C. Self-Regulatory Organization's Statement of Comments on the Proposed Rule Change Received From Members, Participants, or Others

Comments were neither solicited nor received on this proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. By order approve such proposed rule change, or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Various rules under the Act and the Securities Act of 1933 use the terms "inter-dealer quotation system" (or some variation thereof) and "automated inter-dealer quotation system." Some of these rules have been construed to

apply only to the NASDAQ System, while others apply also to other inter-dealer quotation media. Based on a review of the rules, the Commission believes that the proposed service should be subject to those rules which apply to all inter-dealer quotation media, but not to those rules which have heretofore been construed to apply only to the NASDAQ System.

Interested persons are invited to submit data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 5th Street NW., Washington, DC 20549. Copies of the submissions, 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 5th Street NW., Washington, DC 20549. Copies of such filings will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to the file number in the caption above and should be submitted by August 23, 1988.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority, 17 CFR 200.30-3(a)(12).

Dated: July 28, 1988.

Jonathan G. Katz,

Secretary.

[FR Doc. 88-17381 Filed 8-1-88; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-25943; File No. SR-PSE-88-13]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change by the Pacific Stock Exchange Incorporated Relating to the Extension of Effectiveness of its Pilot Program for the Appointment and Evaluation of Specialists

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934, ("Act") 15 U.S.C. 78s(b)(1), notice is hereby given that on June 15, 1988 the Pacific Stock Exchange Incorporated ("PSE" or "Exchange") filed with the Securities and Exchange Commission ("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 PSE originally filed its program for the Appointment and Evaluation of Specialists and the Creation of New Specialist Posts ("pilot program") with the Commission on May 4, 1981. In order to adopt the structure of the pilot program as a permanent part of PSE rules, the Board of Governors previously submitted proposed rule filing SR-PSE-87-19.[1] As this request for permanent approval is still pending with the Commission, the PSE is submitting this filing to request that the current temporary structure of the pilot program be extended for an indefinite period in order to enable the PSE to maintain the program while such request for permanent approval is pending and to allow the Commission the time necessary to review the rule filing submitted by the PSE. An indefinite extension is based upon the desire of the PSE to eliminate the need for the Exchange to continually file, and the Commission to process, periodic extension requests.

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 and discussed any comments it received on 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 PSE Program for the Appointment and Evaluation of Specialists and the Creation of New Specialist Posts was originally filed with the Commission on May 4, 1981. The purpose of the pilot has been to establish an effective procedure and criteria for (a) the appointment of new specialists, and (b) the evaluation of the appointment of new specialists, and (c) the evaluation of the performance of PSE specialists. In 1982, 1985, and 1986, the pilot program was amended to provide for changes in the specialist evaluation system. Since its original adoption the program has been renewed on a continual and regular basis.

Prior to the end of the third quarter of 1987, the PSE submitted proposed rule change SR-PSE-87-19 for the purpose of adopting the structure of the pilot program as a permanent part of its rules.

At this time, the PSE is seeking to extend the temporary nature of the pilot program for an indefinite period for the purpose of allowing the Commission the necessary time to process and evaluate the proposed PSE rule change outlined in SR-PSE-87-19 and to allow the program to remain in effect while such proposal is pending.

The proposed rule change is consistent with section 6(b) of the Act in general and section 6(b)(5) in particular, in that it helps to promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in facilitating transactions in securities, remove impediments to, and perfect the mechanics of, a free and open market, and protect investors and the public interest by allowing for an adequate and effective measure of specialist performance.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change imposes no burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

Comments on the proposed rule change were neither solicited nor received by the Exchange.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The PSE requests that the proposed rule change be given accelerated effectiveness pursuant to section 19(b)(2) of the Act. The PSE believes that the continued maintenance of its current pilot program will be consistent with the obligations of the Exchange as prescribed in the Act, particularly section 6, and the rules and regulations thereunder. In addition, the PSE's request for accelerated effectiveness of this filing is based on the desire to maintain the currently existing program as previously approved by the Commission.

[1] *See* Securities Exchange Act Rel. No. 24800 (August 14, 1987) 52 FR 32372.

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 submissions, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communication 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 20549. Copies of such filing will also be available for inspection and copying at the principal offices of the PSE. All submissions should refer to the file number in the caption above and should be submitted by August 23, 1988.

V. Conclusion

The Commission finds that the proposed rule change is 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. In this regard, we note that the extension of the pilot furthers the protection of investors and the public interest because it allows for the continued evaluation of specialist performance while the Commission considers the Exchange's request for permanent approval.

The Commission finds good cause for approving the proposed rule change prior to the thirtieth day after the date of publication of notice thereof in that the Commission believes it is appropriate to permit the program to remain in effect while the Commission considers the Exchange's proposal to approve the pilot program on a permanent basis. Further, the Commission has not received any comments on previous PSE proposed rule changes to extend the pilot program. The Commisison believes, therefore, that accelerated effectiveness of the extension of the pilot program is appropriate.

IT IS THEREFORE ORDERED, pursuant to section 19(b)(2) of the Act that the proposed rule change be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[2]

Dated: July 26, 1988.

Jonathan G. Katz,

Secretary.

[FR Doc. 88-17382 Filed 8-1-88; 8:45 am]

BILLING CODE 8010-01-M

[Release No. IC-16501; 811-4762]

Corporate Cash Management Plus Fund Inc.; Application for Deregistration

July 27, 1988.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of Application for Deregistration under the Investment Company Act of 1940 (the "1940 Act").

Applicant: Corporate Cash Management Plus Fund Inc. ("Applicant").

Relevant 1940 Act Section: Section 8(f).

Summary of Application: Applicant seeks an order declaring that it has ceased to be an investment company under the 1940 Act.

FILING DATES: The application on Form N-8F was filed on November 17, 1987, and an amendment was filed on July 22, 1988.

Hearing or Notification of Hearing: If no hearing is ordered, the application will be granted. Any interested person may request a hearing on this application, or ask to be notified if a hearing is ordered. Any requests must be received by the SEC by 5:30 p.m. on August 22, 1988. 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, for lawyers, by certificate. Request notification of the date of a hearing by writing to the Secretary of the SEC.

ADDRESSES: Secretary, SEC, 450 5th Street NW., Washington, DC 20549. Applicant, One First National Plaza, Dayton, Ohio 45402.

FOR FURTHER INFORMATION CONTACT: Staff Attorney Regina Hamilton, (202) 272-2856, or Special Counsel H.R. Hallock, Jr., (202) 272-3030 (Office of Investment Company Regulation).

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) 258-4300).

Applicant's Representations

1. Applicant, a Maryland corporation and open-end diversified management investment company under the 1940 Act, filed a registration statement under the 1940 Act on Form N-1A on July 23, 1986. The registration statement became effective on October 23, 1986. Applicant also registered under the Securities Act of 1933 an indefinite number of shares of common stock pursuant to Rule 24f-2 of the 1940 Act. Applicant's initial public offering was on November 1, 1986.

2. On July 14, 1987, the Board of Directors of the Applicant authorized the sale of Applicant's net assets to Corporate Cash Management Fund Inc. ("CCM"), a registered series investment company. On July 15, 1987, Applicant executed and delivered to CCM an Agreement and Plan of Reorganization which provided for the sale of Applicant's assets in exchange for shares of Corporate Cash Management Plus Fund Portfolio Stock ("Portfolio Stock"), a new series of CCM with no shares outstanding prior to the sale of assets. Applicant's stockholders received the same number of Portfolio Stock shares as the number of shares of Applicant's stock outstanding on the last business day prior to the closing date. The Applicant's net assets were transferred to CCM on October 15, 1987, in exchange for 246,623,514 shares of Portfolio Stock, on the basis of net asset value per share of the Applicant's shares as determined the preceding business day.

3. As of the date of the sale, the Applicant had outstanding 246,623,514 shares of common stock, with a net asset value of $46.44 per share and net assets of $11,454,286.75.

4. Stockholders received a proxy statement and meeting notice mailed on August 27, 1987. At the stockholder's meeting held on October 15, 1987, 160,745,560 shares (69.746% of the shares authorized to vote) approved the sale of assets. No further stockholder action was required under Maryland law to consummate the transaction and dissolve the Applicant.

5. As of the time of filing the application, Applicant had no security holders. No assets have been retained by Applicant and no liabilities remain outstanding. Applicant is not a party to any litigation or administrative proceedings. It is not presently engaged in, nor does it propose to engage in, any business activities other than those

[2] 17 CFR 200.30-3.

necessary for the winding up of its affairs.

6. Applicant filed Articles of Dissolution with the State of Maryland on October 15, 1987, and has dissolved.

For the Commission, by the Division of Investment Management, under delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 88-17380 Filed 8-1-88; 8:45 am]

BILLING CODE 8010-01-M

SMALL BUSINESS ADMINISTRATION

Reporting and Recordkeeping Requirements Under OMB Review

ACTION: Notice of Reporting Requirements Submitted for Review.

SUMMARY: Under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35), agencies are required to submit proposed reporting and recordkeeping requirements to OMB for review and approval, and to publish a notice in the **Federal Register** Notifying the public that the agency has made such a submission.

DATE: Comments should be submitted by September 1, 1988. If you intend to comment but cannot prepare comments promptly, please advise the OMB Reviewer and the Agency Clearance Officer before the deadline.

Copies: Request for clearance (S.F. 83), supporting statement, and other documents submitted to OMB for review may be obtained from the Agency Clearance Officer. Submit comments to the Agency Clearance Officer and the OMB Reviewer.

FOR FURTHER INFORMATION CONTACT:

Agency Clearance Officer: William Cline, Small Business Administration, 1441 L Street NW., Room 200, Washington, DC 20416, Telephone: (202) 653-8538.

OMB Reviewer: Robert Neal, Office of Information and Regulatory Affair, Office of Management and Budget, New Executive Office Building, Washington, DC 20503, Telephone: (202) 395-7340.

Title: SBA Grants Management Reporting and Recordkeeping Requirements.

Form Nos.: SBA Form 1222, 1223, 1224.

Frequency: On occasion.

Description of Respondents: SBA requires the recipients of Federal dollars to report both programmatic and financial status for prudent monitoring by Federal officials.

Annual Responses: 2,000.

Annual Burden Hours: 10,500.

Title: Prebusiness Workshop Evaluation.

Form Nos.: SBA Form 1591.

Frequency: On occasion.

Description of Respondents: This information is obtained from clients attending prebusiness workshops. Information is needed to monitor and measure the quality of the workshops.

Annual Responses: 40,000.

Annual Burden hours: 10,000.

Title: Score Counseling Evaluation.

Form Nos.: SBA Form 1551.

Frequency: On occasion.

Description of Respondents: This information is obtained from clients obtaining score counseling. Information is needed to monitor and measure the quality of the counseling.

Annual Response: 50,000.

Annual Burden Hours: 8,333.

William Cline,

Chief, Administrative Information Branch.

[FR Doc. 88-17308 Filed 8-1-88; 8:45 am]

BILLING CODE 8025-01-M

Action Subject to Intergovernmental Review

AGENCY: Small Business Administration.

ACTION: Notice of Action Subject to Intergovernmental Review Under Executive Order 12372.

SUMMARY: This notice provides for public awareness of SBA's intention to refund twenty-eight presently existent Small Business Development Centers (SBDCs) on January 1, 1989. Currently, there are 52 SBDCs operating in the SBDC program. The following SBDCs are intended to be refunded, subject to the availability of funds: Arizona, Arkansas, Colorado, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Maine, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Washington, and Wisconsin. This notice also provides a description of the SBDC program by settting forth a condensed version of the program announcement which has been furnished to each of the SBDCs to be refunded. This publication is being made to provide the State single points of contact, designated pursuant to Executive Order 12372, and other interested State and local entities, the opportunity to comment on the proposed refunding in accord with the Executive Order and SBA's regulations found at 13 CFR Part 135.

DATE: Comments will be accepted through October 31, 1988.

ADDRESS: Comments should be addressed to Ms. Janice E. Wolfe, Deputy Associate Administrator for SBDC Programs, U.S. Small Business Administration, 1441 L Street, NW., Washington, DC 20416.

FOR FURTHER INFORMATION CONTACT: Same as above.

SBA is bound by the provisions of Executive Order 12372, "Intergovernmental Review of Federal Programs." SBA has pro-mulgated regulations spelling out its obligations under that Executive Order. See 13 CFR Part 135, effective September 30, 1983.

In accord with these regulations, specifically § 135.4, SBA is publishing this notice to provide public awareness of the pending application of twenty-eight presently existent Small Business Development Centers (SBDCs) for refunding. Also, published herewith is an annotated program announcement describing the SBDC program in detail.

This notice is being published four months in advance of the expected date of refunding these SBDCs. Relevant information identifying these SBDCs and providing their mailing address is provided below. In addition to this publication, a copy of this notice is being simultaneously furnished to the affected State single point of contact which has been established under the Executive Order.

The State single points of contact and other interested State and local entities are expected to advise the relevant SBDC of their comments regarding the proposed refunding in writing as soon as possible. The SBDC proposal cannot be inconsistent with any area-wide plan providing assistance to small business, if there is one, which has been adopted by an agency recognized by the State government as authorized to do so. Copies of such written comments should also be furnished to Ms. Janice E. Wolfe, Deputy Associate Administrator for SBDC Programs, U.S. Small Business Administration, 1441 L Street NW., Washington, DC 20416. Comments will be accepted by the relevant SBDC and SBA for a period of 120 Days from the date of publication of this notice. The relevant SBDC will make every effort to accommodate these comments during the 120-day period. If the comments cannot be accommodated by the relevant SBDC, SBA will, prior to refunding the SBDC, either attain accommodation of any comments or furnish an explanation of why accommodation cannot be attained to the commentor prior to refunding the SBDC.

Description of the SBDC Program

The Small Business Development Center (SBDC) Program is a Business Development program of the U.S. Small Business Administration (SBA). The SBDC operates under the general management and oversight of SBA, but with recognition that a partnrship exists between the Agency and the SBDC for the delivery of assistance to the small business community. SBDC services shall be provided pursuant to a negotiated Cooperative Agreement with full participation of both parties.

SBDCs operate on the basis of a state plan to provide assistance within a state or designated geographical area. The initial plan must have the written approval of the Governor. As a condition to any financial award made to an applicant, non-Federal funds must be provided from sources other than the Federal Government. SBDCs operate under the provisions of Pub. L. 96–302, as amended by Pub. L. 98–395, a Notice of Award (Cooperative Agreement) issued by SBA, and the provisions of this Program Announcement.

Purpose and Scope

The SBDC Program is designed to provide quality assistance to small businesses in order to promote growth, expansion, innovation, increased productivity and management improvement. To accomplish these objectives, SBDCs link resources of the Federal State, and local governments with the resources of the educational system and the private sector to meet the specialized and complex needs of the small business community. SBDCs also coordinate with other SBA programs of business development and utilize the expertise of these affiliated resources to expand services and avoid duplication of effort.

Program Objectives

The overall objective of the SBDC Program is to leverage Federal dollars and resources with those of the state, academic community and private sector to:

(a) Strengthen the small business community;

(b) Contribute to the economic growth of the communities served;

(c) Makes assistance available to more small businesses than is now possible with present Federal resources;

(d) Create a broader based delivery system to the small business community.

SBDC Program Organization:

SBDCs are organized to provide maximum services to the local small business community. The lead SBDC receives financial assistance from SBA to operate a statewide SBDC Program. In states where more than one organization receives SBA financial assistance to operate an SBDC, each lead SBDC is responsible for program operations throughout a specific regional area to be served by the SBDC. The lead SBDC is responsible for establishing a network of SBDC subcenters to offer service coverage to the small business community. The SBDC network is managed and directed by a full-time Director. SBDCs must ensure that at least 80 percent of Federal funds provided are used to provide services to small businesses. To the extent possible, SBDCs provide services by enlisting volunteer and other low cost resources on a statewide basis.

SBDC Services

The specific types of services to be offered are developed in coordination with the SBA district office which has jurisdiction over a given SBDC. SBDCs emphasize the provision of indepth, high-quality assistance to small business owners or prospective small business owners in complex areas that require specialized expertise.

These areas may include, but are not limited to: Management, marketing, financing, accounting, strategic planning, regulation and taxation, capital formation, procurement assistance, human resource management, production, operations, economic and business data analysis, engineering, technology transfer, innovation and research, new product development, product analysis, plant layout and design, agri-business, computer application, business law information, and referral (any legal services beyond basic legal information and referral require the endorsement of the State Bar Association,) exporting, office automation, site selection, or any other areas of assistance required to promote small business growth, expansion, and productivity within the State. The SBDC shall also ensure that a full range of business development and technical assistance services are made available to small businesses located in rural areas.

The degree to which SBDC resources are directed towards specific areas of assistance is determined by local community needs, SBA priorities and SBDC Program objectives and agreed upon by the SBA district office and SBDC.

The SBDC must offer quality training to improve the skills and knowledge of existing and prospective small business owners. As general guideline, SBDCs should emphasize the provision of training in specialized areas other than basic small business management subjects. SBDCs should also emphasize training designed to reach particular audiences such as members of SBA priority and special emphasis groups.

SBDC Program Requirements

The SBDC is responsible to the SBA for ensuring that all programmatic and financial requirements imposed upon them by statute or agreement are met. The SBDC must assure that quality assistance and training in management and technical areas are provided to the State small business community through the State SBDC network. As a condition of this agreement, the SBDC must perform, but not be limited to, the following activities:

(a) The SBDC ensures that services are provided as close as possible to small business population centers. This is accomplished through the establishment of SBDC subcenters.

(b) The SBDC ensures that lists of local and regional private consultants are maintained at the lead SBDC and each SBDC subcenter. The SBDC utilizes and provides compensation to qualified small business vendors such as private management consultants, private consulting engineers, and private testing laboratories.

(c) The SBDC is responsible for the development and expansion of resource within the State, particulary the development of new resources to assist small business that are not presently associated with the SBA district office.

(d) The SBDC ensures that working relationships and open communications exist within the financial and investment communities, and with legal associations, private consultants, as well as small business groups and associations to help address the needs of the small business community.

(e) The SBDC ensures that assistance is provided to SBA special emphasis groups throughout the SBDC network. This assistance shall be provided to veterans, women, exporters, the handicapped, and minorities as well as any other groups designated a priority by SBA. Services provided to special emphasis groups shall be performed as part of the Cooperative Agreement.

Advance Understandings

The Lead SBDC and all SBDC subcenters shall operate on a forty (40) hour week basis, or during the normal business hours of the State or Host Organization, throughout the calendar year. The amount of time allowed the Lead SBDC and subcenters for staff vacations and holidays shall conform to the policy of the Host organization.

Dated: July 26, 1988.

James Abdnor,

Administrator.

Addresses of Relevant SBDC Directors

Mr. Bill Dewey, Acting State Director, Gateway Community College, 108 North 40th Street Phoneix, AZ 85034 (602) 392–5224

Mr. Paul McGinnis, State Director, University of Arkansas, 100 South Main, Suite 401, Little Rock, AR 72201 (501) 371–5381

Dr. Richard E. Wilson, State Director, Colorado Community College, 600 Grant Street, Suite 505, Denver, CO 80203 (303) 894–2422

Ms. Nancy Flake, State Director, Howard University, 6th and Fairmount Street NW., Room 128 Washington, DC 20059 (202) 636–5150

Mr. Gregory Higgins, State Director, University of West Florida, Building 38, Pensacola, FL 32514 (904) 474-3016

Dr. Frank Hoy, State Director, University of Georgia, Chicopee Complex, Athens, GA 30602 (404) 542–5760

Mr. Ronald Hall, State Director, Boise State University, 1910 University Drive Boise, ID 83725 (208) 385–1640

Mr. Jeff Mitchell, State Director, Dept. of Commerce & Community Affairs, 620 East Adams Street, Springfield, IL 62701 (217) 524–5856

Mr. Steve Thrash, State Director, Indiana Economic Development Council, One North Capitol, Suite 200, Indianapolis, IN 46204 (317) 634–1690

Ms. Cynthia Friend, Acting State Director, Wichita State University, Campus Box 48, 021 Clinton Hall, Wichita, KS 67208 (316) 689–3193

Mr. Robert Hird, State Director, University of Southern Main, 246 Deering Avenue, Portland, ME 04102 (207) 780–4423

Mr. Jerry Cartwright, State Director, College of St. Thomas, 1107 Hazeltine Gates Blvd., Suite 452, Chaska, MN 55318 (612) 448–8810

Ms. Carol Daly, Acting State Director, Montana Department of Commerce, 1424 Ninth Avenue, Helena, MT 59620 (406) 444–3923

Mr. Robert Bernie, State Director, University of Nebraska/Omaha, Peter Kiewit Center, Omaha, NE 68182 (402) 554–2521

Mr. Samuel Males, State Director, University of Nevada/Reno, College of Business Admin., Reno, NV 89557–0016 (702) 784–1717

Mr. James Bean, State Director, University of New Hampshire, 370 Commercial Street, Manchester, NH 03103 (603) 625–4522

Ms. Janet Holloway State Director, Rutgers University, Ackerson Hall, 3rd Floor, 180 University Street, Newark, NJ 07102 (201) 648–5950

Mr. Scott Daugherty, State Director, Unversity of North Carolina, 820 Clay Street, Raleigh, NC 27605 (919) 733–4643

Mr. Herb Manning, Acting State Director, SE Oklahoma State University, Station A, Box 4194, Durant, Oklahoma 74701 (405) 924–0277

Mr. Sandy Cutler, State Director Lane Community College, 1059 Willamette Street, Eugene, OR 97401 (503) 726–2250

Ms. Judith Fox, Acting State Director, University of Pennsylvania, The Wharton School, 3201 Steinberg-Dietrich Hall/CC, Philadelphia, PA 19104 (215) 898–1219

Mr. Douglas Jobling, State Director, Bryant College, Smithfield, RI 02917 (401) 232–6111

Mr. William Littlejohn, State Director, University of South Carolina, College of Business Admin., Columbia, SC 29208 (803) 777–4907

Mr. Donald Greenfiled, State Director, University of South Dakota, 414 East Clark, Vermillion, SD 57069 (605) 677–5272

Dr Leonard Rosser, State Director, Memphis State University, Memphis, TN 38152 (901) 454–2500

Mr. Kumen Davis, State Director, University of Utah, 660 South 200 East, Suite 418, Salt Lake City, UT 84111 (801) 581–7905

Mr. Lyle Anderson, State Anderson, State Director, Washington State University, College of Business and Economics, Pullman, WA 99164 (509) 335–1576

Dr. Peggy Wireman, State Director, University of Wisconsin, 602 State Street, Second Floor, Madison, WI 53703 (608) 263–7794.

[FR Doc. 88–17307 Filed 8–1–88; 8:45 am]

BILLING CODE 8025–01–M

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Privacy Act of 1974; General Air Transportation Records on Individuals

The Department of Transportation herewith publishes a notice proposing to add three new routine uses and make editorial changes to update the existing Privacy Act System of Records, DOT/FAA 847, General Air Transportation Records on Individuals.

Any person or agency may submit written comments on the proposed system to the Privacy Officer (M–34) Room 7109, U.S. Department of Transportation, 400 Seventh Street SW., Washington, DC 20590. Comments must be received within 30 days from date this notice is issued to be considered.

If no comments are received, the proposed changes will become effective 60 days from the date of issuance. If comments are received, the comments will be considered and where adopted, the document will be republished with the changes.

Issued in Washington, DC July 22, 1988.

Jon H. Seymour,

Assistant Secretary for Administration.

Narrative Statement for the Department of Transportation Federal Aviation Administration

Explanation of Change:

The Federal Aviation Administration (FAA) proposes to revise the existing system of records, General Air Transportation Records on Individuals, DOT/FAA 847, to add three additional routine uses and make editorial changes to the rest of the system description.

One routine use, (a), has been added to permit the disclosure of basic certification information to the public upon request. Basic information about certificated airmen has historically been provided by the Aeronautical Center systems managers of DOT/FAA 847, General Air Transportation Records on Individuals. Such information is either given directly to public requesters or to FAA public affairs officers and other FAA employees who, in turn, release it to the media and other requesters. The information released pertains only to certificates, ratings, privileges, limitations, and other such information which historically has been considered in the public domain. Information which, if released, might constitute an unwarranted invasion of privacy (e.g., social security numbers, dates of birth, test score results, pending enforcement actions, etc.) is never released unless required or authorized by some other provision of law.

The second routine use, (b), has been added to make necessary records available to the National Transportation Safety Board (NTSB) for accident investigation purposes. The NTSB investigates civil aircraft accidents to determine and report publicly, the facts, conditions, and circumstances relating to each accident and the probable cause thereof. Currently, authorized representatives of NTSB have the explicit statutory authority to "inspect, at reasonable times, records, files, papers, processes, controls, and facilities relevant to the investigation

* * *." (49 U.S.C. section 1903(b)(2)). When the performance of an airman or air traffic controller may have been a factor in an accident, NTSB should have access to medical records in the possession of the FAA. Such access is proper and necessary to the NTSB's investigation so that a determination can be made whether any medical, physiological, or psychological conditions may have been causal or contributory to the accident. Also, a determination by the NTSB that there were no such contributory factors is an important aspect of focusing on the probable cause. NTSB's use of medical data in this fashion will be consistent and compatible with the reasons for which the data are obtained.

A third routine use, (c), has been added to permit disclosure of necessary information about airmen to Federal, state, and local law enforcement agencies when those entities are engaged in the investigation or apprehension of drug law violators. This provision is considered compatible with the purpose for which these airman records are maintained in view of the recently-added Section 609(c)(1) of the Federal Aviation Act of 1958 (49 U.S.C. 1429(c)(1)). That section essentially mandates that the Administrator shall revoke the certificate of any airman who is convicted of a crime under Federal or state law relating to controlled substances, if the Administrator determines that: (1) An aircraft was used in the commission of the offense, and (2) the individual served as an airman, or was on board the aircraft, in connection with the commission of the crime. Since this 1984 amendment has now introduced drug-related offenses as the basis for the revocation of airmen certificates, we believe that disclosure of airmen registry information is appropriate when it can be established that the law enforcement agency requesting it is engaged in a drug-related investigation or enforcement effort.

Other routine uses will undergo changes. Six of the routine uses currently listed are strictly for internal use covered under 5 U.S.C. 552a(b)(1) and are not considered routine uses. These will be taken out of the routine use section. One of the routine uses listed duplicates one listed in the Department of Transportation prefatory statement of routine uses and as such need not be listed again. It will be removed. The remaining routine uses will be rewritten for clarification.

The following statements, which are written in compliance with the terms of the Office of Management and Budget (OMB) Circular A–130, Appendix 1, entitled "Federal Agency Responsibilities for Maintaining Records About Individuals," (50 Federal Register 52738 (1985)), describe the revised system.

1. *Purpose of system.* The General Air Transportation Records on Individuals, DOT/FAA 847, contains a broad range of information, including information used for issuance of airmen certificates, and on individuals against whom enforcement action has been taken, plus accident/incident and medical records information.

2. *Authority under which the system is maintained.* 5 U.S.C. 301, 49 U.S.C. 1341(a), 49 U.S.C. 1429.

3. *Effect on individual rights.* The information in this system is used in accordance with the purpose for which it was collected and in accordance with the stated routine uses. It is not expected to cause any harmful effects on individual privacy or property rights.

4. *Relationship to government agencies.* Information in the system will be provided to Federal, state, local, and foreign governments and the NTSB with a legitimate need to conduct investigations and carry out other safety related activities.

5. *Security.* Personal information in this system of records is processed in both hard copy and digital environments. Applicable safeguards for each have been established.

6. *Compatibility of routine uses with the purposes for which the records were collected.* Three new routine uses have been added to this system of records. In accordance with these new routine uses, information will be released as follows:

a. To the public requesting basic certification information such as airmen certificates, ratings, privileges, and limitations.

b. To NTSB to be used for accident investigation purposes.

c. To Federal, state, and local law enforcement agencies needing necessary information about airmen for the investigation or apprehension of drug law violators.

7. *OMB Control Numbers.* The following OMB control numbers apply as follows:

2120–0007, Flight Engineers and Flight Navigators
2120–0021, Certification: Pilots and Flight Instructors
2120–0022, Certification: Mechanics, Repairmen, Parachute Riggers
2120–0025, Crewmember Certificate Application
2120–0033, Representatives of the Administrator
2120–0034, Medical Standards and Certification

DOT/FAA 847

SYSTEM NAME:

General Air Transportation Records on Individuals, DOT/FAA.

SYSTEM LOCATION:

Records are maintained primarily at:
Department of Transportation (DOT)
Federal Aviation Administration (FAA), Mike Monroney Aeronautical Center, Oklahoma City, Oklahoma 73125

Portions of these records are located in:
U.S. Department of Transportation
Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591
General Aviation District Offices (GADO's)
Flight Standards District Offices (FSDO's)
Air Carrier District Offices (ACDO's)
International Field Offices
Civil Aviation Security Field Offices (CASFO's)
FAA regional offices
(Contact your nearest FAA office for location)

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Current certificated airmen, airmen whose certificates have expired, airmen who are deceased, airmen rejected for medical certification, airmen with special certification, and others requiring medical certification.

Air traffic controllers in air route traffic control centers, terminals, and flight service stations and applicants for these positions.

Holders of and applicants for airmen certificates, airmen seeking additional certifications or additional ratings, individuals denied certification, airmen holding inactive certificates, airmen who have had certificates revoked, and airmen and flight attendants engaged in international air transportation.

Persons who are involved in aircraft accidents or incidents; pilots, crew members, passengers, persons on the ground, and witnesses.

Individuals against whom the Federal Aviation Administration has initiated administrative action or legal enforcement action for violation of certain Federal Aviation Regulations (FAR) or Department of Transportation Hazardous Materials Regulations (HMR).

CATEGORIES OF RECORDS IN THE SYTEM:

All categories of records include identifying information such as name(s), date of birth, place of residence, mailing address, social security number, airman

certificate number, and home telephone number. Records in this system are:

Records that are required to determine the physical condition of an individual with respect to the medical standards established by FAA.

Records concerning applications for certification, applications for written examinations, results of written tests, applications for inspection authority, certificates held, ratings, stop orders, and requests for duplicate certificates.

Reports of fatal accidents, autopsies, toxicological studies, aviation medical examiner reports, medical record printouts, nonfatal reports, injury reports, accident name cards, magnetic tape records of fatal accidents, physiological autopsy, and consulting pathologist's summary of findings.

Records of accident investigations, preliminary notices of accident injury reports, engineering analyses, witness statements, investigators' analyses, pictures of accident scenes.

Records concerning safety compliance notices, letters of warning, letters of correction, letters of investigation, letters of proposed legal enforcement action, final action legal documents in enforcement actions, correspondence of Regional Counsels, Office of Chief Counsel, and others in enforcement cases.

PURPOSE:

General Air Transportation Records on Individuals are the official repository of records, documents, and papers required in connection with the issuance of airmen certificates by the Federal Aviation Administration. Basic information in this file concerning the qualifications of airmen has traditionally been regarded as available to the public upon request. Examples of basic information about these individuals include the type of certificates and ratings held, the date and class of latest physical, pilot's license number, and information relating to the status of the airmen's certificate; that is, whether it is current or has been suspended or revoked for any reason.

The file also serves as a repository for legal documents that relate to an individual's physical status or condition used to determine statistically the validity of FAA medical standards. These files are used to provide information for determining eligibility for airmen medical certification, for review of requests for exemption from medical requirements, and for review of certificate denials. Also, the information in the system is used to inform airmen of meetings and seminars conducted by the FAA regarding aviation safety.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

These records and information in these records may be used:

a. To provide basic airmen certification and qualification information to the public upon request.

b. To disclose information to the National Transportation Safety Board (NTSB) in connection with its investigation responsibilities.

c. To provide information about airmen to Federal, state, and local law enforcement agencies when engaged in the investigation and apprehension of drug law violators.

d. To provide information about enforcement actions arising out of violations of the Federal Aviation Regulations to government agencies, the aviation industry, and the public upon request.

e. To disclose information to another Federal agency, or to a court or an administrative tribunal, when the Government or one of its agencies is a party to a judicial proceeding before the court or involved in administrative proceedings before the tribunal.

f. See Prefatory Statement of General Routine Uses.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

DISCLOSURES PURSUANT TO 5 U.S.C. 552A(B)(12):

Disclosures may be made from these systems to 'consumer reporting agencies' (collecting on behalf of the U.S. Government) as defined in the Fair Credit Reporting Act (15 U.S.C. 1681a(f)) or the Federal Claims Collection Act of 1982 (31 U.S.C. 3701(a)(3)) and to debt collection agencies as defined by inference in the Federal Collection Act of 1966 (31 U.S.C. 3711(f)(1)) as amended.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

These records are maintained in file folders, on lists and forms, and in computer processable storage media. Records are also stored on microfiche and roll microfilm.

RETRIEVABILITY:

These records are retrieved by various combinations of name, birth date, social security account number, airman certificate number, or other identification number of the individual on whom the records are maintained. Records are also indexed by sex. Records are also filed by accident number and/or incident number, and administrative action or legal enforcement numbers.

SAFEGUARDS:

Personal information in this system of records is processed in both hard copy and digital environments. Applicable safeguards for each are described in the following subparagraphs:

Manual records: Strict information handling procedures have been developed to cover the use, transmission, storage, and destination of personal data in hard copy form. These are periodically reviewed for compliance.

Automated Processing (FAA Systems): Computer processing of personal information is conducted within established FAA computer security regulations. A risk assessment of the FAA computer facility used to process this system of records has been accomplished.

Automated Processing (Commercial Time Sharing Contractor): A limited amount of personal information covered by this system of records will be processed at a commercial facility. This data is of low sensitivity to disclosure. A comprehensive security review of the contractor installation was accomplished by the FAA security organization. Computer programs operated on commercial time share systems that contain data on individuals have multiple security levels and record element restrictions to prevent release data to unauthorized parties.

RETENTION AND DISPOSAL:

All records and files are retained and/or disposed of in accordance with the provisions of Order 1350.15B, Records Organization, Transfer, and Destruction Standards.

SYSTEM MANAGER(S) AND ADDRESS:

Records Concerning Aviation Medical Certification: Manager, Aeromedical Certification Branch, Mike Monroney Aeronautical Center, 6500 South MacArthur, Oklahoma City, Oklahoma 73125

Records From Regional Files: Regional Flight Surgeon within the region where examination was conducted.

FAA Certification Records and General Airmen Records: Manager, Airmen Certification Branch, Mike Monroney Aeronautical Center, 6500 South MacArthur, Oklahoma City, Oklahoma 73125. Requests for assistance may be made to the originating district office.

Records Concerning General Aviation Accidents and Incidents and Air Carrier Incidents: Aviation Standards National

Field Office, Attn: Manager, National Safety Data Branch, Mike Monroney Aeronautical Center, 6500 South MacArthur, Oklahoma City, Oklahoma 73125.

Records Concerning Administrative and Legal Enforcement Action:

FAA Enforcement Information System Data Bases for Administrative and Legal Enforcement Actions: Aviation Standards National Field Office, Attn: Manager, National Safety Data Branch, AVN–120, Mike Monroney Aeronautical Center, 6500 South MacArthur, Oklahoma City, Oklahoma 73125.

Official FAA Enforcement Files: The Office of the Chief Counsel, the Office of the Regional Counsel, or the investigating FAA field office, as appropriate. (The address of the appropriate FAA legal or field office maintaining the official agency enforcement file may be obtained from AVN–120.)

(Visit or call the local FAA office in the area in which you reside for any proper address not specifically listed above).

NOTIFICATION PROCEDURE:

Individuals wishing to know if their records appear on this system of records may inquire in person, or in writing, to the system manager.

RECORD ACCESS PROCEDURE:

Individuals who desire access to information about themselves in this system of records should contact or address their inquiries to the system manager.

CONTESTING RECORD PROCEDURES:

Individuals who desire to contest information about themselves contained in this system of records should contact or address their inquiries to the Associate Administrator for Administration or his delegate at the following address: Department of Transportation, Federal Aviation Administration, Associate Administrator for Administration, AAD–1, 800 Independence Avenue SW., Washington, DC 20591.

RECORD SOURCE CATEGORIES:

Medical Information: Information is obtained from Aviation Medical Examiners, individuals themselves, consultants, hospitals, treating or examining physicians, and other Government agencies.

Airmen Certification Records: information is obtained from the individual to whom the records pertain, FAA aviation safety inspectors, and FAA designated representatives. Written test scores are derived from answers given by individuals. Actions filed by FAA personnel.

General Aviation Accident/Incident Records and Air Carrier Incident Records: Information is obtained from Aviation Medical Examiners, pathologists, accident investigations, medical laboratories, law enforcement officials, and FAA employees. Data is also collected from manufacturers of aircraft, and involved passengers.

Administrative Action and Legal Enforcement Records: Information is obtained from witnesses, Regional Counsels, the National Transportation Safety Bord, Civil Aviation Security personnel, Flight Standards personnel, Aeronautical Center personnel, and the Office of Chief Counsel.

SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

Consistent with the provisions of Section (j)(2) and (k)(2) of the Privacy Act, records in this system which relate to administrative actions and legal enforcement may be exempted from certain access and disclosure requirements of the Act.

[FR Doc. 88–17347 Filed 8–1–88; 8:45 am]

BILLING CODE 4910–62–M

Federal Highway Administration

National Motor Carrier Advisory Committee; Public Meeting

AGENCY: Federal Highway Administration (PHWA), DOT.

ACTION: Notice of public meeting.

SUMMARY: The FHWA announces that the Safety subcommittee of the National Motor Carrier Advisory Committee will hold a meeting on August 10, 1988, in Washington, DC, at the U.S. Department of Transportation headquarters building, 400 7th Street SW., Washington, DC. The meeting will being at 9:00 a.m. and will be held in Room 4200. This meeting is open to the public.

The agenda of the subcommittee for this meeting will include issues raised in the Federal Highway Administration's (FHWA) recently published notice of proposed rulemaking (NPRM) which proposed mandatory chemical testing of interstate or foreign commerce drivers for the use of drugs. 53 FR 22268 (June 14, 1988).

The FHWA's NRPM proposed to require motor carriers to establish programs to test drivers for the use of drugs. These programs would consist of five types of testing: pre-employment, periodic (biennial), post-accident, reasonable cause, and random drug testing. The testing procedures to be used would protect individual privacy, ensure accountability and integrity of specimens, require confirmation of all positive screening tests, mandate the use of laboratories operating within the guidelines established by the U.S. Department of Health and Human Services, provide confidentiality for test results and medical histories, and ensure nondiscriminatory testing methods. The FHWA further proposed that all motor carriers be required to establish effective drug abuse prevention programs. Finally, the NPRM proposed four different options concerning the circumstances under which employees would be given the opportunity to seek rehabilitation.

Comments to the FHWA's NPRM must be received on or before September 12, 1988. As part of this rulemaking process, the FHWA has decided to hold a series of public hearings. See 53 FR 25353 (July 6, 1988). The last scheduled hearing will be held on August 9, 1988, in Washington, DC.

FOR FURTHER INFORMATION CONTACT: Mr. Joseph S. Toole, Executive Director, National Motor Carrier Advisory Committee, Federal Highway Administration, HOA–1, Room 4218, 400 7th Street, SW., Washington, DC 20590, (202) 366–2238. Office hours are from 7:45 a.m. to 4:15 p.m., ET, Monday through Friday, except legal holidays.

Issued on: July 26, 1988.

R.D. Morgan,

Executive Director.

[FR Doc. 88–17346 Filed 8–1–88; 8:45 am]

BILLING CODE 4910–22–M

Federal Railroad Administration

Petitions for Approval and Exemptions

In accordance with 49 CFR 211.9, 211.41 and 211.55, notice is hereby given that the Federal Railroad Administration (FRA) has received a request for a special approval and requests for exemptions from compliance with certain requirements of its safety standards. The individual petitions are described below, including the party seeking relief, the regulatory provisions involved, and the nature of the relief being requested.

The individual petitions seeking an approval or exemption are as follows:

National Railroad Passenger Corporation

[*General Docket Number RST–88–1*]

The National Railroad Passenger Corporation (Amtrak) has submitted a request for a special approval under 49 CFR 213.9(c), which states in part,

"Maximum operating speed may not exceed 110 mph without prior approval of the Federal Railroad Administrator." Amtrak requests approval to operate converted Capitoliner passenger cars in a push-pull mode at 125 mph between Washington, DC and New York City, New York. The Capitoliner cars were converted from multiple-unit (MU) Metroliner motive powered cars to non-motive powered cars with an operating cab at one end. The propelling motors have been removed; however, the pantographs will be utilized to draw power from the overhead catenary wire for the electrically operated equipment for each individual car. This conversion makes it possible for Amtrak to operate Capitoliner cars in trains hauled by electric locomotives in both the push and pull mode over electrified sections of the railroad.

In June of 1987, braking and ride quality tests of the Capitoliner cars were successfully completed at speeds up to 125 mph. The tests were made while the train was in both the push and pull mode with electric locomotives and a diesel electric locomotive. Based on the results of those tests, Amtrak is requesting a special approval under 49 CFR 213.9(c) to operate the Capitoliner cars in revenue service, in the push-pull mode, at speeds up to 125 mph, on the Northeast Corridor between Washington, DC and New York City, New York.

Union Pacific Railroad Company

[*Waiver Petition Docket Number PB–88–1*]

The Union Pacific Railroad Company (UP) requests a waiver of compliance with certain provisions of the railroad power brakes regulation (49 CFR Part 232). the UP seeks a waiver of compliance with § 232.12(b), which stipulates, "Each carrier shall designate additional inspection points not more than 1,000 miles apart where intermediate inspection will be made to determine that—

1. Brake pipe leakage does not exceed five pounds per minute;

2. Brakes apply on each car in response to a 20-pound service brake pipe pressure reduction; and

3. Brake rigging is properly secured and does not bind or foul."

The UP request for relief is for only the double stack unit trains operating the West Coast to Chicago, Illinois, and return. It proposes to perform a single intermediate train air brake test at Rawlins, Wyoming, a distance of 1,126 miles from Los Angeles, California; 1,092 miles from Portland, Oregon; 1,269 miles from Oakland, California; 1,232 miles from Tacoma, Washington; 1,270 miles from Seattle, Washington; and 1,137 miles from Chicago, Illinois. At the present time the UP is performing the required intermediate tests at two locations, Salt Lake City, Utah and North Platte, Nebraska, to comply with the Federal regulation.

The railroad states the change is necessary to meet its customers' requirements concerning delivery and time schedules. It refers to the Association of American Railroads' (AAR) long distance train tests made in 1981 and 1985. An analysis of those test results showed that composition brake shoes, which are standard on the double stack cars, wear slightly more than 1/32 of an inch per 1,000 miles. Brake piston travel increase averaged less than 0.2-inch per trip for all trains tested.

Norfolk Southern Corporation

[*Waiver Petition Docket Number PB–87–2*]

On behalf of its operating subsidiaries, the Norfolk Southern Corporation (NS) requests a waiver of compliance with certain provisions of the railroad power brakes regulation (49 CFR Part 232). The NS seeks a waiver of the compliance with § 232.12(b), which stipulates, "Each carrier shall designate additional inspection points not more than 1,000 miles apart where intermediate inspection will be made to determine that:

1. Brake pipe leakage does not exceed five pounds per minute;

2. Brakes apply on each car in response to a 20-pound service brake pipe pressure reduction; and

3. Brake rigging is properly secured and does not bind or foul."

The NS request for relief is for a unit coal train operation between Marrowbone coal mine (near Williamson, West Virginia) and Sherrer, Georgia, a roundtrip of 1,168 miles. At the present time the NS is (1) performing an initial terminal train air brake test at Knoxville, Tennessee (located between Marrowbone and Sherrer) before the empty train departs for the loading site at the Marrowbone coal mine and (2) a 1,000-mile intermediate train air brake test also at Knoxville before the loaded train departs for the Georgia Power Company plant at Sherrer, Georgia. Knoxville, Tennessee is the designated maintenance point for the motive power and rapid-dump hopper cars in the Marrowbone-Sherrer service, according to the NS. It states that the train receives a particularly thorough initial terminal inspection in order to insure that the cars' bottom door operating mechanisms, air brakes, drawgear and running gear are in proper condition for the unit train to maintain its scheduled operating cycle of 72 hours between mine and power plant without equipment-related delays. In addition, the NS schedules 10 cars for removal from the train on a rotating basis for preventive maintenance at the Knoxville car repair shop.

The NS states that the intermediate air brake test made at Knoxville on the train's southbound trip is performed solely in order to comply with § 232.12(b). The NS contends that the inspection and maintenance program for the train keeps the brake systems on the cars in excellent condition to perform properly during the full cycle of 1,168 miles after an initial terminal train air brake test at Knoxville. The railroad is of the opinion that a waiver of the "1,000 mile" intermediate train air brake test required by § 232.12(b) would cause no adverse impacts or increased costs to the private sector, to consumers, or to Federal, State or local governments.

Napa Valley Railroad Company

[*Waiver Petition Docket Number SA–88–1*]

The Napa Valley Railroad Company (NVR) requests a waiver of compliance with certain provisions of the Railroad Safety Appliance Standards (49 CFR Part 231) for its locomotive number NVR 50. The NVR seeks a waiver of compliance with those provisions of § 231.30, "Locomotive used in switching service," that require that each locomotive used in switching service be equipped with four side switching steps, with uncoupling levers that can be operated from the steps, and with side vertical handholds.

This recently acquired locomotive is a 44-ton industrial switcher type locomotive rated at 380 horsepower that was built by the General Electric Company in 1941. This locomotive was formerly owned by the Camino, Placerville and Lake Tahoe Railroad Company and was numbered 102. That railroad was granted a waiver (Docket Number SA–79–7) to operate the 102 without the required side switching steps (§ 231.30(c)), wide vertical handholds (§ 230.30(e)) and uncoupling mechanisms (section 230(f)), based upon its geographical location and operating environments. The NVR has renumbered the locomotive as NVR 50.

The NVR is requesting the same kind of waiver for this locomotive based upon the fact that it will be operated primarily on its own trackage between Napa, California and St. Helena, California, a distance of approximately 21 miles. The locomotive will be used occasionally in interchange freight service.

Border Pacific Railroad

[*Waiver Petition Docket Numbers RSGM–88–7 and LI–88–2*]

The Border Pacific Railroad Company requests a waiver of compliance with certain provisions of the Federal Railroad Administration (FRA) safety standards 49 CFR Part 223 (Safety Glazing Standards) and 49 CFR Part 229 (Locomotive Safety Standards) for its locomotive number BOP 50. The Border Pacific Railroad is a Class III short-line railroad located in south Texas.

The railroad seeks a waiver of the FRA's requirements (1) for certified glazing of locomotive windshields pursuant to § 223.11 (Docket Number RSGM–88–7) and (2) for welded wheels pursuant to § 229.75(m) (Docket Number LI–88–2).

The Border Pacific Railroad line is 31 miles long and operates through a remote area of south Texas between Rio Grande City (at the United States and Mexican border) and Misison, Texas. The largest city through which the railroad operates has a population of 10,000 people. The carrier states that it has never experienced any problems with vandalism or objects being thrown at the locomotive. The maximum permitted speed is 10 mph, and no passengers are carried on its line. In 1987, a total of 327 cars were moved, and none contained hazardous materials. The railroad interchanges with the Missouri Pacific Railroad at a minor location. Section 223.11(a)–(c) requires certified safety glazing for locomotives. The glazing presently installed on locomotive BOP 50 does not comply with those regulations. The Border Pacific Railroad believes that the existing windshield is more than adequate to meet safety concerns relative to its operational and geographical environment. Further, it would cost the railroad several thousand dollars to replace the windshield.

The Border Pacific Railroad seeks a waiver of compliance with those provisions of § 229.75(m) that prohibit the use of welded wheels. The regulation provides in pertinent part as follows:

Fusion welding may not be used on tires or steel wheels of locomotives, except for the repair of flat spots and worn flanges on locomotives used exclusively in yard service. A wheel that has been welded is a welded wheel for the life of the wheel.

The Border Pacific Railroad states that after several years of use, the locomotive wheels were required to be recontoured in order for them to have the necessary width at the flange. Although the length of the flanges was in compliance with FRA regulations, in an abundance of caution, the carrier decided to lengthen the flanges of three wheels so as to maintain an even higher level of safety. It was brought to the carrier's attention by a Federal inspector that fusion welding is not permitted on wheels of locomotives used in other than yard service and that its locomotive was being used in road service. The carrier states that it feels a waiver of § 229.75(m) should be granted for the continued use of its locomotive with welded flanges, given the operating and geographical situation.

The Border Pacific Railroad also states it would cost $10,000 to replace the welded wheels. It submits that a grant of this waiver would result in an equivalent level of safety as required by the existing regulation.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (e.g., Waiver Petition Docket Number LI–88–2) and must be submitted in triplicate to the Docket Clerk, Office of Chief Counsel, Federal Railroad Administration, Nassif Building, 400 Seventh Street SW., Washington, DC 20590. Communications received before September 16, 1988, will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) in Room 8201, Nassif Building, 400 Seventh Street SW., Washington, DC 20590.

Issued in Washington, DC, July 26, 1988.

J.W. Walsh,

Associate Administrator for Safety.

[FR Doc. 88–17345 Filed 8–1–88; 8:45 am]

BILLING CODE 4910–06–M

Maritime Administration

Identification of American Market Capacity for Marine Hull Insurance

On June 20, 1988, the Maritime Administration (MARAD) published in the **Federal Register** a final rule to govern the placement of marine hull insurance on subsubized and Title XI program vessels (53 FR 23112). This rule is effective July 20, 1988. Section 249.9 of the rule requires that the American market be given an opportunity to compete for the placement of marine hull insurance on each vessel. If less than 50% of the placement is made in the American market, the owner or broker must certify that 50% or 75% of the American market (measured in terms of capacity) were offered the risk.

This procedure requires MARAD to identify all qualified American underwriters and their respective capacities, and to make such information available to vessels owners and brokers. The purpose of this notice is to solicit such information from American underwriters, which MARAD intends to do annually. The list prepared as a result of this notice will be distributed to owners and brokers prior to renewal of insurance.

All underwriters licensed to do business in a state, and having at least a B Security rating as published in the latest edition of A.M. Best's Insurance Reports, and who wish to be included in MARAD's list of American market capacity must advise MARAD of their per risk capacity to write marine hull insurance. They must state separately, per risk capacity for blue water and non blue water vessels. In addition, if there are any other capacity limits which only apply to certain types of vessel/rigs, such limits must also be stated separately.

For purposes of determining American market capacity, the American Hull Syndicate and its member companies are to be treated separately, provided they remain able to write independently. Therefore, MARAD expects that the Syndicate members will individually submit their capacity to write independently.

Responses to this notice must be sent to the Secretary, Maritime Administration, Room 7300, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Responses must be received by close of business on September 16, 1988.

Dated: July 28, 1988.

James E. Saari,

Secretary, Maritime Administration.

[FR Doc. 88–17373 Filed 8–1–88; 8:45 am]

BILLING CODE 4910–81–M

DEPARTMENT OF THE TREASURY

Public Information Collection Requirements Submitted to OMB for Review

Date: July 27, 1988.

The Department of Treasury 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 of Clearance Officer listed. Comments regarding this infromation collection should be addressed 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.

Internal Revenue Service

OMB Number: 1545–0227.
Form Number: 6251.
Type of Review: Revision.
Title: Alternative Minimum Tax-Individuals.
Description: Form 6251 is used by individuals having adjustments or tax preference items or a taxable income above certain exemption amounts together with credits against their regular tax. The form provides a computation of the alternative minimum tax which is added to tax liability. The information is needed to see whether taxpayers are complying with the law.
Respondents: Individuals or households.
Estimated Number of Respondents: 1,025,145.
Estimated Burden of Hours Per Response: 50 minutes.
Frequency of Response: Annually.
Estimated Total Reporting Burden: 938,603 hours.
OMB Number: 1545–0890.
Form Number: 1120–A.
Type of Review: Revision
Title: U.S. Corporation Short-Form Income Tax Return.
Description: Form 1120–A is used by small corporations, those with less than $250,000 of income and assets, to compute their taxable income and their tax liability. The IRS uses Form 1120–A to determine whether corporations have correctly computed their tax liability.
Respondents: Farms, Businesses or other for-profit, Small businesses or organizations.
Estimated Number of Respondents: 239,255.
Estimated Burden of Hours Per Response: 5 hours and 25 minutes.
Frequency of Response: Annually.
Estimated Total Reporting Burden: 1,297,622 hours.
OMB Number: 1545–1002.
Form Number: 8621
Type of Review: Revision
Title: Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund.
Description: Form 8621 is used by shareholders of foreign investment companies to report income, make an election to extend the time for payment of tax, and to pay an additional tax and interest amount. The IRS uses Form 8621 to determine if these shareholders have correctly reported amounts in income, made the election correctly, and have properly computed the additional tax and interest amount.
Estimated Number of Respondents: 7,500.
Estimated Burden of Hours Per Response: 1 hour and 44 minutes
Frequency of Response: Annually.
Estimated Total Reporting Burden: 12,964 hours.

Clearrance Officer: Garrick Shear (202) 535–4297, Internal Revenue Service, Room 5571, 1111 Constitution Avenue NW., Washington, DC 20224.

OMB Reviewer: Milo Sunderhauf (202) 395–6880, Office of Management and Budget, Room 3208, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,
Departmental Reports Management Officer.

[FR Doc. 88–17375 Filed 8–1–88; 8:45 am]
BILLING CODE 4810–25–M

VETERANS ADMINISTRATION

Agency Form Under OMB Review

AGENCY: Veterans Administration.
ACTION: Notice.

SUMMARY: The Veterans Administration has submitted to OMB for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35). This document lists the following information: (1) The department or staff office issuing the form, (2) the title of the form, (3) the agency form number, if applicable, (4) a description of the need and its use, (5) how often the form must be filled out, (6) who will be required or asked to report, (7) an estimate of the number of responses, (8) an estimate of the total number of hours needed to fill out the form, and (9) an indication of whether section 3504(h) of Pub. L. 96–511 applies.

ADDRESSES: Copies of the forms and supporting documents may be obtained from John Turner, Department of Veterans Benefits (203C), Veterans Administration, 810 Vermont Avenue NW., Washington, DC 20420 (202) 233–2744.

Comments and questions about the items on the list should be directed to the VA's OMB Desk Officer, Joseph Lackey, Office of Management and Budget, 726 Jackson Place NW., Washington, DC 20503, (202) 395–7316.

DATES: Comments on the information should be directed to the OMB Desk Office within 30 days of this notice.

Dated: July 18, 1988.

By direction of the Administrator.

Frank E. Lalley,
Director, Office of Information Management and Statistics.

Revision

1. Department of Veterans Benefits.
2. Designation of Beneficiary.
3. VA Form 29–336.
4. This form is used by the insured to designate a beneficiary and select an optional settlement to be used when the insurance matures by death. The information is required to determine the claimant's eligibilty to receive the proceeds.
6. Individuals and households.
7. 83,500 responses.
8. 13,917 hours.
9. Not applicable.

[FR Doc. 88–17325 Filed 8–1–88; 8:45 am]
BILLING CODE 8320–01–M

Advisory Committee on Native American Veterans; Reestablishment

In accordance wtih the provisions of the Federal Advisory Committee Act, Pub. L. 92–463, the Administrator of Veterans Affairs gives notice that the Advisory Committee on Native American Veterans, estabished by Pub. L. 99–272 and extended by Pub. L. 100–322, has been reestablished for one year, from July 7, 1988, to July 6, 1989.

The committee will examine and evaluate programs and activities of the Veterans Administration with respect to the needs of veterans who are Native Americans, including American Indians, Alaska Natives, and Native Hawaiians. They will assess the needs of the Native Americans with respect to health care, rehabilitation, readjustment counseling, outreach services, and other benefits and services under programs administered by the Veterans Administration. The committee will be composed of representatives from the Department of Labor, Department of Interior, Veterans Administration, as well as members of the general public

who represent American Indians, Alaska Natives, and Native Hawaiians.

Comments of interested persons concerning the reestablishment of the Committee may be submitted to John Fulton, Committee Manager, Veterans Administration, 810 Vermont Avenue NW., Washington, DC 20420.

Dated: July 25, 1988.

By direction of the Administrator.

Rosa Maria Fontanez,

Committee Management Officer.

[FR Doc. 88-17327 Filed 8-1-88; 8:45 am]

BILLING CODE 8320-01-M

Voluntary Service National Advisory Committee; Meeting

The Veterans Administration gives notice under Pub. L. 92-463 that the annual meeting of the Veterans Administration Voluntary Service National Advisory Committee, comprised of 56 national voluntary organizations, will be held at the Albuquerque Hilton Hotel, Albuquerque, New Mexico, on October 27 through October 30, 1988.

Registration of the conferees and orientation of new committee members will be held beginning at 1 p.m. on October 27, 1988. The committee will officially convene with the Opening Session at 9 a.m., October 28, 1988, and will conclude at 12 noon, October 30, 1988.

The purposes of the meeting are to instruct committee members and organization officials of the obligations they have accepted for volunteer recruitment, communications and program interpretation, and to seek the advice of the committee in further developing volunteer participation in the care and treatment of veteran patients throughout the agency's nationwide medical program.

For further information contact Mr. Edward F. Rose, Director, Voluntary Service (135), Veterans Administration, 810 Vermont Avenue NW., Washington, DC 20420, Telephone (202) 233-4110.

Dated: July 25, 1988.

By direction of the Administrator.

Rosa Maria Fontanez,

Committee Management Officer.

[FR Doc. 88-17326 Filed 8-1-88; 8:45 am]

BILLING CODE 8320-01-M

Sunshine Act Meetings

Federal Register

Vol. 53, No. 148

Tuesday, August 2, 1988

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).

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: 53 FR 27103, Monday, July 18, 1988.

PREVIOUSLY ANNOUNCED TIME AND DATE OF MEETING: 2:00 p.m. (eastern time) Tuesday, July 26, 1988.

CHANGE IN THE MEETING: The meeting has been cancelled.

CONTACT PERSON FOR MORE INFORMATION: Frances M. Hart, Executive Officer, Executive Secretariat, (202) 634–6748.

Date: July 25, 1988.

Frances M. Hart,

Executive Officer, Executive Secretariat.

[FR Doc. 88–17394 Filed 7–29–88; 9:40 am]

BILLING CODE 6750-06-M

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

July 28, 1988.

TIME AND DATE: 10:00 a.m., Thursday, August 4, 1988.

PLACE: Room 600, 1730 K Street NW., Washington, DC.

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commission will consider and act upon the following:

1. *U.S. Steel Mining Co., Inc.*, Docket Nos. PENN 87–37, etc. (Issues include whether the Administrative Law Judge erred in concluding that the operator violated 30 CFR 75.601, dealing with identification of disconnecting devices.)

Any person intending to attend this meeting who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs. Subject to 29 CFR 2706.150(a)(3) and 2706.160(d).

CONTACT PERSON FOR MORE INFORMATION: Jean Ellen, (202) 653–5629 or (202) 566–2673 for TDD Relay.

Jean H. Ellen,

Agenda Clerk.

[FR Doc. 88–17443 Filed 7–29–88; 1:42 pm]

BILLING CODE 6735-01-M

NUCLEAR REGULATORY COMMISSION:

DATE: Weeks of August 1, 8, 15, and 22, 1988.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Open and Closed.

MATTERS TO BE CONSIDERED:

Week of August 1

Wednesday, August 3

2:00 p.m.
Briefing by NUMARC on Plant Maintenance (Public Meeting)

Thursday, August 4

2:00 p.m.
Briefing on the Status of Sequoyah I (Public Meeting)

3:30 p.m.
Affirmation/Discussion and Vote (Public Meeting)

a. Revision of the ECCS Rule Contained in Appendix K and § 50.46 of 10 CFR 50 (Final Rule)
b. Allocation Between Commission and Illinois of Regulatory Authority Over West Chicago Waste Materials
c. Licensing Board Decision on Senior Reactor Operator License for David W. Held

Friday, August 5

10:00 a.m.
Briefing on Status of Efforts to Enhance Safety of Users of By-Product Materials (Public Meeting)

2:00 p.m.
Briefing on Individual Plant Examinations Generic Letter (Public Meeting)

Week of August 8—Tentative

Tuesday, August 9

10:00 a.m.
Briefing on Status of Agreements with OSHA, EPA and FEMA Concerning Jurisdiction Over Non-Radiological Hazards (Public Meeting)

2:00 p.m.
Briefing on Key Licensing Issues Associated with DOE Sponsored Advanced Reactor Designs (Public Meeting)

Wednesday, August 10

10:00 a.m.
Briefing on Current Status of Nuclear Materials Transportation (Public Meeting)

Thursday, August 11

10:00 a.m.
Briefing on Status, Results, and Implementation of B&W Reassessment (Public Meeting)

2:00 p.m.
Briefing on Standardization of Advanced Reactor Designs (Public Meeting)

3:30 p.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

Week of August 15—Tentative

Monday, August 15

2:00 p.m.
Briefing on Center for Nuclear Waste Regulatory Analysis (CNWRA) (Public Meeting)

Tuesday, August 16

2:00 p.m.
Briefing on Maintenance Workshop (Public Meeting)

3:30 p.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

Week of August 22—Tentative

There are no meetings scheduled for the Week of August 22.

Note: Affirmation sessions are initially scheduled and announced to the public on a time-reserved basis. Supplementary notice is provided in accordance with the Sunshine Act as specific items are identified and added to the meeting agenda. If there is no specific subject listed for affirmation, this means that no item has as yet been identified as requiring any Commission vote on this date.

TO VERIFY THE STATUS OF MEETINGS CALL (RECORDING): (301) 492–0292.

CONTACT PERSON FOR MORE INFORMATION: William Hill (301) 492–1661.

William M. Hill, Jr.,

Office of the Secretary.

July 28, 1988.

[FR Doc. 88–17463 Filed 7–29–88; 3:13 pm]

BILLING CODE 7590-01-M

SECURITIES AND EXCHANGE COMMISSION

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: (To be published).

STATUS: Closed meeting.

PLACE: 450 5th Street, NW., Washington, DC.

DATE PREVIOUSLY ANNOUNCED: July 26, 1988.

CHANGE IN THE MEETING: Additional item.

The following additional item will be considered at a closed meeting scheduled for Tuesday, August 2, 1988, at 10:00 a.m.:

Opinion.

Commissioner Cox, as duty officer, determined that Commission business required the above changed.

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: Patrick Daugherty at (202) 272-3077.

Jonathan G. Katz,

Secretary.

July 27, 1988.

[FR Doc. 88-17383 Filed 7-29-88; 8:47 am]

BILLING CODE 8010-01-M

Corrections

Federal Register
Vol. 53, No. 148
Tuesday, August 2, 1988

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 761

[OPTS-62053A; FLR 3369-2]

Polychlorinated Biphenyls; Exclusions, Exemptions and Use Authorizations

Correction

In rule document 88-14291 beginning on page 24206 in the issue of Monday, June 27, 1988, make the following correction:

On page 24212, in the third column, in the second complete paragraph, in the 17th line, after "(A)," insert "(B),".

BILLING CODE 1505-01-D

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CO-0030-08-4332-09]

Proposed Change in Wilderness Suitability Recommendation; Colorado

Correction

In notice document 88-16264 appearing on page 27403 in the issue of Wednesday, July 20, 1988, make the following correction:

In the second column, under **DATE:**, in the second line, "August 9, 1988" should read "August 19, 1988".

BILLING CODE 1505-01-D

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[NV-930-08-4212-22]

Filing of Plats of Survey; Nevada

Correction

In notice document 88-15774 beginning on page 26680 in the issue of Thursday, July 14, 1988, make the following corrections:

On page 26681, in the third column, under T. 12 N., R. 68 E., in Sec. 15, "SE¼S¼" should read "SE¼SE¼". Also, in Sec. 23, in the second line, "W½NE¼" should read "W½NW¼".

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Part II

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Occupational Safety and Health Administration

29 CFR Part 1926

Crane or Derrick Suspended Personnel Platforms; Final Rule

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1926

[Docket No. S-409]

Crane or Derrick Suspended Personnel Platforms

AGENCY: Occupational Safety and Health Administration, U.S. Department of Labor.

ACTION: Final rule.

SUMMARY: The Occupational Safety and Health Administration (OSHA) hereby amends its Construction Standards for Cranes and Derricks, 29 CFR 1926.550, by adding a new paragraph (g) to prohibit the use of cranes or derricks to hoist personnel except in the situation where no safe alternative is possible, and as long as the requirements for such hoisting set out in paragraph (g) are satisfied. OSHA initiated this rulemaking action to establish clearly the conditions under which employees on personnel platforms may be hoisted by cranes or derricks, and to insure that this information is readily available to employers. The intended effect of this regulation is to increase safety for workers.

EFFECTIVE DATE: October 3, 1988.

FOR FURTHER INFORMATION CONTACT: Mr. James Foster, Occupational Safety and Health Administration, Office of Information and Consumer Affairs, Room N-3637, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, Telephone: (202) 523-8148.

SUPPLEMENTARY INFORMATION:

I. Background

Congress amended the Contract Work Hours Standards Act (40 U.S.C. 327 *et seq.*) in 1969 by adding a new section 107 (40 U.S.C. 333) to provide employees in the construction industry with a safer work environment and to reduce the frequency and severity of construction accidents and injuries. The amendment, commonly known as the Construction Safety Act (CSA), significantly strengthened employee protection by providing occupational safety and health standards for employees of the building trades and construction industry in Federal and federally financed or federally assisted construction projects.

The Occupational Safety and Health Act of 1970 (29 U.S.C. 650 *et seq.*), expanded coverage to virtually all employments, and authorized the Secretary of Labor to adopt established Federal standards issued under other statutes, including the CSA, as occupational safety and health standards. Accordingly, the Secretary adopted the construction standards issued under the CSA as OSHA standards on May 29, 1971 (36 FR 10466) and redesignated these rules as 29 CFR Part 1926 on December 30, 1971 (36 FR 25232). The standard entitled "Cranes and Derricks," § 1926.550, was adopted as an OSHA standard in Subpart N of Part 1926 as part of this process.

Paragraph (b)(2) of § 1926.550 requires employers to ensure that their crawler, locomotive and truck crane operations meet the applicable requirements in the American National Standards Institute (ANSI) standard B30.5-1968, "Safety Code for Crawler, Locomotive and Truck Cranes." Section 5-3.2.3(e) of ANSI B30.5-1968 provides that "the operator shall hoist, lower, swing, or travel while anyone is on the load or hook." Section 5-3.2.1.4(r) of the most recent ANSI edition (1982) retains the ban on riding a bare hook or a load of material.

A similar requirement appears in section 6-3.3.3 of ANSI B30.6-1984, "Safety Code for Derricks," which requires that "the operator shall not hoist, lower, or swing while anyone is on the load or hook."

Ever since OSHA first adopted the CSA standards, the construction industry has expressed concern as to the application of the above-described provisions, particularly with regard to whether they should be interpreted to prohibit the hoisting of personnel platforms, sometimes also known as man baskets or man-skip boxes, by cranes and derricks. OSHA's approach to this question can best be understood by examining the chronology of this rulemaking.

In 1972, a group of Florida contractors requested that OSHA clarify the meaning of the § 1926.550(b)(2) ban on "riding the hook." OSHA responded that, where there were no other practical alternative means of transporting employees, no citations would be issued under § 1926.550(b)(2) provided that employers took specified measures to safeguard hoisted employees (Ex. 2-1).

In 1973, OSHA received an ANSI B30 Committee interpretation of ANSI B30.5, section 5-3.2.3(e). ANSI interpreted the section as referring to the hoisting of employees on the hook itself or on normal material loads, such as beams, girders or concrete buckets. The committee further stated its view that a specially designed scale box or other guarded platform for personnel that was attached to the crane hook was permissible under controlled conditions (Ex. 2-2).

Also in 1973, the Boeing Corporation applied to OSHA for a variance from the application of § 1926.550(b)(2) to its personnel hoisting operations. OSHA determined that Boeing did not need a variance because Boeing's specially designed suspended work platform was not a "load." OSHA further stated that riding and working on these platforms while using a lifebelt-lifeline system did not constitute riding the hook (Ex. 2-3).

In December 1973, the Advisory Committee on Construction Safety and Health (ACCSH) appointed an informal subgroup to examine this issue, to evaluate the need for regulatory action, and to make recommendations to the full committee.

On July 30-31, 1974, the ACCSH subgroup held a public meeting in which interested parties were invited to participate (Ex. 2-4). The ACCSH subgroup reviewed the comments received, along with data developed by the subgroup, and prepared recommendations for consideration by the full committee. On October 30-31, 1974, the Advisory Committee voted to recommend that OSHA initiate rulemaking to regulate employee hoisting operations. (Ex. 2-5).

Since 1975, OSHA has issued four interpretations which provided guidelines for the use of crane suspended work platforms (Exs. 2-6, 2-7, 2-8 and 2-9). On October 8, 1981, the provisions of these guidelines were incorporated into OSHA Instruction STD 1-11.2A. (Ex. 2-10). That instruction, in turn, was replaced by OSHA Instruction STD 1-11.2B on August 8, 1983 (Ex. 2-11).

Despite the issuance of these guidelines, there have been persistent questions about the required equipment and procedures, and a rising toll of fatalities and injuries among hoisted employees. In particular, OSHA is concerned that those guidelines, since they are generally available only to compliance officers, are not known to employers who might be hoisting personnel. Therefore, employers might learn about the approved procedures only after an inspection or accident investigation has taken place.

OSHA determined that these administrative interpretations of § 1926.550(b) have not provided adequate guidance for employers or protection for workers. OSHA initiated this rulemaking action to establish clearly the conditions under which employees on personnel platforms may be hoisted by cranes or derricks, and to

insure that this information is readily available to employers.

Accordingly, OSHA developed a draft proposed rule, which incorporated the best available information on feasible equipment and work practices, language from an adopted but then unpublished revision of ANSI B30.5, and a draft ANSI A10.28 "Crane or Derrick Suspended Work Platforms," which had not yet been adopted by ANSI (Exs. 2–14 and 2–15). The draft OSHA proposal was discussed by ACCSH on May 23 and 24, 1983 (Ex. 2–12). The recommendations of ACCSH were substantially the same as those received by OSHA in 1974, and are discussed in the preamble in conjunction with the appropriate provisions. In addition to the ACCSH review, OSHA distributed drafts of the proposal to interested parties. The Agency received 30 comments, which diverged substantially regarding the limits to be placed on personnel hoisting. On October 31, 1983, ANSI formally issued its revised B30.5, in which section 5–3.2.2 provided guidelines for personnel hoisting.

On February 17, 1984, OSHA issued a notice of proposed rulemaking (NPR) (49 FR 6280). The Agency proposed adding a new paragraph (g), regulating the use of crane or derrick hoisted personnel platforms, to 29 CFR 1926.550, "Cranes and derricks." The NPR established a sixty day period, which ended April 17, 1984, for submission of written comments. The comments received raised a number of important issues and included a hearing request. As discussed below, commenters were particularly concerned with the proposed scope and application of the standard, equipment safety factors, anti-two-blocking precautions and testing requirements.

On June 20, 1984, OSHA announced that it would convene an informal public hearing on September 11, 1984, and extended the period for submitting testimony, documentary evidence and additional comments until August 10, 1984 (49 FR 25248). On July 26, 1984, the Agency rescheduled the hearings to begin on September 18, 1984 (49 FR 30077). The hearings were held on September 18–19, 1984, with Administrative Law Judge Leonard N. Lawrence presiding. At the close of the hearings, Judge Lawrence set a period, ending November 7, 1984, for the submission of additional comments and information. On January 25, 1985, Judge Lawrence certified the hearing transcript and related submissions, closing the record for this proceeding.

OSHA received 92 comments in response to its NPR and hearing notices. A wide range of employees, businesses, labor unions, trade associations, state governments and other interested parties contributed to the development of this record. OSHA appreciates the efforts interested parties have made to help develop a rulemaking record which would provide a sound basis for the promulgation of a final rule.

Based on its review of the record, OSHA has determined that hoisting with crane or derrick suspended personnel platforms constitutes a significant hazard to hoisted employees, and that it will not be permitted unless conventional means of transporting employees are not feasible, or unless they present greater hazards. OSHA has determined that compliance with the provisions of this standard will provide the best available protection for hoisted personnel, in those limited situations where personnel hoisting is necessary.

Employees who are hoisted in crane or derrick suspended personnel platforms are exposed to several serious hazards, including being spilled from the platform or having the platform dropped while they are on board. These hazards, whether caused by mechanical failures or human errors, can result in fatalities and crippling injuries to the hoisted personnel. Those same hazards would simply cause inconvenience and monetary loss when construction materials are spilled or dropped.

As the accident reports presented below indicate, many things can go wrong in a personnel hoisting operation. For example, "two-blocking," one of the most serious and commonly experienced hazards, occurs when a crane operator who is adjusting the elevation of a platform or the length of the crane boom causes the load block on the load line to contact the boom tip, thereby severing the load line and dropping the platform to the ground. Employees can also be injured or killed when a crane tips due to inadequate stabilization; when they ride the hook or a material load attached to a hook; when employers improperly select, assemble and maintain their cranes, derricks and personnel platforms; when the position of the platform or its occupants shifts suddenly; and when the platform is overloaded. Overloading, in particular, results when a crane attempts to hoist a weight which exceeds either the stated capacity of the crane or the crane capacity as limited by worksite conditions.

OSHA determined, in the course of preparing the regulatory analysis for this rulemaking, that accidents resulting from the use of cranes or derricks to hoist personnel result in approximately 63 injuries annually. Of those injuries, approximately 15 are fatal, and at least seven result in total disability.

OSHA believes that the primary cause of non-compliance is the lack of clear regulatory language in Subpart N of 29 CFR Part 1926. In particular, existing § 1926.550(b)(2) provides no direct regulatory guidance. It simply incorporates ANSI B30.5–1968 by reference. Therefore, under the current regulations, employers are expected to obtain and read an ANSI document which, as stated above, has been superseded, and determine from it the procedures for personnel hoisting. In view of this situation, it is easy to see why, despite OSHA's adoption of the ANSI ban on riding the load, so many employees continue to ride the load and are killed or injured each year while doing so. Because of this problem of outdated ANSI Standards, OSHA has avoided the use of incorporation by reference whenever possible in recent years, and has attempted to include all relevant provisions within the regulatory text.

The text of the current directive, the proposed rule and the final rule are very similar. OSHA has found, however, that many employers are unaware of or simply do not follow the interpretations and guidelines in OSHA's directive on § 1926.550(b). Therefore, in order to protect employees who must be hoisted on personnel platforms, the Agency is promulgating this standard to eliminate any uncertainty about what is required. OSHA expects that employers will comply with the requirements of paragraph (g) of § 1926.550, and that compliance will prevent most of the fatalities and injuries which have been experienced under the existing standard. In addition, OSHA anticipates that compliance with this new standard will reduce the number of injuries and fatalities among employees who might otherwise be assigned to construct, use, and disassemble scaffolds, or other "conventional" means of access, in workplace situations which would expose these employees to greater hazards than would be involved with the use of crane or derrick suspended platforms.

OSHA has determined, through its regulatory impact analysis, that the number of employees exposed to the hazards of personnel hoisting is relatively small. However, the injuries which can result from accidents occurring during personnel hoisting are usually very severe. A review of some hoisting accidents illustrates the magnitude of the danger to which employees are exposed.

An accident in Cheyenne, Wyoming (1973) resulted in two deaths when a telescoping boom severed the load line.

Those deaths would have been averted if the employees in the platform had been wearing safety belts and lanyards attached to a lifeline secured to the boom tip, or if the crane had been equipped with a positive acting anti-two-blocking device. The operator, while experienced in operating cranes, was not familiar with the specific machine being used, nor with the hoisting operation during which the accident occurred. OSHA has found that even crane operators who are well acquainted with telescoping boom cranes have had problems when working with this equipment in new locations and in unfamiliar surroundings.

In Kansas City (1972), a structural framework carrying five men and a significant amount of material and equipment fell to the ground when an outrigger of the crane failed. The total weight was reported to be only have the rated capacity of the crane when boomed out to the work location, but the outrigger broke loose from its mounting and the boom collapsed before it reached the intended radius. Failures of this nature point out the need for exact knowledge of crane or derrick stability, and the need for careful inspection and testing of such machinery prior to its use for hoisting employees.

In Chicago (1981), five employees were killed and a sixth employee was seriously injured when a job-built personnel basket fell 100 feet. The employees were being hoisted by a mobile crane to a work station atop a tower crane being assembled on the site. The metal framework at the top of the cage, to which the hoisting rope was attached, separated, causing the platform and its occupants to fall. The implementation of the specific design criteria and inspection and testing requirements in the final rule should prevent such accidents caused by structural failure.

In Tampa, Florida (1983), four men on a personnel platform were killed in an accident at Tampa Stadium when they were being raised by a crane to a work station 135 feet above the ground at the top of the stadium. When the platform reached 130 feet, the boom of the crane fell and the men in the platform fell with it. The Agency believes the implementation of inspection and testing requirements should prevent these types of accidents.

OSHA has carefully developed and reviewed the record for this rulemaking to ensure that the standard, as promulgated, is based on substantial evidence. OSHA has determined, based on the record, that crane and derrick personnel hoisting poses significant risks for affected employees, even when employers comply with the final rule, and, therefore, prohibits personnel hoisting except where there is no feasible safe alternative. The new provisions in paragraph (g) of § 1926.550 provide criteria for equipment and work practices that will enable those employers who have no safe alternative means of transporting employees to or supporting them at their workplace, to hoist personnel as safely as possible.

OSHA has determined that personnel hoisting operations for which there is no safe alternative and which comply with paragraph (g) will protect workers from the kind of accidents that resulted in most of the fatalities and crippling injuries which occurred under the existing crane and derrick regulations; from most of the fatalities and injuries which occurred when employees inappropriately used scaffolds or other "conventional" means of access; and from virtually all of the fatalities and injuries which have occurred when employees rode the hook or load. The Agency believes that although compliance with these regulations will lessen the potential for fatalities and serious injuries, it will not totally eliminate accidents related to the use of crane or derrick suspended personnel platforms. The Agency concludes that this type of operation is inherently dangerous and must only be used as a last resort. OSHA notes that three states (Maryland, Washington and California) with stringent personnel platform regulations were reported by JACA (Ex. 5–2, p. 4–13) as having had no personnel platform accidents for at least five years. While the Agency believes this sample is too small to represent or predict national experience, OSHA observes that the three state standards in question would tend to minimize accidents because of the tight limits on the circumstances where personnel platforms may be used.

II. Summary and Explanation of the Final Rule

OSHA requested comments on ten specific issues in the preamble of the proposed standard (49 FR 6282–6284). All these issues are addressed in conjunction with the appropriate provisions of this final rule.

Paragraph (g)(1) presents the scope and application of the final rule. OSHA identified this subject as a matter of special concern in Issue 1 in the preamble of the proposal. This paragraph has been revised extensively in order to simplify the language and clarify OSHA's regulatory intent. Several changes were made in response to public comment or as clarifications, as discussed below.

As a matter of clarification, the Agency has revised this provision to indicate that paragraph (g) covers not only the hoisting of the personnel platform, but the design, construction, testing, use and maintenance of the personnel platform as well. OSHA recognizes that several paragraphs of this final rule do, indeed, regulate other matters related to personnel platforms and that this was not explicitly stated in the proposed rule. Additionally, OSHA has added a definitions section to paragraph (g)(1) which incorporates some of the definitions which were provided as "Notes" in the proposal. Other definitions in this paragraph are new and reflect changes in terminology which OSHA feels will most clearly express its regulatory intent. Finally, some notes which functioned as definitions in the proposed rule have been incorporated directly into the affected provisions. This reformatting reflects OSHA's recognition that the definition of terms used in the standard is more appropriately placed within the text of the regulation instead of in explanatory notes, and will provide clearer guidance to employers.

In its proposal, OSHA presented a list of cranes which it believed might be used for personnel hoisting. OSHA received many comments, like that of the Granite Construction Company (Ex. 3–50), which stated that the listing of particular machines in proposed paragraph (g)(1) was unnecessarily lengthy and machine-specific. Indeed, several commenters pointed out that, by being so specific, OSHA could create loopholes for specific cranes not listed. For example, the State of California (Ex. 3–33) asserted that OSHA's proposed language did not cover electric cranes, such as hammerhead-type tower cranes. In addition, Unit Crane & Shovel Corporation (Unit Crane) (Ex. 3–47) listed five cranes not mentioned in the proposed rule and recommended that the rule cover all cranes which could be used for personnel hoisting. Unit Crane also recommended that the proposed specification of "friction or hydraulic" be replaced by the word "all." The Associated General Contractors of America (AGC), in turn, testified (Tr. 164) that "Reference to specific types of equipment will result in overly broad coverage which * * * will regulate operations outside of those areas of concern. The AGC, therefore, "recommends that the standard apply only to the hoisting of personnel platforms on the load line of cranes and derricks."

The list of cranes and derricks was intended to illustrate what types of equipment are covered, rather than to limit the scope of the standard. OSHA recognizes that the list gave a misleading impression of the intended scope and that the scope can be set forth without using a list. Therefore, based on the comments received, OSHA has revised paragraph (g)(1) to cover all cranes and derricks used to hoist personnel platforms.

OSHA received comments from Ingersoll-Rand Company (Ex. 3–18) which suggested that the use of derricks for hoisting personnel be prohibited. Ingersoll-Rand asserted that derrick hoisting was more likely than crane hoisting to result in accidents, even if derrick operators complied with the draft revision of ANSI B30.6–1982, because derricks are material handling devices which do not incorporate the safety devices needed for personnel hoisting. Furthermore, the commenter noted that derricks are usually designed and assembled at the jobsite, and that safe alternatives are available. On the other hand, the National Constructors Association and DuPont (Exs. 3–74 and 3–75) stated that derrick hoisting which complies with the existing derrick standards and with the requirements of this standard will not expose hoisted employees to an unreasonable risk, because derricks, though temporary structures, are more stable than mobile cranes and because derricks are available with the same safety devices which would be required for cranes.

OSHA has determined, upon review of the record, that derricks can comply with the provisions of this standard; that there are circumstances, such as during the painting of a water tower (Tr. 554), where there is no safe alternative to the use of a derrick to hoist personnel; and that derrick hoisting in compliance with this standard does not pose a greater danger than crane hoisting. Therefore, OSHA has retained derricks within the scope of paragraph (g), as proposed.

OSHA has deleted the second and third sentences of proposed paragraph (g)(1) because the Agency has determined that they do not deal with the scope and application, and because they add nothing to the requirements of the standard. These sentences merely pointed out that the requirements of this paragraph must be met before hoisting personnel, and that paragraph (g)(2) specifies when this practice is permitted.

The Magma Copper Company and National Constructors Association (Exs. 3–27 and 3–30) suggested that the definition of "hoisting," which appeared as a note to proposed paragraph (g)(1), be revised to cover explicitly booming up or down; extending the boom; swinging; and positioning, so that the term would more fully cover the circumstances encountered during personnel hoisting.

OSHA's intent has been to establish a single term, "hoisting," which could be applied to all operations covered by paragraph (g). Therefore, OSHA has made the suggested change in order to state clearly the meaning of the term "hoisting."

Paragraph (g)(2) of this final rule sets forth OSHA's general policy regarding the use of cranes or derricks to hoist personnel platforms. In proposed paragraph (g)(2), OSHA "permitted" the use of cranes or derrick to hoist personnel when that use was "as safe as the erection, use or dismantling of conventional means of reaching the worksite * * *". OSHA has modified proposed paragraph (g)(2) so it clearly states OSHA's recognition that cranes and derricks are not manufactured for use as personnel hoists. In particular, paragraph (g)(2) of the final rule states that personnel hoisting is "prohibited," subject to exceptions based on necessity. The AGC (Ex. 3–28 and Tr. 164) and Granite Construction (Ex. 3–50), suggested that OSHA permit crane or derrick hoisting "where the use of other conventional means of reaching the worksite is more hazardous or is not practical because of structural design and worksite conditions." In addition, Johnson Brothers Corporation and Gulf Oil Corporation (Exs. 3–43 and 3–68) stated that OSHA should concern itself with ensuring that the appropriate equipment and procedures are used, rather than with limiting circumstances where cranes or derricks may be used for personnel hoisting. Furthermore, Organization Resource Counselors, Inc. (Ex. 3–89) commented that, given the "difficult, if not impossible, task of determining the safest way to perform work, employers will continue to base their decision to use personnel platforms on many considerations, not just safety." As stated above, OSHA has determined that, given the significant risk posed by personnel hoisting, concern for employee safety is the only justification for the practice. Therefore, the Agency will consider personnel hoisting conducted for reasons of practicality or convenience alone, to violate this standard. As discussed above, the experience of three states with stringent personnel platform standards indicates that setting such narrow limits on the circumstances under which personnel platforms may be used will minimize personnel platform accidents.

Several commenters, including the Frey & Egle Company and the United Steelworkers of America (Exs. 3–7 and 3–10) objected to the use of cranes or derricks for personnel hoisting under any circumstances. They stated that personnel hoisting is inherently dangerous and noted that cranes and derricks are not designed or manufactured for personnel hoisting. In addition, the Farm and Industrial Equipment Institute [FIEI] (Ex. 3–37) commented that using a boom-mounted bucket is always safer than using a suspended personnel platform. National Crane Services (Ex. 3–71), while disagreeing with the FIEI contention that boom-mounted baskets are always safer than crane-hoisted platforms, supported harrowly liniting personnel hoisting because cranes are not designed to hoist personnel and because crane hoisting requires more skill and process control than material hoisting.

OSHA recognizes the seriousness of these concerns. In addition, the Agency has received written comments (Ex. 3–7) and public hearing testimony (Tr. 58–163) from Frey & Egle which states that its product, the Crane Air Bridge (CAB), hoists personnel for all the purposes where employers might use cranes or derricks without exposing employees to the hazards associated with crane or derrick hoisting.

OSHA, however, is concerned that the CAB has not been extensively marketed or operated in the United States. OSHA also notes that there is inadequate information in the record to determine if the CAB could satisfactorily replace crane and derrick personnel hoisting equipment totally, now or in the future. Additionally, due to the lack of information, the Agency is unable to determine whether the CAB can be considered a conventional means of access under § 1926.556, Aerial Lifts, or under § 1926.451(f) Elevating and Rotating Work Platforms. That determination will depend upon compliance with ANSI A92.2–1969, Vehicle Mounted Elevating and Rotating Workplatforms, required by both §§ 1926.556 and 1926.451(f). Therefore, while the use of the CAB is arguably as safe as or safer than crane or derrick personnel hoisting, OSHA is going forward with the promulgation of this standard, pending a future determination as to whether or not the CAB can indeed provide safe and reliably available personnel positioning.

The final rule requires that employers take a hard look at their workplace situations before deciding how employees will be transported to or maintained at different elevations.

Where conventional means of access, such as scaffolds, ladders and, perhaps ultimately, CAB's are less hazardous, personnel hoisting by crane or derrick will be prohibited. Where conventional means of access would not be considered safer, personnel hoisting operations which comply with the terms of this standard would be authorized, only to the limited extent that the dangers of using conventional means would justify them or to the extent that it is not possible to transport or position employees using conventional means. OSHA stresses that employee safety, and not practicality or convenience, must be the basis for the employer's choice of method.

The Construction Industry Manufacturers Association (Ex. 3–31) stated that OSHA's use of the word "permitted" in proposed paragraph (g)(2) seemed to promote rather than limit the use of cranes or derricks to hoist personnel. As has already been discussed, OSHA is limiting, not promoting, crane or derrick personnel hoisting. Therefore, OSHA has revised the language of paragraph (g)(2) to reflect the Agency's policy more clearly.

Also, in paragraph (g)(2), OSHA has added "personnel hoist" to the list of conventional means used to reach a worksite. OSHA had intended only to provide examples of such means, not an exhaustive list. However, since a personnel hoist is a commonly used piece of conventional access equipment, OSHA decided that the addition was appropriate.

Paragraph (g)(3) presents the requirements for operating and equipping cranes or derricks used to hoist employees.

Paragraph (g)(3)(i) presents general operational criteria. OSHA received a number of comments regarding the provisions of this paragraph, and has revised it to reflect commenter input as discussed below.

In proposed paragraph (g)(3)(i)(A), OSHA required that hoisting speed not exceed 100 feet per minute. This proposed requirement was based on ANSI B30.5–1982 and recommendations from ACCSH in 1974 and 1983, and reflected the recognition that employee hoisting requires even greater caution and margin of safety than material hoisting. In particular, OSHA was concerned that hoisted personnel or their platforms could be tipped or dropped if hoist speed outstripped the operator's ability to maneuver safely. The Agency believes that those dangers would be especially great when a hoist operation is beginning or ending.

OSHA observed, in its discussion of the proposed provision and in Issue 5, that there were questions regarding the feasibility of and need for a specific speed limit, and for a device to indicate the line speed to the operator. In light of these questions, OSHA did not propose to require that cranes used to hoist personnel be equipped with line speed indicators. The Agency noted that ACCSH in 1974 viewed line speed indicators as either infeasible or unnecessary. In addition, OSHA cited a draft revision of ANSI B30.5–1982, section 5–3.2.2(a)(13), (Ex. 2–14) under which the 100 foot per minute limit would have been changed to a requirement "that movement of the work platform with personnel shall be done in a slow, controlled, cautious manner with no sudden movements of the crane or work platform." (49 FR 6285). OSHA also noted that Grove Crane (Ex. 2–17) included a 100 foot per minute limit in the specifications for the use of its cranes to hoist personnel. As with ANSI and ACCSH, Grove did not suggest specific means by which operators could determine if they were operating within the 100 feet per minute limit.

OSHA received a number of comments on this proposed paragraph. The Tennessee Road Builders Association and the Commonwealth of Puerto Rico (Exs. 3–41 and 3–55) expressed support for the provision as proposed, with Puerto Rico suggesting that employers following the draft revision of ANSI B30.5 use 100 feet per minute as the upper limit of "slow," even if ANSI revised it standard to require "caution" instead of a set limit. On the other hand, Bechtel Corporation (Ex. 3–45) commented that the proposed limit was overly conservative because crane manufacturers' technical specifications for personnel hoisting showed speeds between 150 and 300 feet per minute, and because a requirement that the hoist speed be "reasonable for the conditions" would provide adequate protection. In addition, the Standard Oil Company (Indiana) (Ex 3–46) emphasized that it is the rate of acceleration or deceleration, not the speed, itself, that was the primary safety concern. Also, the T.A. Loving Company (Ex. 3–82) and the AGC of America (Tr. 191–192) suggested that OSHA not require a line speed indicator because watching it would distract the operator from watching the platform and thus increase the risk of two-blocking.

Most of the comments received on this proposed provision, such as those from the State of California, the Boeing Company and the Panama Canal Commission (Exs. 3–33, 3–38 and 3–51) supported wording similar to that in the draft revision of ANSI B30.5, section 5–3.2.2(a)(13).

ANSI retained the 100 foot per minute speed limit when it revised B30.5. OSHA has determined, however, based on its review of the record, that requiring "slow, cautious and controlled" hoisting will provide hoisted personnel with better protection than would a 100 foot per minute limit.

In the course of this rulemaking, OSHA has determined that line speed indicators capable of measuring a speed as slow as 100 feet per minute are not readily available for many cranes. Additionally, OSHA agrees with comments that the operator's attention should be directed to the platform during a lift, and not to a line speed indicator. Also, OSHA agrees with Standard Oil that line speed indicators are not needed on cranes or derrick hoisting personnel because the rate of acceleration or deceleration is more important than the line speed itself in determining the safety of hoisting operations. OSHA notes that the size of the crane or derrick hoist drum and the height of the lift are important considerations in determining what is "slow." For example, when using a crane with a large hoist drum for personnel lifts of several hundred feet, OSHA believes that hoisting at 100 feet per minute is unnecessarily slow. On the other hand, when using cranes with small hoist drums, a rate of 100 feet per minute or less may be necessary for proper control of the platform. As a point of reference, OSHA notes that 100 feet per minute is equivalent to a very slow walk. Site conditions also are important in deciding what rate is safe for a particular lift. Furthermore, a limit on the number of feet a platform can travel in a minute will not protect employees unless the crane or derrick operator otherwise exercises caution while hoisting. Finally, OSHA believes that requiring "slow, cautious and controlled" hoisting will ensure that the operator pays attention to the location of the platform during the lift, the rate of acceleration and deceleration, and the rate of ascent or descent. OSHA, therefore, agrees with the commenters who suggest that the Agency require "slow, cautious and controlled" hoisting as the appropriate means of protecting hoisted employees from sudden pitching of the crane or platform. Accordingly, OSHA is issuing paragraph (g)(3)(i)(A) as revised.

In Issue 5 of the proposed rule, OSHA also asked for comments and information on the need for load line position indicators. The commenters who responded to this Issue (Exs. 3–9, 3–

14, 3–22, 3–30, 3–33 and 3–47) generally stated that the position indicator would be an unnecessary burden because the requirement in proposed paragraph (g)(6)(viii) for continuous sight and communication would protect hoisted employees. The State of California (Ex. 3–33) also stated that specifications for use and maintenance raised concerns. OSHA has determined, based on the record, that the requirements for continuous sight and communication in paragraph (g)(6)(vi) of the final rule make a requirement for a loadline position indicator unnecessary.

Paragraph (g)(3)(i)(B) sets forth the safety factors for load hoist wire ropes on cranes or derricks used to hoist personnel. The proposed paragraph simply stated that the minimum hoist load safety factor would be seven. It became clear to OSHA from commenter responses that the proposal did not indicate clearly how the safety factor for hoisting personnel compared to the safety factor already required for materials hoisting in § 1926.550. The Agency also determined employers need additional information in the standard to determine if their operations comply with the standard. Therefore, the Agency has revised this paragraph to state clearly the required strength of wire rope used to hoist personnel.

OSHA has also added definitions for "failure," "load refusal," and "maximum intended load" in paragraph (g)(1)(ii) in order to state clearly the usage of those terms in the final rule. Additionally, OSHA has added an explanation of how employers are to comply with this requirement.

Section 1926.32(m) defines "safety factor" as "the ratio of the ultimate breaking strength of a member or piece of material or equipment to the actual work stress or safe load when in use."

Under existing OSHA regulations, § 1926.550 (b) and (e), which incorporate ANSI B30.5–1968 (cranes) and B30.6–1969 (derricks) by reference, wire ropes used to hoist material must have a minimum safety factor of 3.5. OSHA has determined, based in part on information from the ACCSH, and ANSI B30.5 Committee and the "Rigging Manual" published by the Construction Safety Association of Ontario, Canada, that a wire rope safety factor of 3.5, alone, is inadequate to protect hoisted personnel from hoisting risks such as the severing of the load line. The ACCSH recommended that the safety factor be eight, while a draft revision of ANSI B30.5, section 5–3.2.2.3(a)(5) recommended a safety factor of eight for rotation resistant rope, and five for other wire rope. The draft revision was not adopted by ANSI as a national consensus standard. The Canadian "Rigging Manual" specifies 10 as the minimum wire rope safety factor for personnel hoisting.

OSHA did not propose any of the suggested safety factors in paragraph (g)(3)(i)(B). Instead, OSHA determined that the necessary employee protection could be achieved by keeping the existing 3.5 safety factor requirement and derating the capacity of a crane or derrick by 50 percent, which would effectively double the safety factor to seven. The proposed safety factor, seven, was intended as an adequate and easy to calculate upgrade in the protection provided by wire ropes used for personnel hoisting.

In Issue 4 of the proposal, OSHA discussed the above-mentioned safety factors and explained how the requirements of proposed paragraph (g)(3)(i)(B) and the 50 percent derating required in paragraph (g)(3)(i)(F) are intended to provide the safety factor of seven. OSHA also requested input regarding the adequacy of the proposed regulatory approach and regarding the need for a different safety factor for rotation resistant wire rope. The latter topic reflected OSHA's concern that while rotation resistant rope reduces platform swaying and spinning, it is also subject to internal, often undetectable, damage.

Ebasco Constructors, Inc. (Ex. 3–6), the National Constructors Association (Ex. 3–30) and Organization Resource Counselors (Exs. 3–89) suggested that OSHA simply refer employers to the manufacturers' specifications for their cranes or derricks and apply the derating provisions of proposed paragraph (g)(3)(i)(B) without setting a separate safety factor provision. Ebasco, in particular, stated that OSHA would confuse compliance efforts if it promulgated both as 50 percent derating and a safety factor, because employers might conclude that they were required both to use wire ropes with a safety factor of seven and to derate capacity by 50 percent. Indeed, the Commonwealth of Puerto Rico (Ex. 3–55) apparently drew that conclusion, as reflected by its comments which favored the proposed safety factor of seven because the 50 percent derating would raise the safety factor to 14.

On the other hand, some commenters, such as Unit Crane, Dupont, and Union Wire Rope (Exs. 3–47, 3–75 and 3–22), stated that the proposed deratings alone would not raise the wire rope safety factors to the extent predicted by OSHA. Those commenters noted that variations in a crane or derrick boom angle, boom weight, or rigging configuration would determine the extent to which derating increased the safety factor. Indeed, Unit Crane observed that, if the boom weighed 20,000 pounds and the rated load was 5,000 pounds, derating by 50 percent would reduce the suspension system load by only 10 percent. Dupont, however, noted that rerating capacity by 50 percent would provide a "generous" addition margin of safety for personnel hoisting operations, as long as the minimum boom angle was at least 40 degrees. Another commenter, the United Steelworkers of America (Ex. 3–10), suggested that OSHA require employers to make charts available to crane operators so that they can quickly and accurately calculate a crane's capacity when the crane boom is at a particular angle.

Several commenters, such as Magma Copper, Bechtel Corporation and the Granite Construction Corp. (Exs. 3–27, 3–45 and 3–50), stated that a safety factor lower than seven would protect workers adequately. Bechtel suggested that OSHA retain 3.5 as the safety factor, without derating, while Magma Copper and Granite Construction suggested that the safety factor be set at five, as recommended by a draft revision of ANSI B30.5 which was then in circulation. The Salt River Project (Ex. 3–61) specifically opposed raising the wire rope safety factor either to seven or 10. Other commenters, including the Wire Rope Safety Board, Kerr-McGee Corporation and Spartan Equipment Company (Exs. 3–15, 3–23 and 3–82), stated that setting the wire rope safety factor at seven would provide adequate protection. In particular, Spartan expressed its understanding that the safety factor of seven would be achieved through derating.

Several commenters, including the Boeing Company, Unit Crane & Shovel and Boeing Aerospace Company (Exs. 3–38, 3–47 and 3–57) suggested that OSHA set the minimum wire rope safety factor for personnel hoisting at 10. In particular, those commenters cited the Canadian "Rigging Manual" published by the Construction Safety Association to support their position. The Boeing commenters also referenced regulations for powered platforms (29 CFR 1910.66) and consensus standards for personnel hoists (ANSI A10.4). In addition, Unit Crane & Shovel based its recommendation on the Power Crane and Shovel Association Standard No. 4–1983, the American Petroleum Institute's API Spec. 2C, Third Edition, March 1983, and the retirement criteria for wire rope presented in ANSI B30.5–1982. The Boeing Company (Ex. 3–78) later reversed its position regarding wire rope

safety factors, suggesting that OSHA raise the safety factors above the levels mandated for material hoisting only if OSHA determined, through a review of accident data, that hoisting personnel with ropes satisfying the existing safety factors poses a significant risk to employees.

The commenters differed in their suggestions for the standard wire rope safety factor but were uniform in their recommendation that OSHA ban or limit the use of rotation resistant wire rope for personnel hoisting. Many commenters suggested that OSHA set a higher safety factor for rotation resistant wire rope. Granite Construction specifically invoked ANSI and, in addition, suggested that OSHA prohibit the use of rotation resistant rope for personnel hoisting. Kerr-McGee suggested that employers avoid the use of rotation resistant rope for personnel hoisting because of problems with the rate and detection of rope deterioration. The Wire Rope Safety Board noted that static tests on rotation resistant rope indicated reduction in breaking strength of up to 50 percent when compared to the same tests on non-rotation resistant rope. The Wire Rope Safety Board also observed that, while the safety factor of seven would provide a reassuring level of protection, the tendency for rotation resistant rope to break down could be important if the rope was burdened at its full breaking strength. That situation could occur in an emergency, such as the snagging of a platform on a projection.

Both the Boeing Company and Boeing Aerospace (Exs. 3–38 and 3–57) expressed special concern about the use of rotation resistant wire rope for personnel hoisting, because that rope is "susceptible to internal damage (from overload) that cannot be detected by inspection." They noted that wire rope manufacturers recommended that employers effectively double the safety factors when using rotation resistant rope. Therefore, they suggested that OSHA set the safety factor for rotation resistant wire rope at double that for other hoisting rope.

The United Steelworkers of America (USWA) and the Construction Industry Manufacturers Association (CIMA) (Exs. 3–10 and 3–31), suggested that, because of the potential hazards to hoisted personnel, OSHA set the safety factor for rotation resistant wire rope at 10, rather than at seven. The USWA cited MSHA's proposed regulation for personnel lifts which requires a 10:1 safety factor for rotation resistant ropes. Also, the CIMA pointed out that, since section 5–1.7.1(c) of ANSI B30.5–1982 requires rotation resistant wire rope to have a minimum design factor of five, setting the minimum safety factor at 10 for personnel hoisting would be consistent with OSHA's position that halving the rated capacity doubles the safety factor.

OSHA has determined, based on its review of the record, that requiring a safety factor of seven for running ropes, other than rotation resistant ropes, provides adequate protection for hoisted personnel. In particular, the Agency believes that setting the safety factor below seven would not satisfy OSHA's intention that hoisted personnel receive more protection than hoisted material. On the other hand, OSHA has decided that setting the safety factor at 10 for standard design running rope is not necessary to protect employees, and would be unnecessarily burdensome, without providing a significant increase in employee safety. In addition, OSHA notes that compliance would be more complicated if the Agency set the safety factor at 10 because the simple 50 percent derating approach could not be applied. OSHA believes that using the 50 percent derating is a convenient and easy to use method of providing the required employee protection. OSHA's deliberations regarding derating are discussed below in more detail under paragraph (g)(3)(i)(F).

OSHA has determined, through its review of the numerous comments received and other information in the record, that although the minimum safety factor of seven is adequate for standard wire rope, it would not adequately protect employees being hoisted with rotation resistant wire rope. In particular, OSHA has concluded that rotation resistant rope is more easily damaged and is more difficult to inspect than other wire rope. Section 5–1.7.1 of ANSI B30.5–1982, for example, takes those differences into account in the context of material hoisting, by setting the minimum design factor at 3.5 for live or running ropes and at five for rotation resistant ropes. Therefore, consistent with its calculations for other wire rope, OSHA believes that derating cranes using rotation resistant wire rope by 50 percent will raise the effective safety factor to 10. The Agency has determined that this increase in the safety factor is necessary to protect employees from the combined hazards of personnel hoisting and rotation resistant rope. OSHA has chosen to set a separate, higher, safety factor for rotation resistant rope rather than limit or prohibit its use because, when used in compliance with the provisions of this standard, rotation resistant rope increases the crane or derrick operator's control over the movement and position of a personnel platform during hoisting, and precludes having to change ropes on a crane already using rotation resistant rope that is used to hoist personnel. OSHA has determined that rotation resistant rope which satisfies the safety factor of 10 is already used by or readily available to employers, so this requirement imposes a minimal additional burden.

Paragraph (g)(3)(i)(C) requires that all brakes and other locking devices be engaged when a personnel platform is in a stationary working position, so that hoisted employees are not exposed to the hazards of cable to slip. The Boeing Company, Boeing Aerospace and Unit Crane & Shovel (Exs. 3–38, 3–57 and 3–47), were the only commenters on this provision. The Boeing commenters supported regulatory language which would protect hoisted employees against sudden platform movement during periods when the platform was suspended at a work position. Unit Crane commented that "this provision in this position is a good one and should be retained." United Crane also noted that this provision, while not part of section 5–3.2.2, Personnel lifting, of ANSI B30.5, was implied by section 5–3.2.1.3(c), "Holding the load." In addition, the commenters suggested that OSHA require automatic brakes in order to prevent inadvertent platform movement. This issue is discussed in detail below. Based on the record, OSHA has determined that paragrapah (g)(3)(i)(C) is necessary to protect hoisted employees from the hazards of being spilled from the platform.

Paragraph (g)(3)(i)(D) of the final rule requires that cranes and derricks used to hoist personnel be equipped for and operated with controlled load lowering. This provision also prohibits free fall. The paragraph is based on ANSI B30.5–1982, section 5–3.2.2(a)(9). Issue 2 specifically requested additional comments on this subject. This paragraph is intended to ensure that employers operate their personnel hoisting equipment so that hoisted personnel are not exposed to the hazards of sudden, fast descents.

The Agency received many comments on this provision. The Milwaukee Construction Industry Safety Council (MCISC), (Exs. 3–26 and 3–70), for example, asserted that engineering and economic constraints would prevent all but the largest contractors from retrofitting their cranes, so the small contractors would be unable to hoist employees. In addition, the Associated General Contructors of America (AGC)

(Ex. 3–28) suggested that such a requirement should be phased in as new equipment is marketed. The AGC joined with the MCISC in recommending that cranes used for pile driving be exempted from this paragraph because "companies engaged in pile driving cannot operate with power load lowering" and those companies "have to hoist personnel aloft to perform pile driving work." Therefore, according to the AGC, the proposed requirement was impracticable for pile driving cranes. Also, the National Association of Demolition Contractors (NADC) (Ex. 3–8) commented that controlled load lowering would impede demolition operations which require free fall. The NADC suggested that the use of oversized brakes and clutches would ensure the safety of hoisted personnel, because the oversized brakes and clutches could be engaged to slow descent safely. Unit Crane & Shovel (Exs. 3–47 and 3–81), on the other hand, asserted that effective field-installed retrofit kets are available at reasonable cost. Unit Crane also observed that the restrictions on personnel hoisting would mean that relatively few cranes with the required equipment would be needed and that contractors could plan ahead to have a properly equipped crane on hand when needed. Indeed, the vast majority of commenters who addressed this issue agreed that OSHA should require controlled load lowering features on all cranes which hoist personnel. These commenters included Northwest Engineering Company, the State of Alaska, the U.S. Air Force, Johnson Brothers Corporation, the Farm and Industrial Equipment Institute, the National Construction Association and the Spartan Equipment Company. (Exs. 3–3, 3–4, 3–24, 3–43, 3–47, 3–73, 3–74 and 3–82). The Parsons Corporation (Ex. 3–22) stated that "We agree with OSHA's proposal to require controlled load lowering; in fact, we consider such a function as essential. DuPont (Ex. 3–75) took issue with those commenters who suggested that OSHA exempt cranes used for pile driving and demolition from the controlled load lowering requirements, stating that most cranes are available with drum drives that allow operation in free fall or controlled lowering mode and that the cost of retrofitting is reasonable. In addition, Northwest Engineering Company (Ex. 3–3) noted that, while it may be impractical to retrofit old cranes, there are enough properly equipped cranes which could be borrowed or rented to hoist employees safely.

OSHA has determined that a controlled load lowering requirement will effectively protect hoisted employees from sudden stops, starts and free fall, without unduly burdening employers. Although they can help stop a fall once it has begun, oversized brakes or clutches will not themselves prevent precipitous free fall. OSHA is also concerned that without controlled load lowering, the use of oversize brakes to stop free fall would jolt the platform, possibly throwing employees off. As documented by JACA, OSHA's contractor for this rulemaking (Ex. 5–2, Appendix C) many employees have been killed or injured in accidents which would have been prevented by the use of controlled load lowering. Therefore, OSHA has decided, based on the evidence in the record, to promulgate paragraph (g)(3)(i)(D) as proposed, except that the explanatory note in the proposed provision has been incorporated into the standard itself.

In addition, Issue 7 requested information on the need for an automatic brake which stops the load when the operator releases the controls. The comments received indicated that opinions on automatic brakes (also referred to as "deadman brakes") intertwined with views on the proposed controlled load lowering requirement. Thus, commenters, such as the AGC of America (Exs. 3–28 and 3–67), and the National Constructors Association mixed their statements of opposition to automatic brakes with assertions that free fall was necessary. Commenters such as Dupont, Spartan Equipment, and Organization Resource Counselors (Exs. 3–75, 3–82 and 3–89) stated that an automatic brake requirement would pose great expense and difficulty for users of mechanical clutch-drive cranes (i.e., cranes which do not have controlled load lowering). On the other hand, Puerto Rico and Boeing Aerospace (Exs. 3–55 and 3–57) stated that automatic brakes were needed to prevent free-fall, and the Construction Safety Association of Ontario (Ex. 3–81) stated that inexpensive automatic brake retrofit kits were readily available.

OSHA has determined, based on its review of the record on Issue 7, that the benefits of an automatic brake requirement will be gained through the promulgation of the proposed controlled load lowering and, in part, anti-two blocking requirements, because the equipment and procedures necessary to prevent free fall or two-blocking will approximate those envisioned for an automatic brake. Therefore, OSHA has decided not to promulgate a separate requirement for an automatic brake.

Paragraph (g)(3)(i)(E) requires that cranes used to hoist personnel be uniformly level within one percent of level grade and located on firm footing. In addition, cranes equipped with outriggers shall have all of them deployed, according to manufacturer's specifications, when personnel are to be hoisted. This language is essentially identical to that in the proposed requirement.

This requirement, based on ANSI B30.5–1968, section 5–1.2, B30.5–1982, sections 5–1.2.2(e) and 5–3.2.1.4(a)(1), and the specifications provided by manufacturers such as Grove (Ex. 2–17), requires that the crane be "level." The Agency notes that B30.5–1968 as referenced in § 1926.550(b)(2), sets the requirements for compliance with the existing standard. OSHA is aware that a crane loses between five and 30 percent of its capacity when it deviates from level by as little as one degree. Indeed, capacity charts generally are based on the assumption that hoisting cranes are within one percent of level. Also, OSHA is aware that most cranes used to hoist personnel are "free-swinging," so that the boom of a crane which is not level will swing around to the "low spot." Based on those considerations and the Agency's concern about the tipping hazards to which hoisted employees are exposed, OSHA has determined that limiting deviation to within one percent of level will provide operators with reliable capacity information and overall stability.

Some of the commenters, such as the Carolinas Branch of the AGC and the T.A. Loving Company (Exs. 3–39 and 3–82), stated that it was impossible to operate a crane uniformly level within one percent of level grade because movement of certain crane components causes one percent deviation, even when no load is hoisted. OSHA observes that the proposed provision covers the placement of the crane, not the operation. Even so, the Agency has determined that the operation of a crane on a surface which has been properly leveled will not result in deviation beyond one percent of level grade. Therefore, OSHA notes the importance of choosing the appropriate set up location and leveling materials and procedures to ensure that deviation does not exceed one percent. Also, the Equitable Gas Company (Ex. 3–25) stated that requiring mobile cranes to be leveled within one percent of level grade would defeat the design of the rear tires, which are designed to be load bearing under certain conditions. OSHA notes that mobile cranes equipped with outriggers are often required to deploy all outriggers, and that the leveling of the crane is accomplished by use of the

outriggers, so that the tires are not load bearing during hoisting operations.

The AGC of America (Ex. 3–28 and Tr. 165, 197), suggested that a crane operating within three percent of level grade would be safe. Another commenter, Granite Construction (Ex. 3–50), suggested that mobile cranes equipped with outriggers can readily satisfy the proposed one percent limit, while crawler cranes, which are not so equipped, should only have to operate within three percent of level grade because it would be too difficult for the crawler cranes to achieve one percent.

The Agency agrees that providing a level grade for a crane without outriggers may be more difficult. OSHA has determined, however, based on the record, that all cranes can be leveled within one percent of grade and that the additional effort required to do so is not an unreasonable burden. The Agency reiterates that employee safety, not the employer's convenience, controls the setting of requirements for personnel hoisting.

Several commenters, such as the State of Maryland, the Construction Industry Manufacturer's Association (CIMA), the Boeing Company and Boeing Aerospace (Exs. 3–19, 3–31, 3–38 and 3–57) expressed support for the one percent limit.

In particular, the CIMA stated that "the correct level is critical to the safe operation of the crane," especially because, as stated above, the load charts only apply when the crane is level. CIMA suggested that the one percent limit be measured as one foot of rise for one hundred feet of run.

The State of Maryland (Ex. 3–19) suggested that OSHA revise this paragraph to specify that *all* outriggers on a given crane be deployed because otherwise employers could interpret the provision as not requiring that all outriggers be used. The danger is that deploying only some of the outriggers could permit the crane to tip out of balance as the boom swings, as documented by JACA, OSHA's contractor for this rulemaking (Ex. 5–2, Case No. P–6). Since some manufacturers do not specify that *all* outriggers must be used, OSHA is requiring that, in the absence of applicable manufacturer instructions, all outriggers be fully extended and positioned.

OSHA believes that the crane leveling requirement, as clarified, provides the necessary protection for hoisted employees, while taking into account the deviation from level for which crane load charts make allowance. OSHA has concluded that allowing greater leeway for deviation from level would dangerously reduce the reliability of the load charts and increase the likelihood of the crane tipping over. Therefore, OSHA promulgates this paragraph, as revised.

Paragraph (g)(3)(i)(F) requires a 50 percent derating of a crane used to hoist personnel, so that the crane would be authorized to lift no more than half the load it could lift if it were hoisting materials. This provision is based on section 5–3.2.2(a)(17) of ANSI B30.5–1982. Parsons Corporation (Ex. 3–22) and the National Constructors Association (Ex. 3–74), among others, supported the proposed derating, focusing on the ease of applying a provision which simply requires the crane operator to divide the referenced load chart figure by two, and on the attendant safety benefit. Universal Wire Rope Products (Ex. 3–36) and DuPont (Ex. 3–75) supported the derating, but noted that achieving the advantages of derating depended on carefully controlling boom angle. Other commenters, such as the United Steelworkers of America (Ex. 3–10) and the Organization Resources Counselors (Ex. 3–89), emphasized the need to provide crane operators with charts so they could calculate the crane's capacity at different boom angles.

The National Association of Demolition Contractors (NADC) (Ex. 3–8) and Unit Crane & Shovel (Ex. 3–47) recommended the cranes be derated to 25 percent, with Unit Crane considering derating to 33 percent adequate for some cranes. NADC apparently viewed derating as a substitute for controlled load lowering and other paragraph (g)(3) requirements. Unit Crane, in turn, based its recommendation on the American Petroleum Institute's Specification 2C, March 1982, which addresses tipping hazards.

OSHA received comments from the Associated General Contractors of St. Louis (Ex. 3–14), the Carolinas Branch of the AGC, (Exs. 3–39 and 3–82), Bechtel (Ex. 3–45) and the State of Michigan (Ex. 3–84) which challenged the need for the proposed derating. Those commenters generally stated that existing safeguards were adequate or that the anticipated platform load was too low compared to the rating of the crane to justify derating. The AGC of America (Ex. 3–28 and Tr. 199) and Granite Construction (Ex. 3–50) asserted that existing and proposed safety requirements made it unnecessary to derate below 75 percent of rated capacity.

OSHA notes that load rating charts are already required by existing § 1926.550(a)(2). OSHA also notes that the commenters who opposed derating and other proposed criteria generally did not distinguish between the safeguards considered adequate for hoisting material and those necessary for hoisting personnel. OSHA has determined that personnel hoisting, insofar as it is allowed, requires a higher degree of caution and a greater margin of safety than is required for material hoisting because the potential for employee injury in a personnel hoisting accident is far greater. OSHA agrees with the commenters who stress that the 50 per cent derating is both protective and easy to apply, increasing the assurance that crane operators will calculate correctly the load limits and safely hoist personnel platforms. OSHA has no basis for concluding that setting the derating requirement at some other percentage would provide more safety. Indeed, the Agency is concerned that setting a different derating percentage would increase the likelihood that the operator would miscalculate the load limit, possibly causing an accident. Therefore, based on the evidence in the record, OSHA is promulgating paragraph (g)(3)(i)(F) as proposed.

Paragraph (g)(3)(i)(G) prohibits employers from hoisting personnel using cranes or derricks with live booms. This provision is based on ANSI A10.28–1983, "Work Platforms Suspended from Cranes or Derricks—Safety Requirements," section 3.1 ANSI A10.28 defines a live boom as one whose lowering is controlled by brakes without aid from other devices. OSHA agrees with ANSI that the use of live booms would endanger hoisted employees.

The agency received comments on this provision from the Carolinas Branch of the AGC (Ex. 3–39 and 3–82) and the Tennessee Roadbuilders Association (Ex. 3–41), requesting that OSHA add an exemption for "life or death emergencies." OSHA understands that during a "life or death emergency" people will do what is necessary, using whatever equipment is available to prevent death or injury. Therefore, this provision is promulgated as proposed, except that the explanatory note in the proposal has been incorporated into the standard.

Paragraph (g)(3)(ii) requires that cranes or derricks used to hoist personnel be equipped with certain operational aids in order to prevent tipping, two-blocking or other accidents. OSHA specifically requested additional input in this subject in Issue 5.

Proposed paragraph (g)(3)(ii)(A) required employers to equip those cranes and derricks having variable angle booms with boom angle indicators which are readily visible to the operator. This provision is based on ANSI B30.5–1982, section 5–1.9.1(c). The Agency

received comments from Unit Crane & Shovel (Ex. 3-47) and Puerto Rico (Ex. 3-55) which supported this requirement as proposed. The State of California, the Boeing Company and Boeing Aerospace (Exs. 3-33, 3-38 and 3-57) supported the proposed requirements and suggested that the Agency also require a radius chart. That suggestion has not been adopted because the necessary data is incorporated in the load chart which is already required by § 1926.550(a)(2) of the construction standards.

As proposed, paragraph (g)(3)(ii)(A) appeared to require that cranes be equipped with boom angle indicators, whether or not they had variable angle booms. Therefore, in promulgating the final rule, OSHA has rephrased paragraph (g)(3)(ii)(A) to make it clear that only cranes and derricks equipped with variable angle booms and used to hoist personnel must have boom angle indicators.

Proposed paragraph (g)(3)(ii)(B) required employers to equip or mark any telescoping boom so that the extended length is clearly indicated. This provision is based on ANSI B30.5-1982, section 5-1.9.1(e). However, commenters such as the Daniel Construction Company and the Carolinas Branch of the AGC (Exs. 3-17 and 3-39), indicated that the marking would be ineffective because the marking would not be visible to the crane operator at the controls. Another commenter, the Al Johnson Construction Company (Ex. 3-42), asserted that effective instruments are not available, and that compliance with paragraph (g)(6)(vi), which requires continuous contact between the operator or signal person and the platform occupants, will provide the operator with the information necessary to hoist employees safely. On the other hand, Wylie Systems presented testimony at the public hearings (Tr. 472-73, 489-90) and the PAT Equipment Corporation submitted information (Ex. 7-E) which indicated that effective instrumentation is available.

Standard Oil (Indiana) (Ex. 3-46) commented that "Safe work practice requires that a crane operator knows the load weight, load radius and height of lift prior to actually making the lift." Using that information, the operator could refer to the crane's range diagram to determine the required boom length without reference to length markings or indicators.

OSHA has determined that there are effective boom length indicators readily available for installation on telescoping booms. In addition, the Agency believes that markings on the boom can provide the operator with boom length information. OSHA also agrees with Standard Oil (Indiana) that an operator preparing to hoist personnel could determine the boom length without using a boom length indicator. Therefore, OSHA has revised proposed paragraph (g)(3)(ii)(B) so that, as promulgated, it permits operators, as an alternative to using the required markings or indicators, to determine the anticipated load radius accurately and use that finding to calculate the necessary boom length.

Paragraph (g)(3)(ii)(C) of this final rule requires the use of an anti-two-blocking device, or a two-block damage prevention feature on cranes or derricks used to hoist personnel. These devices are intended to prevent the boom tip from contacting the load block or overhaul ball and severing the hoist rope. Anti-two-blocking devices detect that the overhaul ball has come close to the boom tip and activate a brake which immediately stops the hoist and holds the platform in place. This provision is based, in part, on ANSI B30.5-1982, section 5-3.2.2, which states that employers shall have warning or other limiting devices "to prevent two-blocking, unless audible communications have been provided and one of the persons being lifted has been specifically assigned" to warn against two-blocking hazards. OSHA did not adopt this approach in the proposed rule. The Agency, however, did request (49 FR 6285) that commenters inform OSHA of any conditions where the use of warning devices would be more feasible than the use of positive acting mechanisms.

OSHA received a great volume of comment on this provision, most of it opposing the requirement or urging that OSHA require something less than the proposed positive acting preventive devices. For example, Longview Fibre Company, Columbia Nitrogen Corporation and the AGC of California (Exs. 3-52, 3-58 and 3-66) asserted that available anti-two-blocking equipment does not work properly and that careful operation of a crane would obviate the need for installation of anti-two-block controls. In addition, Dupont (Ex. 3-75) stated that the kind of automatic brake needed to prevent two-blocking has not yet been developed to the point where it could be considered "a reliable safety component." Therefore, Dupont along with other commenters, such as the Pennzoil Company (Ex. 3-29), Boeing Company (Ex. 3-38), Boeing Aerospace (Ex. 3-57) and the Carolinas Branch of the AGC (Exs. 3-39 and 3-82) requested that OSHA permit employers to use warning devices so that operators could be alerted to two-blocking situations and avoid two-blocking accidents. These commenters stated that requiring positive acting devices would impose unreasonable economic burdens; that many cranes and derricks, particularly older ones, could not be retrofitted; and that anti-two-blocking devices require excessive maintenance, are unreliable, and are misused or abused by operators.

On the other hand, comments by Unit Crane & Shovel (Exs. 3-47 and 3-81) and Kenny Construction Company (Ex. 3-56), in addition to testimony by the Operating Engineers at the public hearing (Tr. 454-457), indicated that workable anti-two-blocking "stop and hold" devices are available and should be required. BWB Controls, Inc. (Ex. 3-63), a manufacturer of anti-two-blocking warning devices, submitted product literature and testimonials attesting to the reliability of its products. OSHA also noted that the CAL/OSHA hearing transcript from May 12, 1983, submitted by opponents of a requirement for anti-two-blocking devices (Exs. 3-28 and 3-66), also included testimony that the devices were, in fact, available and workable.

OSHA does not believe that alarm devices or shouted warnings would provide effective protection for hoisted personnel because they place too much reliance on operator reaction time. For example, the system may function properly, but the operator may be distracted by the noise of the construction site, or the noise of the crane engine and hoist mechanism and not notice the alarm or warning for several seconds, or the reaction time of the operator may simply be too slow. In either case, a two-blocking incident could easily result. Therefore, because the Agency believes that only two-blocking preventive devices will provide the necessary employee protection, OSHA has not followed the pertinent ANSI standard. As stated in its discussion of Issue 7, above, OSHA has, in part, based it decision not to promulgate a separate automatic brake requirement on its determination that the brake mechanism of an anti-two-blocking device will provide reliable protection for hoisted personnel.

OSHA concludes, based on the evidence in the record and its regulatory impact analysis, that the anti-two-blocking device requirement is both feasible and cost effective. The Agency agrees that cranes equipped with these devices require more maintenance than cranes which are not so equipped. OSHA notes, however, that this maintenance would be comparable to that required on the alarm devices which many commenters recommended. The major maintenance and malfunction

concern with either system is the switch at the boom tip. OSHA believes that proper maintenance of the device and proper treatment during rig up, rig down, and transport, coupled with proper adjustment of the device once the crane is in place, will prevent the reported unreliability and malfunctioning.

OSHA has received a considerable amount of information regarding the misuse of anti-two blocking devices by operators. OSHA has determined that the proper selection and training of operators is necessary to prevent the misuse of these devices as "operational controls." In particular, operators must be taught that an anti-two-blocking device is a backup for proper operator control, and must not be used routinely as a stopping device.

Therefore, based on its review of the evidence in the record, which includes many two-blocking accident reports, such as the one discussed earlier in this preamble (Cheyenne, Wyoming, 1973), OSHA is promulgating paragraph (g)(3)(ii)(C) as proposed, except that the term "fall ball" has been replaced by the term "overhaul ball," to conform with current industry terminology.

Paragraph (g)(4) provides design criteria, platform specifications, loading requirements and rigging requirements for personnel platforms.

Paragraph (g)(4)(i) provides design criteria for personnel platforms. One proposed provision, paragraph (g)(4)(i)(D), has been moved to paragraph (g)(4)(ii)(E) because it involves platform specifications. The language of the remaining three provisions is identical to that in the proposal, except as discussed below.

Paragraph (g)(4)(i)(A) requires the employer to ensure that personnel platforms and suspension systems are designed by a qualified engineer or qualified person who has demonstrated skill and experience in structural design. The term "qualified" is defined in § 1926.32(e). In the proposed standard, this provision required that the employer have a qualified engineer design the platform, based on ANSI A10.28–1983, section 5.1. The States of Maryland and California (Exs. 3–19 and 3–33) commented favorably on the proposed requirement. However, the International Cargo Gear Bureau Inc. (ICGBI) (Ex. 3–1) asserted that the proposed language was too vague and asked OSHA to specify design criteria and accredit persons who would certify that the platforms were built to specifications. The ICGBI did not express an opinion on the need to require that only engineers provide the certification. On the other hand, Magma Copper (Ex. 3–27) and Lunda Construction Company (Ex. 3–92) suggested that only a "competent" individual is necessary to design a personnel platform. OSHA notes that the term "competent person" has a unique meaning by definition in §1926.32(f). However, the Magma Copper and Lunda Construction comments appear to use the term "competent" to indicate that the person designing the platform must be "competent" to design and construct platforms which meet this standard, and that a person need not be an engineer to demonstrate such competence. In other words, they indicate that the standard should not require design by an engineer, because platforms can be properly designed by knowledgeable non-engineers, as well. OSHA agrees that some individuals, who lack engineering degrees, have the requisite skill and experience to design and construct a personnel platform which meets the requirements of the standard. Based on the above discussion, OSHA has determined, notwithstanding ANSI A10.28–1983, that design by a qualified engineer or a qualified person with specific structural design skills and experience will ensure that a personnel platform and its rigging provide the necessary employee protection and has revised this provision as noted.

This paragraph has also been modified to make it clear that the suspension system (i.e., the permanently attached rigging), as well as the platform, must be designed by a qualified engineer or qualified person. Based on comments from Bechtel (Ex. 3–45), OSHA determined that the compatibility of the platform structure with the attached rigging is critical to safe hoisting. OSHA also notes that the rigging is subject to the same loads and operating conditions as the platform, and that the platform tackle is often attached to the platform at the time the platform is made. The Agency notes that in some circumstances the person who designs the platform will also design the tackle attached to the platform.

Proposed paragraph (g)(4)(i)(B) required that the suspension system for personnel platforms be designed to minimize tipping. The Agency received very few comments on this provision. Bechtel (Ex. 3–45) commented that the requirement was unnecessary in light of the preceding paragraph. The State of Maryland (Ex. 3–19) suggested that OSHA require a suspension system consisting of a factory-made wire bridle with four legs and suspended at 60 degrees to the horizontal, because this configuration has a known rated capacity and is easily inspected. OSHA notes that employers use personnel platforms to access a wide variety of workplaces and believes a specific bridle configuration would not be appropriate with all platforms or for all hoists. In addition, as was stated in the discussion of the previous paragraph, OSHA has determined that requiring qualified engineers or qualified persons to design the bridle provides adequate protection. Therefore, OSHA will not prescribe what tackle may be used. The ICGBI (Ex. 3–1) argued that the requirement should be "to prevent tipping." OSHA agrees with the ICGBI that "to prevent tipping" is the desired goal, but believes it is not feasible to prevent tipping totally, due to the nature of personnel platforms. Therefore, this paragraph is promulgated as proposed.

Proposed paragraph (g)(4)(i)(C) required that personnel platforms be designed with a minimum safety factor of five. As discussed under paragraph (g)(3)(i)(B), above, OSHA is incorporating language related to safety factors which the Agency believes will express clearly the regulatory intent of the provision. OSHA based this provision on ANSI standards B30.5–1982, section 5–3.2.2(b)(3) and A10.28–1983, section 5.2.

In 1974, as noted in the proposal, the ACCSH recommended a safety factor of six for the design of personnel platforms. In 1983, the ACCSH discussed setting a safety factor for personnel platforms, but made no recommendations. OSHA specifically requested input regarding the sufficiency of the proposed safety factor in Issue 4 of the proposal (49 FR at 6283).

Bechtel (Ex. 3–45) stated that the proposed safety factor of five was "unnecessary and wasteful," because existing American Institute of Steel Construction (AISC) specifications provided sufficient guidance for the design of personnel platforms, just as they already did for other temporary personnel supports."

The Department of the Air Force, Milwaukee Construction Industry Safety Council, National Constructors Association and Unit Crane & Shovel (Exs. 3–24, 3–26, 3–30 and 3–47) expressed support for the proposed safety factor. In particular, Unit Crane cited ANSI B30.5–1982 to support this provision and noted that, "since a platform is not subject to the same sorts of fatigue as running ropes," there was no inconsistency in supporting five as a safety factor for platforms, while suggesting that OSHA set the wire rope safety factor at 10.

The Boeing Company (Ex. 3–38) recommended setting the safety factor at four, as provided in the § 1910.28(a)(4)

requirements for "suspended scaffolds," so that the provision would be consistent with the "safety factors established for similar set ups." Boeing Aerospace (Ex. 3–57) disagreed with this recommendation, suggesting that "the safety factor should be at least 5," because personnel platforms are exposed to hazards, such as snagging, which ordinary scaffolds do not confront. Boeing Aerospace also stated that setting the safety factor at five was appropriate so that hoisted personnel would have at least as much protection as hoisted material, citing § 1926.251(c)(i), rigging, and § 1926.251(f)(1), shackles and hooks for material handling.

The United Steelworkers of America and the Spartan Equipment Company (Exs. 3–10 and 3–82) suggested that setting the platform safety factor at 10 would provide adequate protection. In particular, the United Steelworkers stated that the higher the safety factor, the greater the assurance that OSHA is satisfying its statutory duty to protect employees.

Norpac Engineering (Ex. 3–88) suggested that OSHA set personnel platform safety factors which are comparable to those for elevator design and which are at least as safe as those required for scaffolds. OSHA has determined that the current ANSI standard for Elevators, A17.1–1984, is not an appropriate reference because it does not provide clear guidance for the construction of personnel platforms. Norpac (Ex. 3–88) also recommended that OSHA use the scaffold standards, §§ 1926.28(a)(4) and 1926.451(a)(7) which, as noted above, require a safety factor of four.

OSHA has determined that setting the platform safety factor at five provides adequate protection for hoisted personnel, consistent with the applicable consensus standards and most of the comments received. In addition, the Agency believes that neither the AISC specifications nor the ANSI elevator standard provides the specific pertinent information which an employer needs to fabricate a platform properly. Furthermore, OSHA has determined that setting the safety factor at four, as is required under the scaffold standard, would not adequately protect hoisted personnel because, as noted by Boeing Aerospace (Ex. 3–57), platforms are exposed to hazards which suspended scaffolds do not face.

OSHA also has determined that it is unnecessary to set the safety factor at six or ten, as recommended by the ACCSH and certain commenters because, as observed by Unit Crane & Shovel (Ex. 3–47), five is recognized by ANSI as providing adequate protection under the conditions where platforms are used. Accordingly, the Agency promulgates this paragraph as revised and has added an explanation to clarify that the criteria for guardrails and body belt/harness system anchorage points are found in other Subparts of the Construction Standards. OSHA believes that this revision will clarify the requirements and increase consistency within the construction standards, thereby improving compliance.

Proposed paragraph (g)(4)(i)(D) required that personnel platforms have six feet minimum headroom. The commenters uniformly considered this provision as overly restrictive in that it limited the employer's flexibility. Ebasco Constructors and the International Brotherhood of Boilermakers. (Exs. 3–6 and 3–53) suggested a minimum height of six feet, six inches. The National Association of Demolition Contractors and Parson Corporation (Exs. 3–8 and 3–22) suggested seven feet. Other commenters, such as Magma Copper, Bechtel, Unit Crane & Shovel and the Commonwealth of Puerto Rico (Exs. 3–27, 3–45, 3–47 and 3–55), suggested that OSHA simply require "adequate" headroom. OSHA agrees that specifying a minimum height is unnecessary to protect workers and has deleted this specification from paragraph (g)(4)(ii)(E) of the final rule. OSHA has also determined that the headroom requirements for hoisted personnel are already properly addressed in paragraph (g)(4)(ii), "Platform specifications," instead of in paragraph (g)(4)(i), "Design criteria."

Paragraph (g)(4)(ii) of this final rule specifies that personnel platforms must have certain features.

Proposed paragraph (g)(4)(ii)(A) required employers to equip personnel platforms with perimeter protection from the floor to 42 inches, plus or minus three inches, which would consist of either solid construction or expanded metal with openings no greater than one-half inch. This provision was based on § 1926.500(f) and ANSI A10.28–1983, section 5.6. Commenters, including the National Association of Demolition Contractors, Equitable Gas, the Associated General Contractors of America and Standard Oil (Indiana) (Exs. 3–8, 3–25, 3–28 and 3–46), stated that standard guardrails have satisfactorily prevented accidental falls. Commenters, such as Columbia Nitrogen and the Milwaukee Construction Industry Safety Council (Ex. 3–26 and 3–58), suggested that OSHA permit the use of standard guardrails, except with six inch or 12 inch toe plates in lieu of enclosure between the toe plate and mid-rail. In addition, commenters, such as Granite Construction (Ex. 3–50) and Organization Resources Counselors, Inc. (Ex. 3–32 and 3–89) stated that requiring enclosure to 42 inches, as proposed, would unnecessarily interfere with the intended use of the platform. The State of Maryland (Ex. 3–19) noted that the requirement would necessitate the frequent repositioning of the platform to make the work area accessible.

Further, Unit Crane & Shovel (Ex. 3–47) commented that permitting the use of solid sidewalls would increase the tendency of a platform to swing in the wind and recommended that only expanded metal be allowed.

On the other hand, the Boeing Company (Ex. 3–38), Boeing Aerospace (Ex. 3–57), and the Salt River Project (SRP) (Ex. 3–61) stated that the proposed enclosure requirement was "acceptable." The Boeing commenters also stated that "Guardrails have been satisfactory," and SRP noted that it has a variance for certain operations which require top guardrails at 30 inches.

OSHA has revised this provision to require simply that the employer provide a guardrail system which meets the requirements of Subpart M. OSHA anticipates that employers will already be familiar with the requirements for guardrail systems in Subpart M, so it would be unnecessary to set out specifications in this provision. OSHA notes that, under Subpart M, the required height for a top rail is approximately 42 inches, as was proposed. In addition, OSHA has determined that perimeter enclosure between the toe board and the midrail of the guardrail provides appropriate platform level protection against the hazard to employees below from falling objects. Further, OSHA has determined that since perimeter enclosure will only be required between the toe board and the mid-rail, swinging will not pose difficulties and employers will have flexibility to address workplace circumstances.

Paragraph (g)(4)(ii)(B) requires that the employer provide a grab rail inside the entire perimeter of the personnel platform. This provision is based, in part, on A10.28–1983, section 5.8. The proposal did not specify that the grab rail would extend along the entire inside perimeter of the platform. OSHA revised the provision because it determined that, as noted by the State of Maryland (Ex. 3–19) and Unit Crane & Shovel (Ex. 3–47), a worker might not otherwise have a grab rail readily available when needed.

The Salt River Project (Ex. 3–61) suggested that the top rail of a platform

constitutes an adequate grab rail. OSHA, however, believes that permitting the use of the top rail as a grab rail would expose employees to the risk of having their hands smashed against external objects while grabbing the top rail. The ACCSH drew a clear distinction between the use of the guardrail to prevent falls and the use of a grab rail to help employees maintain balance during hoists (Tr. 5–23–83, pp. 123–124.) Therefore, OSHA has determined that the required grab rails must be inside the personnel platform, and promulgates this provision as revised.

Proposed paragraph (g)(4)(ii)(C) required that an access gate, if provided, must not swing outward during hoisting and must be equipped with a restraining device to prevent accidental opening. This provision was based on ANSI A10.28–1983, section 5.4 and B30.5–1982, section 5–3.2.2(b)(7). The Agency has decided, however, to relocate the restraining device requirement to a separate provision (paragraph (g)(4)(ii)(D)) of this final rule, for the sake of clarity. OSHA received several comments, including those from Ebasco Constructors, The National Constructors Association and Granite Construction (Exs. 3–6, 3–30 and 3–50), which suggested a revision of the proposed rule to permit the use of sliding or folding gates. Since the modifications requested are in line with the Agency's original intent, paragraph (g)(4)(ii)(D) of the final rule reflects the acceptability of these other approaches and incorporates the proposed requirement for restraining devices. This provision is discussed further below.

OSHA also received comments from the Carolinas Branch of the AGC (Exs. 3–39 and 3–82) which requested that OSHA permit the access gate on small platforms to swing out when there is not room for it to swing in. The Agency has not adopted this suggestion because, as noted by Unit Crane & Shovel (Ex. 3–47), an outward opening gate could strike against a wall or other object during hoisting, possibly upsetting the platform. In addition, OSHA is concerned that an improperly designed outward opening gate could open accidentally if objects or personnel inside the platform were thrown against it. On the other hand, OSHA recognizes that the restrictive approach of the proposed standard is not necessary to protect workers because the Agency knows of platforms which do not conform to the proposed rule but which adequately protect occupants. OSHA also recognizes that some personnel platforms are used in emergency situations to transport injured employees on stretchers or to effect rescues. In such circumstances access gates that only swing inward would create access and egress problems, especially on smaller platforms. OSHA also notes that sliding or folding gates may not be feasible for a given personnel platform. The Agency does not wish to preclude the use of properly designed personnel platforms in emergency situations by requiring a gate swing which would render them useless.

In order to resolve these conflicting concerns, OSHA has decided that access gates that swing, must be configured so that they do not open outward during hoisting. OSHA notes that it is technically feasible and equally protective to install a single gate which is capable of swinging both inwardly and outwardly, provided that the gate not open outwardly during hoisting. Therefore, based on the above discussion, OSHA promulgates this paragraph as revised and relocated.

Paragraph (g)(4)(ii)(D) requires that access gates be equipped with a restraining device to prevent accidental opening. This provision was proposed as part of paragraph (g)(4)(ii)(C). The Agency determined that, because of the above-described revisions to paragraph (g)(4)(ii)(C), retaining this provision within paragraph (g)(4)(ii)(C) could obscure this important requirement. Therefore, the Agency decided to incorporate the appropriate comments received on this provision and promulgate the revised requirement as a separate provision. The comments received on this provision are discussed above under paragraph (g)(4)(ii)(C).

As discussed above, paragraph (g)(4)(ii)(E) of this final rule presents the revised requirements of proposed paragraph (g)(4)(i)(D) for adequate headroom in the personnel platform. Specifically, this provision requires that platforms have headroom which allows employees to stand upright. OSHA has determined that this performance-oriented approach is appropriate for a provision where, as the commenters observed, the circumstances for its application may vary significantly. Therefore as revised and relocated, OSHA is promulgating this provision.

Paragraph (g)(4)(ii)(F) requires that personnel platforms have overhead protection when there is employee exposure to falling objects. This provision is based on ANSI A10.28–1983, section 5.5, and B30.5–1982, section 5.3.2.2(b)(8). This requirement is similar to that in proposed paragraph (g)(4)(ii)(D), and has been shifted because of the addition or relocation of paragraphs, as discussed above.

OSHA requested additional information on the need for overhead protection on personnel platforms in Issue 6. A number of commenters, such as the State of Alaska (Ex. 3–4), Unit Crane & Shovel (Ex. 3–47) and Kenny Construction (Ex. 3–56), agreed that overhead protection should be required "as needed." Several commenters, including the State of Maryland (Ex. 3–19) and the AGC of America (Exs. 3–28 and 3–67) expressed general support for the requirement, while noting that certain work cannot be performed when overhead protection is in place. Unit Crane (Ex. 3–47) noted that the boom tip and hoist lines above the platform effectively block work which is directly overhead and constitute falling object hazards because they may be lowered into a landed platform. Unit Crane also noted that, "Anytime the occupants must work above shoulder height and might be restricted from the work piece (SIC) by overhead protection, such a condition can be eliminated by merely elevating the platform another three feet."

Gulf Oil (Ex. 3–68), stated that overhead protection on the platform was unnecessary and would reduce visibility. Gulf suggested that, "If a hazard of falling objects is present, a more positive means of protection should be provided other than assuming the personnel platform would withstand the dropping objects." Gulf Oil, however, did not specify any "positive means." The Carolinas Branch of the AGC (Exs. 3–39 and 3–82) observed that requiring overhead protection would negate the possibility of employees tying off to anything other than the platform itself, an action which is useless and impractical. The Carolinas Branch was apparently concerned that if the platform tipped or fell the lanyard attached to an employee's body belt or harness would pull the employee up against the overhead protection, preventing escape from the platform and increasing the likelihood and severity of injuries. The Carolinas Branch was also concerned that "work from a platform often must be done above the top of the platform, such as, but not limited to: Rubbing concrete; form work; passing and receiving tools and material, etc." In addition, the Al Johnson Company (Ex. 3–42) stated that the proposed overhead protection was unnecessary because it is more effectively handled under the general safety regulations which limit work overhead * * *". Some commenters, including Equitable Gas, Standard Oil (Indiana) and Organization

Resources Counselors (Exs. 3–25, 3–46 and 3–89), suggested that requiring the use of hard hats would generally be preferable to requiring overhead protection.

OSHA has determined, based on the evidence in the record, that hoisted personnel who are exposed to falling objects need overhead protection. Given the small area of a personnel platform, OSHA is concerned that workers would not be able to avoid falling materials, and that head protection alone would not be sufficient. OSHA notes that this provision is consistent with the requirements for scaffolds in §§ 1926.451(a)(16) and 1926.451(h)(13), which require overhead protection when employees working on other types of scaffolds are exposed to overhead hazards. The Agency is concerned that overhead protection and the use of hard hats could be viewed as either equivalent or mutually exclusive. Therefore, OSHA has added language to this provision so it is clear that overhead protection is required in addition to the use of hard hats.

The final rule is drafted in performance-oriented language which requires that employers install the protective covering whenever employees are exposed to falling objects. Therefore; when there is no potential for injury, whether due to the nature of the work or the work practices enforced at the workplace, the employer need not provide overhead protection other than hard hats.

OSHA notes that this paragraph does not prohibit the use of a personnel platform with overhead protection that incorporates a removable top, a hinged top, or a trap door to permit overhead work, if such work is necessary, as long as the necessary overhead protection function is not compromised. In addition, this paragraph does not prohibit the use of transparent materials to provide a viewing port in the overhead protection.

In response to the concern that overhead protection would complicate tying off (as required by paragraph (g)(6)(viii) of the final rule), the Agency notes that the requirement to tie off is intended to protect employees from falling in the event the platform tips or the employees are thrown from the platform. It is not intended to protect workers in the event that the platform breaks free of the load line or hook. Most of the remaining provisions of the standard focus on preventing the platform from dropping. These provisions, such as the requirement for tests, derating and prevention of two-blocking are intended to prevent situations where the personnel platform breaks free of the load line or hook.

Paragraph (g)(4)(ii)(G) of this final rule requires employers to ensure that all rough edges of the platform exposed to employee contact are so surfaced as to prevent injury to employees from punctures or lacerations. This paragraph, based on ANSI A10.28–1983, section 6.1, is similar to (g)(4)(ii)(E) of the proposal, but has been rephrased to clarify OSHA's intent. The Agency received virtually no comment on this provision. Bechtel (Ex. 3–45) asserted that this requirement was a matter of common sense and that it need not be covered by an OSHA standard. OSHA believes that this provision provides necessary guidance to employers, so it is promulgating this provision as revised.

Proposed paragraph (g)(4)(ii)(H) has been deleted from the final rule. That proposed paragraph required that a personnel platform be readily identifiable by color or marking. This provision was based on ANSI B30.5–1982, section 5–3.2.2(b)(9).

Most of the comments received, such as those from Magma Copper, Bechtel, and Granite Construction (Exs. 3–27, 3–45 and 3–50), indicated that this provision was unnecessary and would impose high maintenance costs. The State of California and Boeing Company (Exs. 3–33 and 3–38) supported the proposed provision. OSHA has determined, based on its consideration of the record, that the proposed provision is not needed to protect workers, given the other provisions of paragraph (g) which cover the design, construction, testing and use of the personnel platform. The Agency, therefore has eliminated proposed paragraph (g)(4)(ii)(H).

Paragraph (g)(4)(ii)(H) requires that all welding of the platform and components be performed by a qualified welder familiar with the weld grades, types and materials specified in the design. This provision, which is virtually identical to proposed paragraph (g)(4)(ii)(F), is based on ANSI A10.28–1983, section 6.3.

In addition, OSHA solicited comments on whether a welder who is "qualified" as defined in § 1926.32(1) is sufficient or if a certified welder would be more appropriate. Magma Copper (Ex. 3–27) cautioned OSHA regarding use of the term "qualified," because "Any experienced * * * welder could assemble a cage." Unit Crane & Shovel (Ex. 3–47) suggested that OSHA require American Welding Society certified-welders, while the Boilermakers Union (Ex. 3–53) suggested that OSHA require that fabrication be done by a certified welder who has passed a welding test that meets the specifications of the ASME welding code. On the other hand, Puerto Rico (Ex. 3–55) suggested that requiring a "qualified" welder, as understood in terms of section 1926.32(1), provided adequate assurance that the platform would be safe. The Agency believes that requiring welder certification or specifying a particular set of credentials for a platform welder would not improve employee protection. Indeed, OSHA agrees with Puerto Rico that the term "qualified," as defined, provides appropriate assurances that the welder assigned to construct a personnel platform will assemble it properly.

Paragraph (g)(4)(ii)(I) of this final rule requires that employers post personnel platforms with plates or other permanent markings indicating the platform weight and its rated load capacity or maximum intended load. This provision is based on ANSI A10.28–1983, section 5–3 and, in part, on B30.5–1982, section 5–3.2.2(b)(4). This requirement was proposed as paragraph (g)(4)(ii)(G) and has been redesignated.

A few commenters, including the International Cargo Gear Bureau, the United Steelworkers, and Norpac Engineering, Inc. (Exs. 3–1, 3–10 and 3–88), suggested that the marking also indicate the maximum number of personnel who may be lifted. OSHA notes that ANSI B30.5–1983, section 5–3.2.2(b)(4), provides that the plate shall specify the maximum number of persons to be hoisted. In addition, the United Steelworkers of America (Ex. 3–10) recommended that this provision be revised to include a platform certification requirement, with the certification posted on the platform.

OSHA has determined that the platform posting provision as proposed will provide adequate protection for hoisted workers by alerting everyone involved in a lift of the rated load capacity or maximum intended load of the platform. Furthermore, insofar as A10.28 and B30.5 differ in their provisions for marking of personnel platforms, OSHA has decided to rely on ANSI A10.28–1983, which exclusively covers personnel platforms, rather than B30.5–1982, which focuses on cranes, in deciding not to require the plate to state the maximum number of passengers. The Agency believes that an additional requirement to post the personnel platform with the maximum number of passengers will not add to the degree of employee protection provided by the requirement to post the maximum intended load or rated load capacity. Finally, OSHA has determined that although a personnel platform designed

and built at the worksite may not have a rated load capacity (such capacities are normally determined for manufactured platforms) the design will have been based on a determinable maximum intended load. In those situations where a platform does not have a rated load capacity, the maximum intended load shall be posted. Therefore, this paragraph is being promulgated as revised.

Paragraph (g)(4)(iii) of this final rule covers personnel platform loading.

Paragraph (g)(4)(iii)(A) prohibits loading the platform in excess of its rated load capacity or maximum intended load, whichever is less. This provision is similar to the proposed requirement and is based on ANSI B30.5–1982, sections 5–3.2.1.1–(b) and (c). The Agency received no comments which opposed this requirement. Ebasco Constructors (Ex. 3–6) suggested that OSHA base the rated load capacity on a specified minimum pounds-per-square-foot requirement.

The performance-oriented language of the provision, as originally proposed, allows the employer to determine what criteria are used to rate the capacity of the personnel platform. OSHA believes that this provision, when coupled with the design, construction, and testing requirements presented in this standard, will provide adequate protection for employees. As noted above, a job built and designed personnel platform may not have a rated capacity, but the design will have been based on a maximum intended load. Therefore, for platforms whose rated load capacity has not been determined, or for which there is no such rating, the employer can comply with this provision by ensuring that the maximum intended load is not exceeded.

Paragraph (g)(4)(iii)(B) limits the number of employees being hoisted to those required to do the work. This provision, which is identical to the proposed requirement, is based on ANSI A10.28–1983, section 12.2. OSHA specifically requested additional input on this subject in Issue 3. Many commenters, especially contractors such as Parsons, Johnson Bros. and Granite (Exs. 3–22, 3–43 and 3–50), supported the provision as proposed. Supportive comments were also received from the Boilermakers Union (Ex. 3–53).

As indicated by the discussion of paragraph (g)(4)(ii)(I) above, some commenters suggested that OSHA limit the number of employees to be hoisted and that the maximum intended load and rated load capacity be based on that number of employees times a pounds per employee load factor (Exs. 3–24, 3–27, 3–33, 3–47, 3–76, and 3–82).

However, other commenters, such as Puerto Rico (Ex. 3–55) and the Salt River Project (Ex. 3–61), asserted that OSHA should focus on preventing loads from exceeding capacity, not on the number of employees needed to perform work duties. OSHA agrees with those commenters who favored compliance capacity requirements set forth in terms of total load weight. Indeed, OSHA has determined that compliance with the load limits of the platform and maintenance of the platform safety factor established by the standard will provide the necessary protection, while allowing the employer the flexibility to determine how many employees must be hoisted to perform assigned work. The Agency believes that specifying a limit on the number of hoisted personnel would unreasonably restrict the determination of how many workers are required to perform a particular task safely. Accordingly, OSHA has promulgated this paragraph unchanged.

Paragraph (g)(4)(iii)(C) limits the occupancy of the personnel platform to employees, and the tools and materials necessary to do the work they are assigned. This provision reflects input from the ACCSH which urged OSHA to ensure that personnel platforms were not used as material hoists (Tr. 5–23–83 pp. 50–52). Unit Crane & Shovel (Ex. 3–47) recommended that OSHA prohibit the use of personnel platforms to hoist bulk material because a shifting load could endanger the hoisted personnel. The Carolinas Branch of the AGC (Exs. 3–48 and 3–82) opposed such a restriction on transporting material in bulk or other loads not related to the task to be performed on personnel platforms, as long as the capacity of the platform was not exceeded. OSHA believes that compliance with capacity limitations above does not provide adequate assurance of employee safety when loading personnel platforms. OSHA believes that it is less likely that the appropriate concern for capacity limitations would be shown when using a personnel platform as a material hoist. This misuse would cause structural fatigue which may not be readily detected by inspection, until failure occurs. The Agency reiterates its concern that personnel hoisting, insofar as it is permitted under the terms of this standard, must satisfy more demanding criteria than are required for material hoisting. Given the special concern OSHA has expressed regarding the hazards of personnel hoisting, the Agency has determined that it would be inappropriate to allow personnel platforms to be used as material hoists. In addition, the Agency believes that any blurring of the distinction between personnel hoisting and material hoisting would increase the likelihood of operator error. Therefore, OSHA is promulgating this paragraph as proposed, with a clarification that the platforms are not to be used for other purposes when they are not hoisting personnel.

Proposed paragraph (g)(4)(iii)(D) has been separated into two provisions for the sake of clarity, but the provisions will be discussed jointly since it was proposed as one provision. The proposed paragraph required that materials on a personnel platform be secured and evenly distributed while the platform is in motion. Paragraph (g)(4)(iii)(D) requires that materials and tools on an occupied personnel platform be secured to prevent displacement. Paragraph (g)(4)(iii)(E) requires materials to be evenly distributed within the confines of the platform. These provisions are based on ANSI A10.28–1983, section 8.1. The few comments received support these provisions in principle. The Boeing Company and Boeing Aerospace (Exs. 3–38 and 3–57), however, suggested that OSHA change the wording to "loaded in such a way that they do not present a hazard to personnel." Ebasco Construction (Ex. 3–6) suggested that the language be changed to require materials to be "evenly distributed within the confines of the platform." The Agency believes that the Boeing commenters' suggested revision provides less guidance to the employer, and would be less protective than the requirement, as proposed. On the other hand, OSHA has determined that Ebasco's suggested language better expresses OSHA's original intent that the load be evenly distributed within the platform. Therefore, the Agency has adopted Ebasco's suggested change and promulgates these paragraphs as revised and separated.

Paragraph (g)(4)(iv) addresses the rigging used to suspend personnel platforms.

Paragraph (g)(4)(iv)(A) requires that if a rope bridle is used to connect the personnel platform to the load line, the bridle legs shall be connected to a master link or shackle, so that the weight of the platform is evenly distributed among the bridle legs.

The State of California (Ex. 3–33) suggested requiring that four part bridles be designed as if only two legs were supporting the platform to ensure stability, because the weight of the loaded platform would probably not be evenly distributed. Although this suggestion, in general, is technically sound rigging practice, OSHA has determined that other bridle

configurations will provide the necessary protection In addition, OSHA believes that the bridle configuration suggested by the State of California may not be appropriate in all circumstances. Therefore, OSHA has determined that the requirement, as proposed, provides the necessary protection for hoisted employees.

Lift-All Company, Inc., the Boeing Company and Boeing Aerospace (Exs. 3–13, 3–38 and 3–57) commented that the use of the term "ring" in paragraph (g)(4)(iv)(A) was inappropriate. They suggested that OSHA use the term "master link" adopted by ANSI B30.9–1984, "Slings". OSHA has decided that the suggested change is proper and has reworded the final rule accordingly.

Standard Oil (Indiana) (Ex. 3–46) expressed concern that this provision as proposed would not permit alternatives to wire rope bridles and requested that OSHA clearly state that such alternatives were permitted. OSHA believes that it is sufficiently clear from the use of the expression "when a wire rope bridle is used" that OSHA is simply taking into account the consequences of a particular rigging choice and does not mean to limit the choice of equipment. Therefore, OSHA has not made the requested change.

The Organization Resources Counselors (Ex. 3–32) asserted that hoisted personnel would be safer if OSHA permitted bridle legs to be attached to the hook individually, rather than joined at a single ring or shackle. OSHA has determined that the suggested change would allow hoisted personnel to be exposed to greater danger than would be permitted under the standard as proposed, because the displacement of any one of the bridle legs could cause the platform to tip. Therefore, the suggested change has not been made.

Paragraph (g)(4)(iv)(B) requires that the hooks or other attachment assemblies used for rigging personnel hoists be of types that can be closed and locked. This provision, which is identical to the proposed requirement, is based on ANSI A10.28–1983, section 9.2. OSHA highlighted this subject in Issue 8. Many commenters, including Johnson Bros. Corporation, Unit Crane & Shovel and Lunda Construction Company (Ex. 3–43, 3–47 and 3–92), strongly supported this requirement. On the other hand, Bechtel (Ex. 3–45) asserted that this provision was redundant with existing safety standards, and the American Road & Transportation Builders Association (ARTBA) (Ex. 3–65) stated that the proposed requirements were "excessively descriptive and restrictive," though ARTBA did suggest that OSHA require positive locking devices on hooks. As has been discussed above, OSHA believes that the hoisting of personnel requires even greater care than the hoisting of material, so the precautions required by this paragraph are necessary.

Some commenters, such as Standard Oil (Indiana) (Ex. 3–46) and Gulf Oil (Ex. 3–68), suggested that OSHA permit "mousing," a practice by which wire rope is wrapped around a hook to cover the hook opening and to prevent the dropping of a hoisted load, as an alternative to the shackles and locking hooks required in the proposed standard. These commenters asserted that mousing was a safe and proven technique and that the provision, as proposed, would impose hardship. Indeed, ANSI B30.5–1982, section 5–3.2.2(b)(10), recognizes mousing as a means of securing the hook opening for personnel hoisting operations. Other commenters, including Parsons Corporation (Ex. 3–22), the State of California (Ex. 3–33), the Boilermakers Union (Ex. 3–53) and NORPAC Engineering (Ex. 3–88), asserted that OSHA should not allow mousing. These commenters stated that mousing was unsafe and that a strong, securely locked hook should be used instead. In addition, the International Union of Operating Engineers testified (Tr. 465–466) that mousing does not close a hook opening and that properly closing safety hooks are available.

OSHA has determined that mousing would not provide the necessary assurance that a personnel platform would not be dropped, because the platform could still slip off the hook despite the mousing. The Agency agrees with those commenters who suggest that only hooks whose openings lock closed may be used. Therefore, OSHA has not made the suggested revision. OSHA has followed ANSI A10.28 instead of ANSI B30.5 in this case, because the Agency believes that permitting mousing under this standard would not effectuate the purposes of the OSHA Act.

OSHA has revised the wording of proposed paragraph (g)(4)(iv)(B) in several places to clarify the intended meaning. As was the case with paragraph (g)(3)(ii)(C), the term "overhaul ball" has replaced "fall ball" to be consistent with current industry terminology. In addition, OSHA has replaced the term "screw pin" with "bolt" and has specified that any shackles used must be of the "alloy anchor-type," in response to comments from Columbus McKinnon Corporation (Ex. 3–16), which reflect current usage in the industry. Otherwise, this paragraph has been promulgated unchanged.

Proposed paragraph (g)(4)(iv)(C) required that all wire rope and hardware used to rig personnel platforms have a minimum safety factor of seven, in order to be consistent with the proposed load line (running rope) safety factor. Issue 4 of the proposal discussed the proposed equipment safety factors and solicited additional input. Some commenters, including Lift-All and the Wire Rope Technical Board (Exs. 3–13 and 3–15), supported setting the safety factor at seven. Other commenters, such as the Salt River Project and the Spartan Equipment Co. (Exs. 3–61 and 3–82), "accepted" the proposed safety factor, while Standard Oil (Indiana) (Ex. 3–46) simply took it as a "given." Spartan suggested that setting the safety factor at five instead of seven would still provide "satisfactory" protection. These comments either did not provide a basis for using seven or they relied on the rationale presented in the proposal to support setting seven as the safety factor for hoist ropes.

Unit Crane & Shovel, the Boeing Company, and Boeing Aerospace (Exs. 3–47, 3–38 and 3–57) suggested that OSHA set the safety factor for rigging at 10, based on the same authorities and rationale used to support their suggestion that the safety factor for running ropes be set at 10 (See discussion of paragraph (g)(3)(i)(A) of the final rule.) The Boeing commenters also suggested that OSHA require a higher safety factor when employers use rotation resistant rope. OSHA notes that Unit Crane would set different safety factors for the personnel platform and its "attaching devices" (safety factor of 5) on the one hand, and running ropes (safety factor of 10) on the other, citing ANSI B30.5–1982, section 5–3.2.2(b)(3). This raises the question whether platform rigging should be considered part of the platform or part of the load line for the purpose of setting a safety factor for rigging.

ANSI A10.28–1983 does not specify a safety factor for rigging, but it does agree with ANSI B30.5–1982 in setting the safety factor for the personnel platform at five. The National Constructors Association, Johnson Bros. Corporation and Granite Construction (Exs. 3–30, 3–43 and 3–50) suggested setting the rigging safety factor at five so that it would be consistent with the personnel platform safety factor. Magma Copper and the AGC of America (Exs. 3–27 and 3–28) suggested that setting the safety factor for rigging at five would be adequate. In addition, Columbus McKinnon (Ex. 3–16) opposed the proposed rigging safety factor of seven because it was inconsistent with the

industry practice regarding hooks (safety factor of three to five) and shackles (five to six).

OSHA notes that the load imposed on the hoist line is greater than that imposed on any single static line, such as a platform sling. Based on the comments and the pertinent consensus standards, OSHA is convinced that it is critical to provide employers with clear, readily applicable guidance for designing the platform and its rigging. Accordingly, the Agency has determined that the platform rigging safety factor should be the same as for the platform itself and has revised the proposed paragraph to require a safety factor of five. OSHA agrees that rotation resistant rope is subject to greater and harder to detect deterioration than standard wire rope, therefore the Agency has set the safety factor for rotation resistant rope at 10. Therefore, OSHA promulgates paragraph (g)(4)(iv)(C), as revised.

Paragraph (g)(4)(iv)(D) requires that all eyes in wire rope slings be fabricated with thimbles to prevent excessive wear on the rigging.

Magma Copper (Ex. 3–27) commented that thimbles were unnecessary, based on its suggestion that OSHA set the wire rope and hardware safety factors at five. In addition, Standard Oil (Indiana) (Ex. 3–46) commented that thimbles would only be minimally useful, based on a safety factor of seven. The Salt River Project (Ex. 3–61) and Lunda Construction Company (Ex. 3–92) supported the proposed provision, with the Salt River Project emphasizing that OSHA should require thimbles of the flemish eye type, rather than the fold back splice type.

OSHA has determined that there is a reasonable basis for this requirement because thimbles are generally used in the fabrication of slings intended for use more than one time, whether hoisting material or personnel. Thimbles allow a smoother bending of the portion of wire rope used to make eyes, and help prevent kinks and crimps that would occur without the thimble. This results in less deformation of the wire rope, and, therefore, reduces deterioration of the ropes strength. In keeping with the performance-oriented approach OSHA has taken in setting requirements for personnel platforms, the Agency will not specify the type of thimble to be used. Therefore, this paragraph is promulgated unchanged.

Paragraph (g)(4)(iv)(E) prohibits the use of personnel hoisting bridles and other personnel hoisting rigging for any other purpose. This provision appeared in the proposed standard as paragraph (g)(6)(x). It has been relocated so it will appear with other provisions which regulate rigging.

The Construction Industry Manufacturers Association (Ex. 3–31) recommended that "no external load shall be lifted by attaching to the personnel platform." The State of California (Ex. 3–33) and the National Constructors Association (Ex. 3–74), while generally opposed to hoisting of other loads, commented that it should be permitted in the isolated circumstances when need was shown. The Milwaukee Construction Industry Safety Council (MCISC) (Ex. 3–70) commented that a crane should not hoist other loads while employees are aloft, suggesting that the platform be lowered when the workers need more materials. DuPont (Ex. 3–75) and the State of Michigan (Ex. 3–84) suggested that OSHA expressly prohibit any other crane operations while employees are being hoisted. On the other hand, Kenny Construction (Ex. 3–69) asserted that it needs to use a "whip" line to assist hoisted personnel in their work.

As already stated in the discussion of paragraph (g)(4)(iii)(C), OSHA believes that the use of a personnel platform for material hoisting would expose hoisted employees to increased risks. Given the close relationship between the platform and the attached rigging, OSHA has concluded that the ban on material hoisting should also apply to the rigging. In particular, OSHA has determined based on the evidence in the record, that the danger of excessive wear and entanglement from hoisting other loads far outweighs the convenience value of permitting the practice. OSHA has revised the language to prohibit clearly the use of the rigging for other service and to make the language consistent with the similar restrictions for use of the platform found in paragraph (g)(4)(iii)(C).

In addition, OSHA solicited comments in Issue 10 regarding the need for an additional sling (bridle) which would be in position to support the personnel platform in case the primary connection failed. Several commenters, such as Parsons Corporation, the U.S. Air Force and the Research and Trading Corporation (Exs. 3–22, 3–24 and 3–60) stated that a secondary bridle was necessary for protection of hoisted personnel. Other commenters, the Boeing Company and Boeing Aerospace (Exs. 3–38 and 3–57), stated that secondary bridles were not always needed, particularly where independent lifelines were feasible. The Boeing commenters noted that the "safety" bridle protected against only one possible cause of platform fall. The State of California (Ex. 3–33) noted that a secondary bridle would not be needed where the requirement in proposed paragraph (g)(4)(iv)(B) for positive locking load hook was satisfied and suggested that hooks be designed to ensure that secondary bridles would not be needed. The Milwaukee Construction Industry Safety Council (Ex. 3–26), in turn, noted that a standard hook with a safety latch would be sufficient to comply with proposed paragraph (g)(4)(iv)(B) if the second sling was required.

On the other hand, the Northwest Engineering Company, the AGC of St. Louis, Unit Crane and Shovel and Norpac Engineering, Inc. (Exs. 3–3, 3–14, 3–47 and 3–88) commented that a safety sling requirement was neither necessary nor desirable. In particular, the AGC of St. Louis and Unit Crane stated that the proximity of the "redundant" sling to the load line would cause damage through chafing and tangling. Unit Crane added that compliance with the proposed requirements for closing the hook throat, prohibiting free fall, using lifelines and performing prelift safety checks would properly protect hoisted personnel. In addition, the Boilermakers Union (Ex. 3–53) stated that there had been no accidents involving its members which indicated need for a safety bridle. The Boilermakers added that the "rigorous testing" required under the proposed rule made the possibility of such an accident "virtually non-existent."

OSHA agrees with the commenters who noted that compliance with the provisions of the proposed rule, such as the requirements for hook throat closing and equipment testing, will protect hoisted personnel, so that a secondary sling is not needed.

Paragraph (g)(5) of this final rule details the inspection and testing requirements for cranes, derricks and platforms used to hoist personnel. This paragraph has been extensively revised, as discussed below.

Paragraph (g)(5)(i) as proposed required the inspection, by a competent person, of the crane or derrick used to hoist personnel, before each shift and after material handling operations where the load exceeded 50 percent of the rated capacity. The Boeing Company and Boeing Aerospace (Exs. 3–38 and 3–57) commented that the latter requirement would necessitate disruptive mid-shift inspections. In addition, the National Constructors Association and Bechtel (Exs. 3–30 and 3–45) noted that inspections are already required by other paragraphs in § 1926.550.

OSHA has determined that any potential problem involving a crane or

derrick supported personnel hoisting system or set-up would be detected through compliance with the existing requirements of § 1926.550, or through the evaluation of a trial lift which satisfies the terms of new paragraph (g). Therefore, OSHA has deleted the inspection requirements set out in proposed paragraph (g)(5)(i).

In the proposed rule, OSHA required that employers perform trial lifts, and the Agency provided guidance regarding the information to be obtained through the trial lifts. OSHA recognizes that some commenters were confused by the proposed language.

OSHA intended to require that employers conduct trial lifts with the personnel platform unoccupied. The trial lift would encompass the entire operational cycle—from the point where an employee entered the platform; through each work location accessible from the set up location, in sequence; and, return to the point where the employees would exit the platform. The trial lift would be repeated each time the crane was set up in a new location. The Agency position regarding this provision has not changed. In this final rule, OSHA provides specific guidance to employers as to what must be determined during this trial lift.

Commenters also expressed uncertainty regarding the Agency's purpose in requiring trial lifts. Many commenters apparently confused the trial lift and proof testing requirements. In order to eliminate misunderstanding, OSHA notes that the purpose of the trial lift is to determine that the lift route is free of obstacles; to determine work location accessibility; to confirm that no work locations will place the crane or derrick in such a configuration where the intended load would exceed the 50 percent limit of the crane's rated capacity; to ensure soil or other supporting surface stability, and to determine suitability for the intended lift. The trial lift is conducted just prior to commencing actual hoisting operations. The proof test, on the other hand, is conducted to test the capacity and construction of the personnel platform. Proof testing is required prior to hoisting personnel and after any repair or modification. The proof test and trial lift can be conducted simultaneously, as long as the specific requirements for each are satisfied.

Paragraph (g)(5)(i), as promulgated, requires that the operator perform a full cycle operational trial lift before allowing personnel in the platform. This paragraph is similar to proposed paragraph (g)(5)(ii) and is based on ANSI B30.5–1982, section 5–3.2.2(a)(6). Additionally, this paragraph requires the operator to determine that all systems, controls and safety devices actuate and function properly; that there is nothing along the hoisting route which would interfere with the platform reaching the work location and returning; and that all configurations needed during the hoisting operation will allow the operator to remain within the derated capacity. OSHA believes that the crane or derrick operator is the best and, probably, the only person qualified to make these determinations.

Most of the commenters supported proposed paragraph (g)(5)(ii), although they diverged as to the circumstances when the trial lift must be performed. A few commenters, such as Columbia Nitrogen (Ex. 3–58), stated that the requirement would impose a burden without providing a benefit, because the 50 percent derating already provided the necessary protection. Some commenters, such as Unit Crane & Shovel and the Organization Resources Counselors (Exs. 3–47 and 3–88), suggested that OSHA promulgate the provision as proposed. Others, such as the Associated General Contractors of America and Granite Construction (Exs. 3–28 and 3–50), asserted that trial lifts should only be required at the beginning of a shift. Granite Construction's comment, however, reflected the mistaken impression that operators would have to interrupt hoisting to perform a trial lift each time the *platform* was repositioned, even if the crane or derrick were not moved. OSHA's intent is for operators to run the unoccupied platform through all movements and positions necessary to do the work before permitting employees aboard the platform. By contrast, a change in the set-up location of the *crane or derrick*, the addition of one or more work locations to those already reached from an existing set-up location, or a significant change in the lift route, will require another trial lift.

OSHA has determined that a trial lift should be performed directly before personnel are hoisted, rather than at the beginning of a shift, as was proposed. The Agency is concerned that a trial lift would not take into account the circumstances under which personnel hoisting would take place if the trial lift were conducted hours before the hoisting. Under those circumstances, the proposed trial lift might not provide the necessary assurance that the lift would be completed safely.

OSHA believes that the requirement as revised will impose a more reasonable regulatory burden on employers than did the requirement as proposed. Employers will only need to perform trial lifts when they will actually be hoisting employees, instead of having to perform them at the beginning of any shift in which there is a possibility that they might need to hoist personnel. Therefore, OSHA has decided that this requirement, as revised, most effectively regulates the timing of trial lifts.

Paragraph (g)(5)(ii) of this final rule requires that the trial lift be repeated whenever the crane is moved and set up in a new location or returned to a previously used location. This provision is similar to and replaces paragraph (g)(5)(iii) of the proposal.

In the proposal, OSHA required that the test lift at each new set-up location be conducted at 150 percent of the intended load. OSHA recognizes that the proposed language was not sufficiently clear. Several commenters apparently misconstrued the trial lift requirement as requiring a proof test of the platform. For example, the Bechtel Power Corporation (Ex. 3–45) commented as follows:

> The proposed requirement is excessive, costly and nonproductive. We agree a load test of the personnel platform is a good practice but there is no sense in requiring load testing more often than that for the crane. ANSI requires load testing of cranes at the time they first come on the job or when modified or possibly damaged or on an annual basis.

The National Constructors Association, Standard Oil Company (Indiana), the American Road and Transportation Builders Association, and the Carolinas Branch of the AGC, (Exs. 3–30, 3–46 3–65 and 3–82), opposed the proposed requirement on the grounds that compliance would involve frequent handling of materials, which could damage the platform and cause employee injury, and would require employers to carry test weights or ensure test weights are available.

On the other hand, many commenters, such as the Commonwealth of Puerto Rico (Ex. 3–55) and the Milwaukee Construction Industry Safety Council (Ex. 3–26), supported the proposed trial lift requirements. Unit Crane & Shovel (Ex. 3–47) suggested that, in addition, OSHA require a trial lift when a crane or derrick is moved back to a former set-up location. Further, the International Union of Operating Engineers testified:

> And whenever that crane is relocated, I mean, from coming around from this side of the building over to this other side of the building, and set up to work to operate again with a work platform, it should be tested again.
>
> Our feeling is that it should be tested again. Because, we're not just testing, and load the

sandbags in and take it up to the point where the work is going to be performed.

We're not just testing for the rigging or the stability of the crane, but we're testing for clearances on whatever obstructions there might be, like the edge of a building, or a tree over here, or a guide wire going up to a stack.

We're going to see if we can get the crane into this place with this work platform, with the men in it, without hitting any kind of an obstruction. So, we're testing for clearances, as well as for stability of the crane.

And, of course, there could be something. There's always the possibility that there's an old manhole or a sewer or something down there. And we get this concentrated ground bearing pressure under an outrigger or under the end of the cats or something, that we might drop down through. (Tr. 424–425)

OSHA agrees with the Operating Engineers' reasons for performing trial lifts in these situations. Accordingly, based on the evidence in the record, the Agency is requiring that the employer conduct a trial lift, with the platform loaded to the anticipated lift weight, at each new set-up location and when returning to previously used locations.

OSHA has relocated the provisions of proposed paragraph (g)(6)(vii) to paragraph (g)(5)(iii) in the final rule. This consolidates the inspection and testing requirements in paragraph (g)(5), as suggested by the National Constructors Association (Ex. 3–30). Proposed paragraph (g)(6)(vii), which is based on ANSI B30.5–1982, section 5–2.4.2(a), requires testing and inspection to ensure, prior to hoisting, that a personnel platform is secure and properly balanced. In particular, the inspection must ensure that hoist ropes are free of kinks; lines are not twisted around each other; the primary attachment is centered over the platform; and all ropes are properly seated on drums and in sheaves.

Several commenters, including the American Road & Transportation Builder Association (ARTBA) (Ex. 3–65), stated that these proposed provisions were unnecessary and should be deleted. In particular, the ARTBA contended that the determinations required under proposed paragraph (g)(6)(vii) could be made in conjunction with the trial lift. This was OSHA's intent, and in order to clarify this intent, the Agency now specifically states that this is to be done as part of the trial lift.

OSHA has relocated these provisions, related to hoist rope and rigging inspection, to paragraph (g)(5)(iii) because the Agency believes that they deserve specific mention as a reminder to employers that these items must be inspected at the end of the trial lift, and directly before actually hoisting personnel.

Paragraph (g)(5)(iv) provides that a competent person shall inspect the equipment and base support or ground immediately after a trial lift, to determine whether the test exposed any defects or had any adverse effects. This requirement is virtually identical to proposed paragraph (g)(5)(iii)(A). The added "competent person" requirement reflects input from the ACCSH (Tr. 5–23–83 pp. 148–149) and is intended to ensure that the designated person has the skill, experience and authority to perform the inspection and have any defects repaired. Unit Crane & Shovel (3–47) suggested that OSHA specifically require employers to inspect the rigging after a trial lift. The Agency intended the employers to include the rigging when they performed their post-trial lift inspection. For the sake of clarity, OSHA has revised this provision as suggested. Therefore, OSHA promulgates paragraph (g)(5)(iv) as renumbered and revised.

Paragraph (g)(5)(v) requires that employers correct any defects found during an inspection before hoisting personnel. This provision is identical to proposed paragraph (g)(5)(iii)(B). There were no comments regarding this requirement. Therefore, OSHA promulgates proposed paragraph (g)(5)(iii)(B) as paragraph (g)(5)(v).

Paragraph (g)(5)(vi) requires that employers proof test their personnel platforms and hoist rigging at 125 percent of the rated capacity of the platform, with the test load evenly distributed on the platform. The proof test is to be performed prior to hoisting personnel for the first time at a work site, or whenever the platform or rigging has been repaired or modified. This provision, based on ANSI A10.28–1983, section 7.2, has been added because of OSHA's concern that employees might otherwise be hoisted unsafely in personnel platforms whose structural integrity may have been compromised by damage, repair or modification. In its discussion of proposed paragraph (g)(4)(ii)(F), covering welding (49 FR 6286), OSHA requested input regarding the need for proof testing and the appropriate weight and procedure. Unit Crane & Shovel (Ex. 3–47) recommended that "the platform be proof tested after fabrication and certified to have withstood a load five times its assigned capacity rating." The Specialized Carriers and Rigging Association (Ex. 3–54) noted that "B30.9 of ANSI requires that all welded assemblies used in overhead lifting (personnel platform) must be proof tested to twice their rated capacity." The Commonwealth of Puerto Rico (Ex. 3–55) recommended proof testing at 150 percent of rated capacity after fabrication, and the Boeing Company and Boeing Aerospace (Exs. 3–38 and 3–57) recommended proof testing at 200 percent every three months, if the platform is in continual use. In addition, Bechtel (Ex. 3–45) suggested that OSHA require proof testing at 125 percent of the rated capacity of the personnel platform.

The State of California (Ex. 3–33) recognized proof testing as an option, but suggested that OSHA instead require personnel platform certification by an engineer, coupled with periodic inspection by a competent person.

OSHA has determined that proof testing at each job site is the most effective way to evaluate structural integrity, because the testing would detect deficiencies in fabrication and any damage caused in transit. OSHA also believes that a platform certification requirement is unnecessary because the required proof testing and inspection requirements would disclose any defects.

OSHA believes that field proof testing at 200 percent of the rated capacity could possibly permanently deform structural members. The Agency has further determined that suspending the platform for five minutes, loaded at 125 percent of the rated capacity, is considered an adequate, non-destructive field test and will provide the necessary assurance that any defect in the platform or rigging would be detected and corrected before any personnel were hoisted. Therefore, new paragraph (g)(5)(vi) incorporates such a requirement.

Paragraph (g)(6) addresses work practices which the Agency has determined will enhance the safety of workers being hoisted in personnel platforms.

Paragraph (g)(6)(i) of this final rule requires that hoisted employees keep all parts of their bodies inside the platform during raising, lowering and positioning. This provision, which is based on ANSI A10.28–1983, section 12.6, is identical to the proposed provision, except that the Agency has added an explanation which states that the requirement does not apply to an occupant of the platform performing the duties of a signal person. Thus, the paragraph, as promulgated, takes into account a common sense consideration which was overlooked in the proposal. OSHA determined that this revision was needed based on comments submitted by Magma Copper and Bechtel (Exs. 3–27 and 3–45). The Construction Industry Manufacturers Association (Ex. 3–31) expressed support for the provision as proposed.

Proposed paragraph (g)(6)(ii) required that the platform be landed or secured to the structure before employees enter or exit the platform. This provision was based on ANSI A10.28–1983, section 12.7. One commenter, the State of Maryland (Ex. 3–19), disagreed with the proposed requirement, stating that "securing the platform to another structure can be dangerous." On the other hand, commenters such as the Commonwealth of Puerto Rico (Ex. 3–55) supported the proposed provision. In addition, Unit Crane & Shovel (Ex. 3–47) commented that "it is unclear what structure OSHA is referring to." Unit Crane suggested that OSHA use the term "stable structure." Unit Crane also noted that the movement of workers in a personnel platform could cause dangerous instability and suggested that the hoisted platform be secured to a "stable structure" whenever employees were working either in the platform or outside.

OSHA has reviewed the evidence in the record regarding this issue and agrees that the language of this provision needs to be clarified. In response to Unit Crane's concern, the Agency is revising the paragraph to make it clear that the platform is to be secured to "the structure where the work is to be performed * * *.". On the other hand, the Agency concluded that a requirement to secure the platform to a "stable structure" would be inappropriate for certain work activities, such as demolition, where securing to the structure would create an unsafe condition. Indeed, OSHA recognizes that there are circumstances where there is no structure to which it is possible to secure the platform safely, and has revised the paragraph accordingly. Therefore, OSHA has decided to promulgate this provision as revised.

Paragraph (g)(6)(iii) of the final rule is identical to the proposed provision. This provision, which is based on ANSI A10.28–1983, section 12.8, requires the use of tag lines, unless the use of a tag line creates an unsafe condition. The Agency believes, based on ANSI B30.5–1982, section 5–3.2.1.4(m) and the *Crane Handbook* (Ex. 5–2D), that compliance with this provision will be an important element in ensuring that any hoisting while traveling, as regulated by paragraph (g)(7) below, proceeds safely. The Agency received few comments on this provision. Kerr-McGee (Ex. 3–23) commented that the use of a tag line as a means of controlling platform motion was preferable to the use of rotation resistant wire rope. In addition, the Milwaukee Construction Industry Safety Council (Ex. 3–26) and Organization Resources Counselors (Ex. 3–89) expressed support for the proposed requirement. Therefore, OSHA promulgates the requirement as proposed.

Proposed paragraph (g)(6)(iv), which prohibited traveling with personnel suspended on a hoisted platform, has been deleted. Traveling is now addressed in paragraph (g)(7), below.

Proposed paragraph (g)(6)(v) has been redesignated as paragraph (g)(6)(iv) in the final rule. The proposed provision required that the crane or derrick operator remain at the controls at all times when hoisting employees. The requirement was based on ANSI A10.28–1983, section 12.4, and B30.5–1982, section 5–3.2.2(a)(12), which provide that the crane or derrick operator shall stay at the controls while the platform is suspended. Boeing (Ex. 3–38) and Standard Oil (Indiana) (Ex. 3–46) agreed that this requirement should only apply when the platform was suspended. In addition, Unit Crane & Shovel (Ex. 3–47) suggested that the crane operator remain at the controls, with "attention directed to the platform at all times when the platform is suspended." Unit Crane recognized that careful regulatory drafting would be necessary to ensure that compliance with this requirement did not detract from the performance of the operator's other duties. OSHA believes that a requirement for the operator to remain at the controls and carefully conduct the lift ((g)(3)(i)(A)) will ensure that the necessary attention is paid to the position of the platform. Therefore, OSHA has responded to Unit Crane's concern, but has not adopted the suggested language.

Also, the Construction Industry Manufacturers Association (CIMA) and the Boilermakers Union (Exs. 3–31 and 3–53) stated that the operator should remain at the controls while the platform is "occupied." The CIMA emphasized the alertness required to ensure the safety of platform passengers while the crane engine is running, and the Boilermakers Union was particularly concerned that hoisted personnel would be endangered if the operator left the controls once the platform had been hoisted to and secured at its working position.

OSHA agrees with the CIMA and Boilermakers Union that the operator should be at the controls once the crane engine is running and the personnel platform is occupied, because inadvertent movement by the crane before hoisting or after landing could cause injuries. Therefore, OSHA has revised this paragraph to require that the operator remain at the controls whenever the crane engine is running and the personnel platform is occupied.

Paragraph (g)(6)(v) requires that employers discontinue personnel hoisting promptly when there are indications that hoisted employees would be exposed to dangerous weather conditions or other impending danger. This provision is virtually identical to paragraph (g)(6)(vi) of the proposed standard. The Agency has added the word "promptly" to this paragraph, as recommended by the Construction Industry Manufacturers Association (Ex. 3–31). The Agency believes that this modification clarifies its regulatory intent.

Some commenters suggested that OSHA set a specific wind speed at which operations would be discontinued (Ex. 3–31 and 3–46). Other commenters, such as the Boeing Company (Ex. 3–38), suggested that OSHA specify the weather conditions under which employers would be required to discontinue personnel hoisting operations. OSHA believes that it is neither possible nor necessary to compile such a list, because circumstances vary so much between construction sites. Indeed, the ACCSH declined to suggest more specific language for this provision because it felt that a broadly worded requirement was needed to cover the many hazards which could arise (Tr. 5–23–83 pp. 147–148). OSHA also notes that its enforcement efforts would be adversely affected if problems arose due to conditions not specifically included in a list.

In addition, the Boilermakers Union (Ex. 3–53) suggested that OSHA require a "constant monitor" to detect hazardous gases when employees are hoisted to repair the tops of foundry stacks, coke ovens and other chimneys at facilities where normal operations are continuing. Although OSHA is concerned that hoisted employees could be harmed by toxic materials, the hazards raised by the Boilermakers are already regulated by other construction standards, such as the permissible exposure limits set forth in § 1926.55. Therefore, the Agency believes that it is not necessary to adopt the suggested revision.

The provisions of proposed paragraph (g)(6)(vii) have been moved to paragraph (g)(5) and have been discussed above.

Paragraph (g)(6)(vi) of this final rule, which is virtually identical to proposed paragraph (g)(6)(viii), requires that employees being hoisted remain in continuous sight of and in direct

communication with the operator or signal person, while allowing the use of direct communications alone only if the circumstances warrant. This provision is consistent with ANSI A10.28–1983, sections 11.1 and 11.2, and with B30.5–1982, section 5–3.2.2(a)(15). Proposed paragraph (g)(6)(viii) required in all circumstances both continuous visual contact, and communication with the operator or signal person. OSHA received written comments and hearing testimony which indicated that radios or other means of communication would enable the hoist to proceed safely when direct visual contact with the operator or signal person was impossible or unsafe.

A representative of Sigma Associates, Ltd. testified as follows:

> I can envision times when it's going to be impractical and really unsafe to place a signalman in a position where he would have view of the crane operator as well as the personnel work platform. So I can see some conditions where it would not be possible or practical to have a signalman in view and, under these conditions, would recommend that communications would be permitted in lieu of the signalman concept. (Tr. 39)

Several other commenters suggested that OSHA permit the use of two-way audio communication equipment as an alternative to visual contact. Some commenters, such as Morrison-Knudsen Co. and Standard Oil Company (Indiana) (3–9 and 3–46), stated that audio contact was appropriate where visual contact could be lost in the course of the hoisting operation, such as where employees are hoisted inside a silo or furnace stack. Other commenters, such as the National Constructors Association, Boeing Aerospace and the Organization Resources Counselors (Exs. 3–30, 3–57 and 3–89), stated that audio contact was a satisfactory means of maintaining communication.

OSHA has determined that there are circumstances where it would be impossible or unsafe for hoisted personnel to maintain visual contact with the signal person or crane operator. In particular, the Agency believes that stationing a signal person atop a chimney or silo to observe hoist operations would be dangerous. Therefore, OSHA has revised the proposed standard to provide that hoisted employees may use direct communication, such as audio contact, as an alternative to continuous sight when it would be more dangerous for the signal person to remain in continuous sight.

Paragraph (g)(6)(vii) of this final rule is essentially the same as paragraph (g)(6)(ix) of the proposed standard, except that proposed paragraph (g)(6)(ix) provided only for the use of body belts. The final rule reflects the ACCSH recommendations for flexible approaches to protection of hoisted personnel from fall hazards (Tr. 5–23–83 p. 143). This provision requires employees occupying a personnel platform to use a body belt or harness system, with a lanyard attached to either the load block, overhaul ball or a structural member of the platform capable of supporting the anticipated fall impact. This provision is based on ANSI A10.28–1983, sections 10.1 and 10.2. However, at the suggestion of the Boeing Company (Ex. 3–38), OSHA has added the option for personnel to use a body harness system to comply with this provision.

Several commenters, including the Panama Canal Commission (Ex. 3–51) and Standard Oil Company (Indiana) (Ex. 3–46), asserted that the tie-off requirement, especially during over water operations, would be hazardous. The Panama Canal Commission pointed out that:

> In the event of cable or crane failure, employees attached to the work platform by belts or lanyards would be dragged under with the dropped platform.

In addition, the American Road and Transportation Builders Association (ARTBA) (Ex. 3–65) commented that the proposed provision was "not realistic." ARTBA stated that tie-off should not be required "where it creates another hazardous situation."

OSHA recognizes that there is a basis for special concern regarding crane or cable failure over water, and has incorporated this suggestion into this revised paragraph. In addition, OSHA notes that the revision is consistent with the existing § 1926.106 which requires specific precautions for all construction work over water.

Proposed paragraph (g)(6)(x) has been relocated to paragraph (g)(4)(iv)(E) of the final rule so that all provisions related to rigging are consolidated. The provisions of that paragraph are discussed as part of paragraph (g)(4).

OSHA has added a new paragraph (g)(6)(viii) to the final rule. This provision prohibits cranes or derricks being used to hoist personnel from hoisting any other loads at the same time. OSHA added this paragraph because, as noted by several commenters, including the Construction Industry Manufacturing Association and the National Roofing Constructors Association (Exs. 3–31 and 3–59), the use of other lines would endanger hoisted personnel due to risks of entanglement and destabilization.

OSHA has added a new paragraph (g)(7) to the final rule in order to provide requirements for cranes which need to travel with employees suspended in a personnel platform.

Proposed paragraph (g)(6)(iv) prohibited hoisting personnel while the supporting crane was traveling, except where a portal or tower crane was operating on & fixed track. This proposed provision reflected OSHA's concern that a crane moving across a construction site would be unable to maintain the stability necessary to protect employees from tipping or other hazards. OSHA notes that section 5–3.2.2(a)(14) of ANSI B30.5–1982 prohibits "travel while personnel are on the platform." On the other hand, ANSI A10.28–1983, section 12.9, provides that cranes shall not travel while hoisting personnel, "except under carefully controlled conditions." In Issue 9, the Agency presented questions regarding the circumstances which would make it necessary for a truck or crawler crane to travel while hoisting personnel.

Several commenters, such as the State of Alaska, Granite Construction Company and the Spartan Equipment Company (Exs. 3–4, 3–50 and 3–82), stated that traveling while hoisting was sometimes necessary in order to protect employees from greater hazards. In particular, Alaska stated that the decision should be based on the weather, terrain, the height to which personnel would be hoisted and the obstacles anticipated in lowering and rehoisting personnel and suggested that employers be required to demonstrate the need for travel. Also, Granite Construction stated that traveling while hoisting would be necessary where the crane was so hemmed in by structures that the boom could not be adjusted to reach all work stations. Granite Construction and Spartan Equipment stated that limited travel should be permitted to position the crane properly. In addition, the AGC of America (Exs. 3–28 and 3–67) stated that the proposed provision was too restrictive and unrealistic in light of workplace realities. The AGC suggested that OSHA permit travel when the terrain is firm, smooth and even; when traveling is done at a very slow speed; when travel is limited to the radius of the boom; when the boom is parallel to the direction of travel; and with outriggers, if equipped, fully extended with rams no more than 50 percent raised.

The National Constructors Association and the State of California (Exs. 3–30, and 3–33) generally favored prohibition of traveling, subject to exception for minor movement for final

positioning. California added that "traveling on rail, prepared level pads, or concrete floors could be acceptable." The State of Maryland (Ex. 3–19) also commented that hoisting while traveling on rails was acceptable.

Other commenters, such as Ebasco Constructors, Inc., Unit Crane & Shovel and the Commonwealth of Puerto Rico (Exs. 3–6, 3–47 and 3–55), suggested that OSHA prohibit travel. Ebasco Constructors noted the continual "changes in the physical surrounding" and the high rate of employee turnover as reasons why traveling would be unsafe. Unit Crane & Shovel stated that even slightly uneven terrain could cause a personnel platform to bounce and swing, and that traveling would cause stability and occupant footing problems. Unit Crane and Puerto Rico noted that swinging of the boom during travel was a particularly dangerous situation. Norpac Engineering, Inc. (Ex. 3–88) commented that cranes should not be allowed to travel while hoisting and that requiring mobile cranes to deploy their outriggers while hoisting would ensure that cranes would not travel.

The Parsons Corporation (Ex. 3–22) supported the proposed ban on travel by truck or crawler cranes while hoisting. Parsons also suggested that OSHA regulate travel by cranes on fixed tracks to ensure that the speed and path of movement are safe.

Sigma Associates, in its hearing testimony (Tr. 48–49), stated that it knew of "no condition where a pneumatic or rubber tired crane or even a crawler would * * * need to travel." Sigma Associates emphasized the importance of ensuring that the crane was supported on a firm level surface and indicated that travel would detract from crane stability and would endanger employees.

OSHA has determined, based on the evidence in the record, that hoisting of employees while traveling is, in general, an extremely dangerous practice. Therefore, the Agency has prohibited the practice, *except* under very limited circumstances. Because this practice is so inherently dangerous, OSHA has determined that the ANSI A10.28 requirement for "careful control" of operations is not sufficient to protect employees from the hazards of traveling. The Agency has determined that a prohibition against all hoisting while traveling, except as set forth in paragraph (g)([7) of this standard, is the only way to ensure that personnel hoisting is done only in those situations where it is necessary, and not just for an employer's convenience. OSHA notes that the Panama Canal Commission (Ex. 3–51) has had successful experience with locomotive cranes and agrees that those types of cranes should be included, along with tower and portal cranes, in the exception to the prohibition. In addition, OSHA believes that the circumstances where other kinds of cranes would need to travel while hoisting are so rare that the proper course is to require an employer to demonstrate to OSHA, as suggested by the State of Alaska (Ex. 3–4), that traveling is necessary to avoid greater hazards while performing work.

Paragraph (g)(7)(i) prohibits cranes from traveling while hoisting employees, except for portal, tower and locomotive cranes, or where the employer demonstrates that there is no less hazardous way for employees to perform their work. This paragraph, which is similar to proposed paragraph. (g)(6)(iv), adds exceptions for personnel hoisting operations involving locomotive crane and other circumstances where traveling has been shown to be necessary. OSHA stresses that this practice would still have to satisfy all of the other requirements of the standard so that employees would be hoisted safely. This provision reflects a recommendation from Granite Construction (Ex. 3–50) which commented:

> Hoisting of personnel while the crane travels should be permitted to a limited extent under carefully controlled conditions where necessitated by worksite restrictions.

Other commenters, including the State of Alaska (Ex. 3–4), The National Constructors Association (Ex. 3–30), and the Spartan Equipment Company (Ex. 3–82) also suggested that OSHA allow some travel under controlled conditions, when the circumstances required it.

Paragraph (g)(7)(ii) provides additional rules that must be followed when cranes travel while hoisting employees.

Paragraph (g)(7)(ii)(A) requires crane travel to be restricted to a fixed track or runway. This provision is similar to the exception in proposed paragraph (g)(6)(iv). OSHA has added provision for traveling on a "runway," as defined in paragraph (g)(1)(ii)(E), to reflect recognition that there may be cranes, other than those on fixed tracks, which need to travel while hoisting personnel. This requirement, as revised, reflects comments from the State of California (CAL/OSHA) (Ex. 3–33) and the approved revision of ANSI A10.28–1983, which has not yet been published. In particular, CAL/OSHA stated that "traveling on rail, prepared level pads, or concrete floors could be acceptable."

Paragraph (g)(7)(ii)(B) limits travel to the load radius of the boom used during the lift. This requirement was suggested by the AGC of America (Ex. 3–28) and Granite Construction (Ex. 3–50). Therefore, if travel would exceed the boom radius used during a particular personnel hoisting operation, the crane operator would be required to lower the platform, unload the occupants, reposition the crane, and perform another trial lift at the new position, before resuming the hoist operations. OSHA believes that this limitation will ensure that only the minimal, necessary traveling takes place.

Paragraph (g)(7)(ii)(C) requires that the boom be parallel to the direction of travel. This requirement, also suggested by the AGC (Ex. 3–28) and Granite Construction (Ex. 3–50), is consistent with ANSI B30.5–1982, section 5–3.2.1.4(m) which covers travel while hoisting material. This provision is intended to minimize the possibility that the crane will tip over, due to swinging of the boom and platform during travel.

Paragraph (g)(7)(ii)(D) requires that an employer perform a complete trial run before allowing employees on the platform. OSHA intends this requirement to supplement the requirements of paragraph (g)(5). It imposes only a nominal additional burden, because all testing requirements can be satisfied through one full cycle trial lift or run. This provision reminds the employer to test the route of travel as well as the route of the lift.

Paragraph (g)(7)(ii)(E) provides requirements for travel by rubber-tired cranes, reflecting OSHA's concern that rubber-tired cranes have lower capacity ratings than crawler cranes. These provisions are based on generally accepted good safety practice and comments received from the AGC of America (Ex. 3–28).

Paragraph (g)(8) requires that a pre-lift meeting be held prior to the trial lift. This paragraph reflects a suggestion received from the ACCSH at the May 23–24, 1983 meeting (Tr. 149–150), and is very similar to proposed paragraph (g)(7). The pre-lift meeting requirements have been modified slightly to clarify the Agency's regulatory intent.

One commenter, the Farm and Industrial Equipment Institute (FIEI) (Ex. 3–37), suggested that OSHA require employers to document, in writing, that they have complied with the standard. The FIEI stated "such documentation will fix accountability, aid enforcement and immeasurably improve the overall effectiveness of the rule in actual practice." Another commenter, the State of California (Ex. 3–33) suggested that OSHA require a written pre-lift plan.

OSHA has determined that the suggested written plan and recordkeeping requirements are not necessary. The procedures to be followed are clearly set forth and whether or not they have been followed can be readily determined by employee interviews at the hoist site.

The Agency has undertaken several recent rulemakings which follow the mandate of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) and section 8(d) of the OSH Act (29 U.S.C. 657(d) to reduce recordkeeping requirements where they do not significantly contribute to employee safety and, therefore, unnecessarily burden employers. Accordingly, OSHA is very concerned that there be a clear benefit from any additional recordkeeping requirements. OSHA believes that requiring employers to document their compliance efforts, as suggested, would not significantly enhance the protection provided to employees by this standard. Therefore, the Agency has not adopted the suggested paperwork requirements, and promulgates paragraph (g)(8) as revised.

III. Final Analyses of Regulatory Impact, Regulatory Flexibility, and Environmental Impact

The following is a summary of the final regulatory impact and regulatory flexibility analyses prepared by OSHA for the final revised standard for crane or derrick suspended personnel platforms. The full text of the document may be examined and copied in OSHA's Docket Office, 200 Constitution Avenue, NW., Room N–3670, Washington, DC, 20210; telephone (202) 523–7894.

Summary of Effects

Affected Firms and Industries and Construction

The hoisting of personnel occurs in construction firms classified under a broad range of four-digit Standard Industrial Classification Codes (SICs). OSHA has determined that the final rule could potentially affect all firms within SICs 1541, Industrial Buildings and Warehouses; 1542, Nonresidential, not elsewhere classified; 1622, Bridge, Tunnel, and Elevated Highway Construction; 1629, Heavy Construction, Not Elsewhere Classified; 1791, Steel Erection; and 1795, Demolition. There were 42,804 firms in these SICs in 1982, and OSHA estimates that the number increased to about 45,000 firms in 1987. However, a number of these firms may adopt alternative means for hoisting personnel, such as aerial lifts, once the standard is implemented.

In addition to directly affecting the construction industry, the final rule will also indirectly affect the crane manufacturing industry and the firms that sell, lease, or rent cranes. In 1983, there were 26 companies that manufactured the types of cranes covered by the final rule, 7 of which were considered large companies. Crane rental agencies buy about 60 percent of all new construction cranes and construction companies buy most of the remainder.

Feasibility, Benefits, and Costs

OSHA has determined that compliance with this standard is technologically feasible. The standard does not require any devices that are not presently available for use on cranes and derricks. However, some cranes, especially the older mechanical ones, would require considerable modification in order to comply with the standard.

The benefits of the rule accrue to those workers who are at risk from current hoisting practices in the construction industry. Although the JACA Corp., OSHA's contractor, was unable to estimate the total number of workers who would benefit from the final standard due to the infrequency of such operations and the wide diversity of potentially affected workers, JACA was able to estimate the rate of injuries per lift. It is estimated that 1 injury occurs for every 36,500 persons lifted and that 3 fatalities and 3 nonfatal injuries occur each year as a result of crane- or derrick-suspended platform accidents. OSHA concludes that compliance with the final standard will avert most of these predicted fatalities and nonfatal injuries. In fact, a review of the experience of the states with stringent suspended platform rules in place for five years revealed no accidents during the five-year period.

Using current industry practice as a baseline, OSHA estimates that the annualized costs of full compliance with the final standard would be $5.8 million in 1987 and $5.5 million each for the years 1988–1991. The cost of using substitutes where they are a safe alternative to hoisting personnel by means of cranes or derricks accounts for over half of the estimated annual compliance cost for this baseline. The costs of retrofitting or converting cranes, retrofitting or building personnel platforms, and providing locking hooks and test weights comprise about 26% of the total cost. Delay-of-job, pre-lift meeting, and familiarization costs comprise the remainder. If all firms were in full compliance with the current OSHA Directive on work platforms suspended from crane booms, the cost of the proposed changes would be $2.8 million in 1987, and from $2.4 million to $2.6 million on an annual basis over the 1988–1991 period. There would be no cost for the substitution of alternative hosting methods because the current OSHA Directive requires the use of less hazardous substitutes. This category represents the bulk of the cost difference between the two baselines.

Economic Effect

JACA used model firms to characterize the impacts on major users of suspended platforms. JACA estimated that the percentage increases in prices that would be needed for model firms to pass forward their compliance costs fully to their customers were insignificant; none would exceed 0.1 percent. JACA also calculated the effects of compliance costs on return-on-assets and profit margins assuming costs would be fully absorbed by model firms, and concluded that the decline in the rates of return on assets and profit margins was insignificant for all size firms. JACA concluded further that firms would be able to pass on most of their incremental costs to customers, and projected that compliance with the proposed standard would not result in decreased competition within the affected sectors of the construction industry as compliance costs are not likely to force the closure of any firms. In view of these factors, OSHA concludes that compliance with this final rule is economically feasible.

OSHA has assumed that crane manufacturers would be able to pass forward to the construction industry the increased costs of their product attributable to the standard because the magnitude of the costs is small. But if it were assumed that manufacturers would not be able to pass forward the increased costs, any adverse financial effects would be mitigated by the very small proportion of total output represented by cranes used for personnel hoisting. OSHA therefore concludes that the final rule will have no adverse economic effects on the crane manufacturing industry.

Regulatory Flexibility Certification and Environmental Impact Assessment

Regulatory Flexibility Certification

Pursuant to the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*), OSHA has assessed the impact of the final rule and concludes that it would not significantly affect a substantial number of small entities. Specialization and the highly fragmented nature of the market structure in the construction industry

tend to minimize the extent of direct competition between small and large firms.

Assuming that the full cost of compliance would be passed through, OSHA estimated the economic impacts according to firm size by examining the relationship between compliance costs (in both low and high-cost estimates) and annual contract revenues for three size categories of model firms (annual revenues of $11 million, $50 million, and $250 million). The ratio of these costs to annual revenues was nearly proportional across all size categories for both low and high cost estimates, in no case exceeding 0.1 percent. However, if firms would be forced to absorb all of their compliance costs, OSHA found that the percentage decline in the profit margins of small firms would be slightly greater than for larger firms under both cost estimates. Under the low cost estimate, the small firm's profitability declined an average 1.7 percent over the five year period while the large firm's profitability declined an average 1.5 percent. Under the high cost estimate, the small firm's profitability declined 5 percent over the five years while the large firm's profitability declined 3 percent. The significance of the differential impact on profit margins is reduced by the likelihood that all firms in the industry should be able to pass on a substantial portion, if not all, of their compliance costs. OSHA believes the demand for the projects built by construction firms which rely on hoisting of personnel by cranes and derricks is inelastic. Therefore, construction firms would have no incentive to underbid on projects requiring cranes since they would be unable to reduce operating costs merely by using equipment other than cranes to hoist personnel platforms or by redesigning structures to eliminate the use of cranes. In effect, both large and small firms will shift costs forward to the buyer.

For these reasons, OSHA concludes that small entities would not be significantly affected by the final rule.

Environmental Impact Assessment

This final rule has been reviewed in accordance with the requirements of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4231 *et seq.*), the Guidelines of the Council on Environmental Quality (CEQ) (40 CFR Parts 1500–1517), and the Department of Labor's NEPA Procedures (29 CFR Part 11). As the result of this review, the Assistant Secretary of Labor for OSHA has determined that the final rule qualifies as a categorically excluded action according to Subpart B, § 11.10 of the DOL NEPA regulations and that the final rule would have no significant environmental impact.

OSHA's final rule contains provisions for work practices which will enhance worker safety and reduce safety hazards from the hoisting of personnel platforms by cranes and derricks. The provisions include design criteria for cranes, derricks, and platforms; inspection and testing of cranes and derricks; required test lifts; and pre-lift meetings. Because the final rule focuses on the reduction of accident or injury by means of compliance with design criteria and work practices and procedures, it does not impact on air, water, or soil quality, plant or animal life, the use of land or other aspects of the environment.

IV. Recordkeeping

The recordkeeping requirements in this standard have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.* The approval number is 1218–0151 and the approval has been granted until June, 1991.

List of Subjects in 29 CFR Part 1926

Construction safety, Construction industry, Cranes, Derricks, Hoisting, Personnel platform, Rigging.

V. State Plan Standards

The 25 States with their own OSHA-approved Occupational Safety and Health plans must adopt a comparable standard within six months of this publication date. These States are: Alaska, Arizona, California, Connecticut,[1] Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, New York,[1] North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Virgin Islands, Washington, and Wyoming. Until such time as a State standard is promulgated, Federal OSHA will provide interim enforcement assistance, as appropriate.

VI. Authority

This document was prepared under the direction of John A. Pendergrass, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

Accordingly, pursuant to sections 4, 6(b), and 8(g) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657), section 107 of the Construction Safety Act (40 U.S.C. 333), Secretary of Labor's Order No. 9–83 (48 FR 35736), and 29 CFR Part 1911, 29 CFR Part 1926 is amended as set forth below.

Signed at Washington, DC this 26th day of 1988.

John A. Pendergrass,

Assistant Secretary of Labor.

29 CFR Part 1926 is amended as follows:

PART 1926—SAFETY AND HEALTH REGULATIONS FOR CONSTRUCTION

1. The authority citation for Subpart N of Part 1926 is revised to read as follows:

Authority: Sec. 107, Contract Work Hours and Safety Standards Act (Construction Safety Act) (40 U.S.C. 333); secs. 4, 6, 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), or 9–83 (49 FR 35736), as applicable. Section 1926.550 also issued under 29 CFR Part 1911.

2. In § 1926.550, a new paragraph (g) is added to read as follows:

§ 1926.550 Cranes and derricks.

* * * * *

(g) *Crane or derrick suspended personnel platforms*—(1) *Scope, application and definitions*—(i) *Scope and application.* This standard applies to the design, construction, testing, use and maintenance of personnel platforms, and the hoisting of personnel platforms on the load lines of cranes or derricks.

(ii) *Definitions.* For the purposes of this paragraph (g), the following definitions apply:

(A) "Failure" means load refusal, breakage, or separation of components.

(B) "Hoist" (or hoisting) means all crane or derrick functions such as lowering, lifting, swinging, booming in and out or up and down, or suspending a personnel platform.

(C) "Load refusal" means the point where the ultimate strength is exceeded.

(D) "Maximum intended load" means the total load of all employees, tools, materials, and other loads reasonably anticipated to be applied to a personnel platform or personnel platform component at any one time.

(E) "Runway" means a firm, level surface designed, prepared and designated as a path of travel for the weight and configuration of the crane being used to lift and travel with the crane suspended platform. An existing surface may be used as long as it meets these criteria.

(2) *General requirements.* The use of a crane or derrick to hoist employees on a personnel platform is prohibited, except when the erection, use, and dismantling

[1] Plan covers only State and local government employees.

of conventional means of reaching the worksite, such as a personnel hoist, ladder, stairway, aerial lift, elevating work platform or scaffold, would be more hazardous, or is not possible because of structural design or worksite conditions.

(3) *Cranes and derricks*—(i) *Operational criteria.* (A) Hoisting of the personnel platform shall be performed in a slow, controlled, cautious manner with no sudden movements of the crane or derrick, or the platform.

(B) Load lines shall be capable of supporting, without failure, at least seven times the maximum intended load, except that where rotation resistant rope is used, the lines shall be capable of supporting without failure, at least ten times the maximum intended load. The required design factor is achieved by taking the current safety factor of 3.5 (required under § 1926.550(b)(2)) and applying the 50 per cent derating of the crane capacity which is required by § 1926.550(g)(3)(i)(F).

(C) Load and boom hoist drum brakes, swing brakes, and locking devices such as pawls or dogs shall be engaged when the occupied personnel platform is in a stationary working position.

(D) The load line hoist drum shall have a system or device on the power train, other than the load hoist brake, which regulates the lowering rate of speed of the hoist mechanism (controlled load lowering.) Free fall is prohibited.

(E) The crane shall be uniformly level within one percent of level grade and located on firm footing. Cranes equipped with outriggers shall have them all fully deployed following manufacturer's specifications, insofar as applicable, when hoisting employees.

(F) The total weight of the loaded personnel platform and related rigging shall not exceed 50 percent of the rated capacity for the radius and configuration of the crane or derrick.

(G) The use of machines having live booms (booms in which lowering is controlled by a brake without aid from other devices which slow the lowering speeds) is prohibited.

(ii) *Instruments and components.* (A) Cranes and derricks with variable angle booms shall be equipped with a boom angle indicator, readily visible to the operator.

(B) Cranes with telescoping booms shall be equipped with a device to indicate clearly to the operator, at all times, the boom's extended length, or an accurate determination of the load radius to be used during the lift shall be made prior to hoisting personnel.

(C) A positive acting device shall be used which prevents contact between the load block or overhaul ball and the boom tip (anti-two-blocking device), or a system shall be used which deactivates the hoisting action before damage occurs in the event of a two-blocking situation (two block damage prevention feature).

(4) *Personnel Platforms.*—(i) *Design criteria.* (A) The personnel platform and suspension system shall be designed by a qualified engineer or a qualified person competent in structural design.

(B) The suspension system shall be designed to minimize tipping of the platform due to movement of employees occupying the platform.

(C) The personnel platform itself, except the guardrail system and body belt/harness anchorages, shall be capable of supporting, without failure, its own weight and at least five times the maximum intended load. Criteria for guardrail systems and body belt/harness anchorages are contained in other Subparts, E and M, respectively of this part.

(ii) *Platform specifications.* (A) Each personnel platform shall be equipped with a guardrail system which meets the requirements of Subpart M, and, shall be enclosed at least from the toeboard to mid-rail with either solid construction or expanded metal having openings no greater than ½ inch (1.27 cm).

(B) A grab rail shall be installed inside the entire perimeter of the personnel platform.

(C) Access gates, if installed, shall not swing outward during hoisting.

(D) Access gates, including sliding or folding gates, shall be equipped with a restraining device to prevent accidental opening.

(E) Headroom shall be provided which allows employees to stand upright in the platform.

(F) In addition to the use of hard hats, employees shall be protected by overhead protection on the personnel platform when employees are exposed to falling objects.

(G) All rough edges exposed to contact by employees shall be surfaced or smoothed in order to prevent injury to employees from punctures or lacerations.

(H) All welding of the personnel platform and its components shall be performed by a qualified welder familiar with the weld grades, types and material specified in the platform design.

(I) The personnel platform shall be conspicuously posted with a plate or other permanent marking which indicates the weight of the platform and its rated load capacity or maximum intended load.

(iii) *Personnel platform loading.* (A) The personnel platform shall not be loaded in excess of its rated load capacity. When a personnel platform does not have a rated load capacity then the personnel platform shall not be loaded in excess of its maximum intended load.

(B) The number of employees occupying the personnel platform shall not exceed the number required for the work being performed.

(C) Personnel platforms shall be used only for employees, their tools, and the materials necessary to do their work, and shall not be used to hoist only materials or tools when not hoisting personnel.

(D) Materials and tools for use during a personnel lift shall be secured to prevent displacement.

(E) Materials and tools for use during a personnel lift shall be evenly distributed within the confines of the platform while the platform is suspended.

(iv) *Rigging.* (A) When a wire rope bridle is used to connect the personnel platform to the load line, each bridle leg shall be connected to a master link or shackle in such a manner to ensure that the load is evenly divided among the bridle legs.

(B) Hooks on overhaul ball assemblies, lower load blocks, or other attachment assemblies shall be of a type that can be closed and locked, eliminating the hook throat opening. Alternatively, an alloy anchor type shackle with a bolt, nut and retaining pin may be used.

(C) Wire rope, shackles, rings, master links, and other rigging hardware must be capable of supporting, without failure, at least five times the maximum intended load applied or transmitted to that component. Where rotation resistant rope is used, the slings shall be capable of supporting without failure at least ten times the maximum intended load.

(D) All eyes in wire rope slings shall be fabricated with thimbles.

(E) Bridles and associated rigging for attaching the personnel platform to the hoist line shall be used only for the platform and the necessary employees, their tools and the materials necessary to do their work, and shall not be used for any other purpose when not hoisting personnel.

(5) *Trial lift, inspection, and proof testing.* (i) A trial lift with the unoccupied personnel platform loaded at least to the anticipated liftweight shall be made from ground level, or any other location where employees will enter the platform, to each location at

which the personnel platform is to be hoisted and positioned. This trial lift shall be performed immediately prior to placing personnel on the platform. The operator shall determine that all systems, controls and safety devices are activated and functioning properly; that no interferences exist; and that all configurations necessary to reach those work locations will allow the operator to remain under the 50 percent limit of the hoist's rated capacity. Materials and tools to be used during the actual lift can be loaded in the platform, as provided in paragraphs (g)(4)(iii) (D), and (E) of this section for the trial lift. A single trial lift may be performed at one time for all locations that are to be reached from a single set up position.

(ii) The trial lift shall be repeated prior to hoisting employees whenever the crane or derrick is moved and set up in a new location or returned to a previously used location. Additionally, the trial lift shall be repeated when the lift route is changed unless the operator determines that the route change is not significant (i.e. the route change would not affect the safety of hoisted employees.)

(iii) After the trial lift, and just prior to hoisting personnel, the platform shall be hoisted a few inches and inspected to ensure that it is secure and properly balanced. Employees shall not be hoisted unless the following conditions are determined to exist:

(A) Hoist ropes shall be free of kinks;

(B) Multiple part lines shall not be twisted around each other;

(C) The primary attachment shall be centered over the platform; and

(D) The hoisting system shall be inspected if the load rope is slack to ensure all ropes are properly stated on drums and in sheaves.

(iv) A visual inspection of the crane or derrick, rigging, personnel platform, and the crane or derrick base support or ground shall be conducted by a competent person immediately after the trial lift to determine whether the testing has exposed any defect or produced any adverse effect upon any component or structure.

(v) Any defects found during inspections which create a safety hazard shall be corrected before hoisting personnel.

(vi) At each job site, prior to hoisting employees on the personnel platform, and after any repair or modification, the platform and rigging shall be proof tested to 125 percent of the platform's rated capacity by holding it in a suspended position for five minutes with the test load evenly distributed on the platform (this may be done concurrently with the trial lift). After prooftesting, a competent person shall inspect the platform and rigging. Any deficiencies found shall be corrected and another proof test shall be conducted. Personnel hoisting shall not be conducted until the proof testing requirements are satisfied.

(6) *Work practices.* (i) Employees shall keep all parts of the body inside the platform during raising, lowering, and positioning. This provision does not apply to an occupant of the platform performing the duties of a signal person.

(ii) Before employees exit or enter a hoisted personnel platform that is not landed, the platform shall be secured to the structure where the work is to be performed, unless securing to the structure creates an unsafe situation.

(iii) Tag lines shall be used unless their use creates an unsafe condition.

(iv) The crane or derrick operator shall remain at the controls at all times when the crane engine is running and the platform is occupied.

(v) Hoisting of employees shall be promptly discontinued upon indication of any dangerous weather conditions or other impending danger.

(vi) Employees being hoisted shall remain in continuous sight of and in direct communication with the operator or signal person. In those situations where direct visual contact with the operator is not possible, and the use of a signal person would create a greater hazard for that person, direct communication alone such as by radio may be used.

(vii) Except over water, employees occupying the personnel platform shall use a body belt/harness system with lanyard appropriately attached to the lower load block or overhaul ball, or to a structural member within the personnel platform capable of supporting a fall impact for employees using the anchorage. When working over water, the requirements of § 1926.106 shall apply.

(viii) No lifts shall be made on another of the crane's or derrick's loadlines while personnel are suspended on a platform.

(7) *Traveling.* (i) Hoisting of employees while the crane is traveling is prohibited, except for portal, tower and locomotive cranes, or where the employer demonstrates that there is no less hazardous way to perform the work.

(ii) Under any circumstances where a crane would travel while hoisting personnel, the employer shall implement the following procedures to safeguard employees:

(A) Crane travel shall be restricted to a fixed track or runway;

(B) Travel shall be limited to the load radius of the boom used during the lift; and

(C) The boom must be parallel to the direction of travel.

(D) A complete trial run shall be performed to test the route of travel before employees are allowed to occupy the platform. This trial run can be performed at the same time as the trial lift required by paragraph (g)(5)(i) of this section which tests the route of the lift.

(E) If travel is done with a rubber tired-carrier, the condition and air pressure of the tires shall be checked. The chart capacity for lifts on rubber shall be used for application of the 50 percent reduction of rated capacity. Notwithstanding paragraph (g)(3)(i)(E) of this section, outriggers may be partially retracted as necessary for travel.

(8) *Pre-lift meeting.* (i) A meeting attended by the crane or derrick operator, signal person(s) (if necessary for the lift), employee(s) to be lifted, and the person responsible for the task to be performed shall be held to review the appropriate requirements of paragraph (g) of this section and the procedures to be followed.

(ii) This meeting shall be held prior to the trial lift at each new work location, and shall be repeated for any employees newly assigned to the operation.

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Part III

Department of Agriculture

Food and Nutrition Service

7 CFR Part 210

National School Lunch Program Revision; Final Rule

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Part 210

National School Lunch Program, Revision

AGENCY: Food and Nutrition Service, USDA.

ACTION: Final rule.

SUMMARY: This rulemaking is a complete revision of 7 CFR Part 210, the regulations governing the National School Lunch Program and the Commodity School Program. This revision finalizes an interim rule (51 FR 4864) which was intended to resolve ambiguities and inconsistencies; eliminate unnecessary, duplicative and obsolete provisions; and clarify both language and style so that Part 210 is easily understood. Further, this rulemaking makes several policy changes which are addressed in detail in the following preamble.

EFFECTIVE DATE: This rule is effective on September 1, 1988.

FOR FURTHER INFORMATION CONTACT: Mr. Lou Pastura, Chief, Policy and Program Development Branch, Child Nutrition Division, Food and Nutrition Service, USDA, Alexandria, Virginia 22302; telephone (703) 756–3620.

SUPPLEMENTARY INFORMATION:

Classification

This final rule has been reviewed under Executive Order 12291 and has been classified as not major because it does not meet any of the three criteria identified under the Executive Order. This action will not have an annual effect on the economy of $100 million or more, nor will it result in major increases in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions. Furthermore, it will not have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United State-based enterprises to compete with foreign-based enterprises in domestic or export markets.

This rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act (5 U.S.C. 601–612). The Administrator of the Food and Nutrition Service has certified that this rule will not have a significant economic impact on a substantial number of small entities.

Although this rule reflects a number of changes to Part 210, the reporting and recordkeeping requirements remain unchanged. These requirements have been approved by the Office of Management and Budget (OMB) for use through June 30, 1990 (OMB No. 0584–0006).

The National School Lunch Program is listed in the Catalog of Federal Domestic Assistance under No. 10.555 and is subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials. (7 CFR Part 3015, Subpart V and 48 FR 29112, June 24, 1983.)

Background

The last major revision of 7 CFR Part 210, the regulations governing the National School Lunch and Commodity School Programs, was published in the **Federal Register** on January 20, 1970 (35 FR 753). Since that time, Part 210 was amended by over 70 final and interim rules, many of which were promulgated quickly in response to legislation or litigation. As a result, Part 210 contained ambiguities and inconsistencies as well as duplicative and obsolete provisions.

On February 12, 1985, the Department published a proposed revision of Part 210 in the **Federal Register** (50 FR 5950). The proposal was intended to clear up ambiguities and inconsistencies, remove unnecessary, duplicative and obsolete provisions; examine the organization of Part 210 and its components; rewrite as necessary to ensure that Part 210 is easily understood; and, based on the resultant revisions, redesignate paragraphs and sections to accommodate the changes. Several policy changes were also proposed. The Department provided a 60-day comment period, during which time 927 comments were received.

The Department determined that, in recognition of the large number of comments received and the extensive changes made, a second round of public comments would be beneficial. Thus, on September 30, 1986, the Department published an interim rule in the **Federal Register** (51 FR 34864). This interim rule provided commenters with a 120-day comment period. During this comment period, 154 comments were received from a variety of sources, including State educational agencies, school personnel, industry, and the general public. The Department would like to thank all those commenters who responded to both the proposed and interm rules. Especially appreciated were those many detailed suggestions which proved helpful in formulating this final rule.

General Comments

Of the 154 comments received on the interim rule, 82 addressed a single issue, i.e., the duration of contracts between school food authorities and food service management companies. Only 75 commenters addressed other aspects of Part 210 (three of whom also addressed the duration issue). Of the 75 commenters addressing other issues, the major areas of concern included the elimination of Federal reimbursement for second lunches, the newly defined "subsidized lunch", and the subsitution of food items for handicapped children.

Since commenters did not express any opposition to the reorganization of Part 210, the Department has adopted the new format. A redesignation table was provided in the interim rule which indicated the old section numbers and the corresponding new section numbers. Since this final rule has adopted the same format provided in the interim rule, the redesignation table was not restated in this rule. Interested parties may obtain a copy of the redesignation table from the Deaprtment upon request.

The remainder of this preamble discusses concerns expressed by commenters and the specific changes being made in the final rule. For ease in reference, commenter concerns and any corresponding changes are explained under the final rule section headings. The preamble does not address sections for which no substantive objections were raised by commenters or those comments which resulted in nonsubstantive revisions which simply serve to clarify the regulatory wording. Commenters will note that the Appendices remain unchanged, except for minor corrections, and are not restated in this final rule. Subsequent amendments will be numbered consecutively, beginning with number 1.

Subpart A—General

Section 210.2 Definitions.

Several commenters requested clarification of the definition "*Commodity School Program*" and an explanation of how it relates to Commodity Only Schools. To clarify the definition, several changes were made to the final rule. "Commodity School Program" is defined to mean a program under which participating schools operate a nonprofit lunch program in accordance with the provisions of Part 210 and receive donated food assistance in lieu of general cash assistance. Participating schools also receive special cash assistance, the entitlement value of donated food assistance and bonus donated foods.

Prior to August 1981, the National School Lunch Act authorized the participation of schools which received only commodity assistance. Such schools were termed "Commodity Only Schools". In 1981, Pub. L. 97–35 amended the Act to allow these schools to receive special cash assistance, thus changing their commodity only status. To acknowledge this change in status, the interim rule termed these schools as the Commodity School Program. While usage of this term suggests a totally separate program, it does provide a technical advantage. The Department defined "Program" to mean both the National School Lunch Program and Commodity School Program, thus throughout Part 210, references to Program refer to both types of operations.

Several commenters expressed concerns regarding the definition "*Food item*". The interim rule defined food item to mean one of the five required food servings that compose the reimbursable school lunch. Commenters were concerned that the word "servings" suggested that each food item would need to be a distinct item, thus disallowing a food that combined food items, such as pizza. To clarify the definition, the final rule defines a food item as one of the five required foods that compose the reimbursable school lunch.

The definition, "*High tuition private school*", has been deleted. This definition was added in response to the Child Nutrition Amendments of 1986 which increased the tuition limit on private schools from $1,500 to $2,000. Subsequently, Pub. L. 100–71, enacted July 11, 1987, removed all tuition limitations, thereby making this definition obsolete.

The interim rule defined "*Lunch*" to mean a meal which meets the school lunch pattern for specified age/grade groups of children as designated in section 210.10 and, unless otherwise exempted by FNS, which is served at or about midday. Several commenters requested clarification of "unless otherwise exempted by FNS". For purposes of clarity, that portion of the definition regarding timeframes has been moved to § 210.10(g), *Lunch period*.

This final rule presents a slightly abbreviated definition of "*School*". The Department is hopeful that this definition will provide the clarity requested by commenters. To ensure that no misinterpretation occurs, the Department would like to restate its intent regarding preprimary classes. Preprimary classes are eligible to participate: (a) When they are recognized as part of the educational system of the State; or (b) when they are conducted in a participating school having classes of primary or higher grades.

"*School food authority*" has been revised to clarify that a school food authority means the governing body which is responsible for the administration of one or more schools. Such governing body "* * * shall have the legal authority to operate the Program therein or be otherwise approved by FNS to operate the Program." This definition is designed to provide FNS with the authority to approve arrangements between schools which are administered by different legal entities. For example, FNS may authorize a public school district to act as a school food authority for schools within the public school district and, provided that a contractual arrangement exists, for any nearby eligible private schools. The school food authority would be required to ensure all program requirements are met for any school for which it acts as governing body.

Almost 40 commenters disapproved of the definition of "*Subsidized lunch*" and suggested a return to the term "paid lunch". However, each "paid lunch" bought by students is subsidized by the Department with both cash assistance and donated food assistance. Therefore, the final rule restates the definition without change.

The definition "*Tuition*" has been deleted. Pub. L. 100–71, enacted on July 11, 1987, removed all tuition limitations previously imposed upon private schools, thereby making this definition obsolete.

Subpart B—Assistance to States and School Food Authorities

Section 210.8 Method of reimbursement.

One commenter expressed some concern regarding the intent of paragraph (b), *Content of claim*, which states that the State agency "may authorize a school food authority to submit a consolidated Claim for Reimbursement * * *". The commenter suggested that this wording allowed a school food authority to make the determination of whether or not to submit a consolidated claim. This is not the Department's intent; clearly, the determination rests with the State agency. The final rule restates this provision without change.

Paragraph (c), *Advance funds*, of both the interim and final regulations establishes procedures whereby State agencies may make advance funds available for the Program to a school food authority in an amount equal to the amount of reimbursement estimated to be needed for one month's operation. Several commenters noted that the regulatory language conflicts with the Department's policy on making advance funds available.

The Department would like to point out that while the authority currently exists to make advance funding available, all funding is contingent upon the extent to which funds are available. Currently, the Department is unable to make such advance funding available. However, the States continue to have the authority to make advances available to schools. While the Department will not provide the funds to do so, States may rely on available State funds or on their existing authority to vary rates of reimbursement.

Subpart C—Requirements for School Food Authority Participation

Section 210.9 Agreement With State Agency.

Paragraph (b), *Annual agreement*, of the interim rule required each school food authority to maintain a current written agreement on file at the State agency each year. State agencies were authorized to allow school food authorities to extend by amendment a previous year's agreement in lieu of taking a new agreement annually, provided that a current written agreement is on file each year. Fifteen commenters recommended revising the interim provision to allow agreements to stay on file until substantial changes necessitate the development of a new agreement.

The Department cannot accept the commenters' suggestion. The Program is a grant program with funds appropriated on a fiscal year basis. The Department does not believe a longstanding agreement would be supported by the National School Lunch Act nor would it be in the best interest of the Program. Maintenance of a current agreement is a good management practice which enables State agencies and FNS to be fully apprised of the responsible parties and their duties. This requirement also serves to assure the Department that any new school officials will be cognizant of their responsibilities under the Program. Therefore, the final rule restates the interim wording.

Section 210.10 Lunch components and quantities.

Several commenters to the proposed rule recommended deletion of production records, contending that the prohibition on claiming reimbursement for second lunches obviates the need for production records. The Department

retained the requirement for production records in paragraph (b), *General*, of the interim rule; however, commenters were encouraged to address the usefulness of retaining production records.

Of the 12 commenters who addressed this issue, 8 opposed the retention of production records arguing that offer versus serve and the prohibition on claiming for second lunches make production records obsolete. Commenters in favor of retaining these records indicated that this requirement leads to good management practices. This complements the Department's contention that schools can use the historical perspective provided by production records to assist in forecasting the number of lunches and quantities of each food item needed to provide one lunch per child per day. Since so few commenters expressed concern regarding this issue, the Department does not believe that sufficient cause exists to remove this requirement. Thus, the final rule remains unchanged.

Approximately 60 commenters addressed the requirement in paragraph (b), for the elimination of reimbursement for excess lunches. Most of these commenters (95%) opposed the elimination of reimbursement for excess lunches citing the difficulties in monitoring and in predicting the actual number of lunches needed and the burden placed on satellite programs.

The Department recognizes the validity of commenter concerns and the consequent burden of such a requirement. However, fiscal constraints mandate that no Federal reimbursement be claimed for lunches served in excess of one reimbursable lunch per child per day. In support of the Department's position, several commenters identified the costs of allowing excess lunches to be claimed. Extrapolation of those costs nationwide suggests that an excessive amount of program funds are being expended to provide children more than one lunch per child per day. The Department remains firm in its position to prohibit reimbursement for lunches served in excess of one reimbursable lunch per child per day. Therefore, the final rule remains unchanged from the interim.

Several commenters questioned whether the "one lunch per child per day" provision applied to enrolled or participating children. To ensure no confusion exists, the Department would like to clarify that this provision applies to participating children and in no way may it be construed to apply to enrolled children.

One commenter pointed out an inconsistency between the meal pattern chart and the regulatory language in paragraph (d)(2)(ii). The interim rule stated that nuts and seeds served as a meat alternate meet 50 percent of the meat/meat alternate requirement and must be combined with 50 percent of another meat/meat alternate. This language was revised in the final rule to state that nuts and seeds served as a meat alternate may be used to meet "no more than" 50 percent of the meat/meat alternate requirement and must be used in combination with any other meat/meat alternate.

Readers will note that the meal pattern chart and paragraphs (d)(1), *Milk*, and (i)(5), *Insufficient milk supply*, have been revised to include a revision of the milk requirement mandated by Public Laws 99–500 and 99–591 and subsequently implemented by a final rule published in the **Federal Register** on March 23, 1987 (52 FR 9109). Specifically, the meal pattern chart and paragraphs (d)(1) and (i)(5) have been revised to require schools to offer students fluid whole milk in addition to at least one type of unflavored fluid milk containing two percent or less milk fats, such as lowfat milk, skim milk, or buttermilk.

Readers should also note that paragraph (e), *Offer versus serve*, has been revised to make it clear that a school must offer all five required food items; however, senior high school students must be permitted to decline up to two of the five required food items and, at local discretion, students below the senior high school level may be permitted to decline one or two of the required five food items. While the decision to implement the offer versus serve provision for students below senior high rests with the local school food authority, the decision regarding which food items to decline rests solely with the student.

In response to commenters concerns, paragraph (g), *Lunch period*, has been clarified to specify that "mid-day" means between 10:00 a.m. and 2:00 p.m., unless otherwise exempted by FNS. The Department believes that with few exceptions schools can schedule lunches within these hours. To provide flexibility for unusual circumstances, such as some split-shifts, the Department has provided for FNS exceptions to these hours. However, the Department does not believe evening meals can be considered lunch and does not intend to provide reimbursement for such meals.

Paragraph (h), *Infant lunch pattern*, has been revised to incorporate the provisions of a final rule which establishes consistency in the infant meal pattern requirements among the Child Nutrition Programs and reflects the most recent information regarding infant feeding practices. This rule was published in the **Federal Register** on July 6, 1988 (53 FR 25303), and becomes effective on September 6, 1988.

Interim paragraph (i)(1), *Medical or dietary needs*, requires substitutions in the meal pattern to be made for those handicapped children whose handicap restricts their diet and allows, at local discretion, substitutions to be made for nonhandicapped children who are unable to consume the regular lunch because of medical or other special dietary needs. In order to claim reimbursement for such lunches, substitutions are to be made on a case by case basis and supported by a statement of the need for substitutions signed, in the case of a handicapped child, by a physician, and, in the case of a nonhandicapped child, by a recognized medical authority.

Commenters requested clarification and guidance in implementing this provision. Special areas of concern included the definitions of handicapped and recognized medical authority, and the responsibility of the school food service to provide special food items. While the Department has additional guidance on the implementation of this provision, it would like to take this opportunity to clarify some of the areas of confusion.

A handicapped student, as defined in 7 CFR Part 15b, is one who has "* * * a physical or mental impairment which substantially limits one or more major life activities * * *" Major life activities are defined to include functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. Lunches claimed for reimbursement under this section must be supported by a statement from a physician, in the case of a handicapped child, and by a statement from a recognized medical authority, in the case of a nonhandicapped child. A recognized medical authority may include a physician, a registered nurse, or other health professionals specified by the State agency.

Several commenters recommended that the required signature authority be the same for handicapped as for nonhandicapped, but there was no consensus on whether the signature authority should be a physician or recognized medical authority. Since a school is required to make substitutions for a handicapped child, the physician is indeed the appropriate authority. However, in the case of a nonhandicapped child, the school is authorized by not required to make substitutions, thus the signature of a

physician was determined to be too stringent. For these reasons, the final rule remains unchanged.

Commenters also expressed concerns regarding whether a school food service is to provide foods not readily available to the kitchen. Nothing in this regulation is meant to require schools to operate special diet kitchens. Usually there is no difficulty acquiring substitute items in local markets.

However, if the authorized substitute foods are not normally kept in inventory or are not generally available in local markets, the parents should provide the substitute food prescribed by the physician or recognized medical authority.

Section 210.14 Resource management.

Paragraph (a), *Nonprofit school food service,* has been revised to incorporate a provision of Public Laws 99–500 and 99–591 which authorizes schools to use facilities, equipment and personnel supported with nonprofit school food revenues to support a nonprofit nutrition program for the elderly. A final rule implementing this provision was published in the **Federal Register** on April 28, 1987 (52 FR 15297).

Section 210.16 Food service management companies.

Paragraph (a), *General,* has been revised to include the provisions of Public Laws 99–500 and 99–591 which prohibit a school or school food authority from contracting with a food service management company to operate an a la carte food service unless the company agrees to offer free, reduced price and school food authority designated full price reimbursable meals to all eligible children. Implementing regulations were published in the **Federal Register** on April 8, 1987 (52 FR 11186).

Paragraph (d), *Duration of contract,* has also been revised to accommodate a change published in the **Federal Register** on February 16, 1988 (53 FR 4377). That final rule responded to comments originally received on the interim Part 210 rewrite. Seventy-nine comments were received which recommended revising the existing requirement which limits a contract to one year with two yearly renewals, i.e., a 3-year bidding cycle. However, no change in the number of possible contract renewals had been proposed. Hence, the Department issued a separate proposal rather than make any change without soliciting additional comments. A proposed rule was published in the **Federal Register** on September 1, 1987 (52 FR 32930) which solicited comments on expanding the current requirement to allow a one year contract with four yearly renewals. One hundred sixty-seven comment letters were received on the proposal. Of these comments, 151 expressed support for the proposal. The supportive comments generally fell into three categories: reduction of administrative burden at all levels, impact on school food service staff, and impact on food service management company contract provisions and operations. Therefore, the final rule published on February 16, 1988 allows school food authorities to annually renew their one-year contracts with food service management companies four times for a maximum contract term of five years. Only new contracts signed after February 16, 1988, are covered by this change. All previously existing contracts are subject to the two-year renewal maximum that was in effect when those contracts were negotiated.

Several commenters suggested additional revisions to the food service management company portion of the regulations. Specifically, some commenters recommended revisions to a number of requirements in this section to reflect the diverse arrangements between school food authorities and food service management companies. A number of commenters recommended requiring all food service management companies to register with the State. The Department has taken these comments under consideration and is reviewing the requirements of this section for possible revision in the future. No substantive changes have been made in this final rule because the Department would first issue a proposed rulemaking in order to implement such changes. Readers will, however, note several minor technical changes to paragraphs (a)(6) and (c) of this section which are not intended to change current operating procedures.

Subpart D—Requirements for State Agency Participation

Section 210.17 Matching Federal funds.

Paragraph (g), *Reports,* has been revised to extend the submission of the Annual Report of Revenues (FNS–13) from 90 days to 120 days. This revision is intended to reflect actual operating policy.

Section 210.18 Monitoring responsibilities.

Paragraph (c), *Improved management,* of the interim rule restated the requirement that the State agency shall work with a school food authority toward improving a school food authority's management practices where the State agency has found poor food service management practices leading to decreasing or low student participation and/or poor student acceptance of the Program or of foods served. Efforts to assist in the correction of management problems were to include the promotion of student and parent involvement in Program activities.

Over 20 commenters opposed the requirement for parent/student involvement, arguing that the correction of management problems is very subjective, and that an additional requirement for parent/student involvement is difficult to administer and monitor. In response to commenter concerns, this paragraph has been revised in the final rule to remove the requirement for parent/student involvement. The Department has also revised its assessment of what constitutes poor student acceptance to allow for more flexibility.

Readers will note a number of changes to § 210.18 which implement the provisions of a final rule which revised the AIMS reporting and recordkeeping requirements. This final rule was published in the **Federal Register** on February 26, 1987 (52 FR 5735). In addition to these changes, paragraph (m), *AIMS recordkeeping,* has been revised to require State agencies to maintain AIMS records for 3 years after the end of the school year in which the review or audit was conducted. Previously, such records were to be maintained for 3 years after the date of the exit conference. This revision is intended to ensure that AIMS records are maintained for a complete 4-year cycle and not, as previously authorized, for only a portion of that cycle.

Appendix A, B and C

The Appendices remain unchanged, except for minor corrections, and are not restated in this final rule.

List of Subjects in 7 CFR Part 210

Food assistance programs, National School Lunch Program, Commodity School Program, Grant programs-Social programs, Nutrition, Children, Reporting and recordkeeping requirements, Surplus agricultural commodities.

Accordingly, Subpart A, B, C, D, E, and F of Part 210 are revised as follows:

PART 210—NATIONAL SCHOOL LUNCH PROGRAM

Subpart A—General

Sec.

Authority: The provisions of Part 210 issued under sec. 2–12, 60 Stat. 230, as amended; sec. 10, 80 Stat. 889, as amended; 84 Stat. 270; 42 U.S.C. 1751–1760, 1779.

Subpart A—General

§ 210.1 General purpose and scope.

(a) *Purpose of the program.* Section 2 of the National School Lunch Act (42 U.S.C. 1751), states: "It is declared to be the policy of Congress, as a measure of national security, to safeguard the health and well-being of the Nation's children and to encourage the domestic consumption of nutritious agricultural commodities and other food, by assisting the States, through grants-in-aid and other means, in providing an adequate supply of food and other facilities for the establishment, maintenance, operation, and expansion of nonprofit school lunch programs." Pursuant to this act, the Department provides States with general and special cash assistance and donations of foods acquired by the Department to be used to assist schools in serving nutritious lunches to children each school day. In furtherance of Program objectives, participating schools shall serve lunches that are nutritionally adequate, as set forth in these regulations, and shall to the extent practicable, ensure that participating children gain a full understanding of the relationship between proper eating and good health.

(b) *Scope of the regulations.* This part sets forth the requirements for participation in the National School Lunch and Commodity School Programs. It specifies Program responsibilities of State and local officials in the areas of program administration, preparation and service of nutritious lunches, payment of funds, use of program funds, program monitoring, and reporting and recordkeeping requirements.

§ 210.2 Definitions.

For the purpose of this part:

"Act" means the National School Lunch Act, as amended.

"AIMS" means the Assessment, Improvement and Monitoring System. This is a management improvement system used in the National School Lunch and the Commodity School Programs.

"Child" means—(a) a student of high school grade or under as determined by the State educational agency, who is enrolled in an educational unit of high school grade or under as described in paragraphs (a) and (b) of the definition of "*School,*" including students who are mentally or physically handicapped as defined by the State and who are participating in a school program established for the mentally or physically handicapped; or (b) a person under 21 chronological years of age who is enrolled in an institution or center as described in paragraphs (c) and (d) of the definition of "School."

"CND" means the Child Nutrition Division of the Food and Nutrition Service of the Department.

"Commodity School Program" means the Program under which participating schools operate a nonprofit lunch program in accordance with this part and receive donated food assistance in lieu of general cash assistance. Schools participating in the Commodity School Program shall also receive special cash and donated food assistance in accordance with § 210.4(c).

"Department" means the United States Department of Agriculture.

"Distributing agency" means a State agency which enters into an agreement with the Department for the distribution to schools of donated foods pursuant to Part 250 of this chapter.

"Donated foods" means food commodities donated by the Department for use in nonprofit lunch programs.

"Fiscal year" means a period of 12 calendar months beginning October 1 of any year and ending with September 30 of the following year.

"FNS" means the Food and Nutrition Service, United States Department of Agriculture.

"FNSRO" means the appropriate Regional Office of the Food and Nutrition Service of the Department.

"Food component" means one of the four food groups which compose the reimbursable school lunch, i.e., meat or meat alternate, milk, bread or bread alternate, and vegetable/fruit.

"Food item" means one of the five required foods that compose the reimbursable school lunch, i.e., meat or meat alternate, milk, bread or bread alternate, and two (2) servings of vegetables, fruits, or a combination of both.

"Food service management company" means a commercial enterprise or a nonprofit organization which is or may be contracted with by the school food authority to manage any aspect of the school food service.

"Free lunch" means a lunch served under the Program to a child from a household eligible for such benefits under 7 CFR Part 245 and for which neither the child nor any member of the household pays or is required to work.

"Handicapped student" means any child who has a physical or mental impairment as defined in § 15b.3 of the Department's nondiscrimination regulations (7 CFR Part 15b).

"Lunch" means a meal which meets the school lunch pattern for specified age/grade groups of children as designated in § 210.10.

"National School Lunch Program" means the Program under which participating schools operate a nonprofit lunch program in accordance with this part. General and special cash assistance and donated food assistance are made available to schools in accordance with this part.

"Net cash resources" means all monies, as determined in accordance with the State agency's established accounting system, that are available to or have accrued to a school food authority's nonprofit school food service at any given time, less cash payable. Such monies may include, but are not limited to, cash on hand, cash receivable, earnings on investments, cash on deposit and the value of stocks, bonds or other negotiable securities.

"Nonprofit", when applied to schools or institutions eligible for the Program, means exempt from income tax under section 501(c)(3) of the Internal Revenue Code of 1954, as amended; or, in the Commonwealth of Puerto Rico, certified as nonprofit by the Governor.

"Nonprofit school food service" means all food service operations conducted by the school food authority principally for the benefit of schoolchildren, all of the revenue from which is used solely for the operation or improvement of such food services.

"OIG" means the Office of the Inspector General of the Department.

"Program" means the National School Lunch Program and the Commodity School Program.

"Reduced price lunch" means a lunch served under the Program: (a) to a child from a household eligible for such benefits under 7 CFR Part 245; (b) for which the price is less than the school food authority designated full price of the lunch and which does not exceed the maximum allowable reduced price specified under 7 CFR Part 245; and (c) for which neither the child nor any member of the household is required to work.

"Reimbursement" means Federal cash assistance including advances paid or payable to participating schools for lunches meeting the requirements of § 210.10 and served to eligible children.

"Revenue", when applied to nonprofit school food service, means all monies received by or accruing to the nonprofit school food service in accordance with the State agency's established accounting system including, but not limited to, children's payments, earnings on investments, other local revenues, State revenues, and Federal cash reimbursements.

"School" means: (a) An educational unit of high school grade or under, recognized as part of the educational system in the State and operating under public or nonprofit private ownership in a single building or complex of buildings; (b) any public or nonprofit private classes of preprimary grade when they are conducted in the aforementioned schools; (c) any public or nonprofit private residential child care institution, or distinct part of such institution, which operates principally for the care of children, and, if private, is licensed to provide residential child care services under the appropriate licensing code by the State or a subordinate level of government, *except for* residential summer camps which participate in the Summer Food Service Program for Children, Job Corps centers funded by the Department of Labor, and private foster homes. The term "residential child care institutions" includes, but is not limited to: homes for the mentally, emotionally or physically impaired, and unmarried mothers and their infants; group homes; halfway houses; orphanages; temporary shelters for abused children and for runaway children; long-term care facilities for chronically ill children; and juvenile detention centers. A long-term care facility is a hospital, skilled nursing facility, intermediate care facility, or distinct part thereof, which is intended for the care of children confined for 30 days or more; or (d) with respect to the Commonwealth of Puerto Rico, nonprofit child care centers certified as such by the Governor of Puerto Rico.

"School food authority" means the governing body which is responsible for the administration of one or more schools; and has the legal authority to operate the Program therein *or* be otherwise approved by FNS to operate the Program.

"School year" means a period of 12 calendar months beginning July 1 of any year and ending June 30 of the following year.

"Secretary" means the Secretary of Agriculture.

"7 CFR Part 3015", means the Uniform Federal Assistance Regulations published by the Department to implement Office of Management and Budget Circulars A–21, A–87, A–102, A–110, A–122, A–124, and A–128; the Single Audit Act of 1984 (31 U.S.C. 7501 et seq.); and Executive Order 12372.

Note: OMB Circulars, referred to in this definition, are available from the EOP Publications, New Executive Office Building, 726 Jackson Place NW, Room 2200, Washington, DC 20503.

"State" means any of the 50 States, District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Marianas, or the Federated States of Micronesia, the Republic of the Marshalls, and the Republic of Palau.

"State agency" means (a) the State educational agency; (b) any other agency of the State which has been designated by the Governor or other appropriate executive or legislative authority of the State and approved by the Department to administer the Program in schools, as specified in § 210.3(b); or (c) the FNSRO, where the FNSRO administers the Program as specified in § 210.3(c).

"State educational agency" means, as the State legislature may determine, (a) the chief State school officer (such as the State Superintendent of Public Instruction, Commissioner of Education, or similar officer), or (b) a board of education controlling the State department of education.

"State food distribution advisory council" means a group which meets to advise the State educational agency and the State distributing agency with respect to the needs of schools participating in the Program concerning the manner of selection and distribution of commodities.

"Subsidized lunch" (paid lunch) means a lunch served to children who are either not eligible for or elect not to receive the free or reduced price benefits offered under 7 CFR Part 245. The Department subsidizes each paid lunch with both general cash assistance and donated foods. Although a paid lunch student pays for a large portion of his or her lunch, the Department's subsidy accounts for a significant portion of the cost of that lunch.

§ 210.3 Administration.

(a) *FNS.* FNS will act on behalf of the Department in the administration of the Program. Within FNS, the CND will be responsible for Program administration.

(b) *States.* Within the States, the responsibility for the administration of the Program in schools, as defined in § 210.2, shall be in the State educational agency. If the State educational agency is unable to administer the Program in public or private nonprofit residential child care institutions or nonprofit private schools, then Program administration for such schools may be assumed by FNSRO as provided in paragraph (c) of this section, or such other agency of the State as has been designated by the Governor or other appropriate executive or legislative authority of the State and approved by the Department to administer such schools. Each State agency desiring to administer the Program shall enter into a written agreement with the Department for the administration of the Program in accordance with the applicable requirements of this part; Part 235; Part 245; Parts 15, 15a, 15b, and 3015 of Departmental regulations; and FNS instructions.

(c) *FNSRO.* The FNSRO will administer the Program in nonprofit private schools or public or nonprofit private residential child care institutions if the State agency is prohibited by law from disbursing Federal funds paid to such schools. In addition, the FNSRO will continue to administer the Program in those States in which nonprofit private schools or public or nonprofit private residential child care institutions have been under continuous FNS administration since October 1, 1980,

unless the administration of the Program in such schools is assumed by the State. The FNSRO will, in each State in which it administers the Program, assume all responsibilities of a State agency as set forth in this part and Part 245 of this chapter as appropriate. References in this part to "State agency" include FNSRO, as applicable, when it is the agency administering the Program.

(d) *School food authorities.* The school food authority shall be responsible for the administration of the Program in schools. State agencies shall ensure that school food authorities administer the Program in accordance with the applicable requirements of this part; Part 245; Parts 15, 15a, 15b, and 3015 of Departmental regulations; and FNS instructions.

Subpart B—Assistance to States and School Food Authorities

§ 210.4 Cash and donated food assistance to States.

(a) *General.* To the extent funds are available, FNS will make cash assistance available in accordance with the provisions of this section to each State agency for lunches served to children under the National School Lunch and Commodity School Programs. To the extent donated foods are available, FNS will provide donated food assistance to distributing agencies for each lunch served in accordance with the provisions of this part and Part 250 of this chapter.

(b) *Assistance for the National School Lunch Program.* The Secretary will make cash and/or donated food assistance available to each State agency and distributing agency, as appropriate, administering the National School Lunch Program, as follows:

(1) *Cash assistance:* Cash assistance payments are composed of a *general* cash assistance payment, authorized under section 4 of the Act, and a *special* cash assistance payment, authorized under section 11 of the Act. General cash assistance is provided to each State agency for *all* lunches served to children in accordance with the provisions of the National School Lunch Program. Special cash assistance is provided to each State agency for lunches served under the National School Lunch Program to children determined eligible for free or reduced price lunches in accordance with Part 245 of this chapter. The total general cash assistance paid to each State for any fiscal year shall not exceed the lesser of amounts reported to FNS as reimbursed to school food authorities in accordance with § 210.5(d)(3) or the total calculated by multiplying the number of lunches reported in accordance with § 210.5(d)(1) for each month of service during the fiscal year, by the applicable national average payment rate prescribed by FNS. The total special assistance paid to each State for any fiscal year shall not exceed the lesser of amounts reported to FNS as reimbursed to school food authorities in accordance with § 210.5(d)(3) or the total calculated by multiplying the number of free and reduced price lunches reported in accordance with § 210.5(d)(1) for each month of service during the fiscal year by the applicable national average payment rate prescribed by FNS. In accordance with section 11 of the Act, FNS will prescribe annual adjustments to the per meal national average payment rate (general cash assistance) and the special assistance national average payment rates (special cash assistance) which are effective on July 1 of each year. These adjustments, which reflect changes in the food away from home series of the Consumer Price Index for all Urban Consumers, are annually announced by Notice in July of each year in the **Federal Register.** FNS will also establish maximum per meal rates of reimbursement within which a State may vary reimbursement rates to school food authorities. These maximum rates of reimbursement are established at the same time and announced in the same Notice as the national average payment rates.

(2) *Donated food assistance.* For each school year, FNS will provide distributing agencies with donated foods for lunches served under the National School Lunch Program as provided under Part 250 of this chapter. The per lunch value of donated food assistance is adjusted by the Secretary annually to reflect changes as required under section 6 of the Act. These adjustments, which reflect changes in the Price Index for Foods Used in Schools and Institutions, are effective on July 1 of each year and are announced by Notice in the **Federal Register** in July of each year.

(c) *Assistance for the Commodity School Program.* FNS will make special cash assistance available to each State agency for lunches served in commodity schools in the same manner as special cash assistance is provided in the National School Lunch Program. Payment of such amounts to State agencies is subject to the reporting requirements contained in § 210.5(d). FNS will provide donated food assistance in accordance with Part 250 of this chapter. Of the total value of donated food assistance to which it is entitled, the school food authority may elect to receive cash payments of up to 5 cents per lunch served in its commodity school(s) for donated foods processing and handling expenses. Such expenses include any expenses incurred by or on behalf of a commodity school for processing or other aspects of the preparation, delivery, and storage of donated foods. The school food authority may have all or part of these cash payments retained by the State agency for use on its behalf for processing and handling expenses by the State agency or it may authorize the State agency to transfer to the distributing agency all or any part of these payments for use on its behalf for these expenses. Payment of such amounts to State agencies is subject to the reporting requirements contained in § 210.5(d). The total value of donated food assistance is calculated on a school year basis by adding:

(1) The applicable national average payment rate (general cash assistance) prescribed by the Secretary for the period of July 1 through June 30 multiplied by the total number of lunches served during the school year under the Commodity School Program; and

(2) The national per lunch average value of donated foods prescribed by the Secretary for the period of July 1 through June 30 multiplied by the total number of lunches served during the school year under the Commodity School Program.

§ 210.5 Payment process to States.

(a) *Grant award.* FNS will specify the terms and conditions of the State agency's grant in a grant award document and will generally make payments available by means of a Letter of Credit issued in favor of the State agency. The State agency shall obtain funds for reimbursement to participating school food authorities through procedures established by FNS in accordance with 7 CFR Part 3015. State agencies shall limit requests for funds to such times and amounts as will permit prompt payment of claims or authorized advances. The State agency shall disburse funds received from such requests without delay for the purpose for which drawn. FNS may, at its option, reimburse a State agency by Treasury Check. FNS will pay by Treasury Check with funds available in settlement of a valid claim if payment for that claim cannot be made within the grant closeout period specified in paragraph (d) of this section.

(b) *Cash-in-lieu of donated foods.* All Federal funds to be paid to any State in place of donated foods will be made

available as provided in Part 240 of this chapter.

(c) *Recovery of funds.* FNS will recover any Federal funds made available to the State agency under this part which are in excess of obligations reported at the end of each fiscal year in accordance with the reconciliation procedures specified in paragraph (d) of this section. Such recoveries shall be reflected by a related adjustment in the State agency's Letter of Credit.

(d) *Substantiation and reconciliation process.* Each State agency shall maintain Program records as necessary to support the reimbursement payments made to school food authorities under § 210.7 and § 210.8 and the reports submitted to FNS under this paragraph. The State agency shall ensure such records are retained for a period of 3 years or as otherwise specified in § 210.23(c).

(1) *Monthly report.* Each State agency shall submit a final Report of School Program Operations (FNS–10) to FNS for each month. The final reports shall be limited to claims submitted in accordance with § 210.8 and shall be postmarked and/or submitted no later than 90 days following the last day of the month covered by the report. States shall not receive Program funds for any month for which the final report is not submitted within this time limit unless FNS grants an exception. Upward adjustments to a State's report shall not be made after 90 days from the month covered by the report unless authorized by FNS. Downward adjustments to a State's report shall always be made regardless of when it is determined that such adjustments are necessary. FNS authorization is not required for downward adjustments. Any adjustments to a State's report shall be reported to FNS in accordance with procedures established by FNS.

(2) *Quarterly report.* Each State agency shall also submit to FNS a quarterly Financial Status Report (SF–269) on the use of Program funds. Such reports shall be postmarked and/or submitted no later than 30 days after the end of each fiscal year quarter.

(3) *End of year report.* Each State agency shall submit a final Financial Status Report (SF–269) for each fiscal year. This final fiscal year grant closeout report shall be postmarked and/or submitted to FNS within 120 days after the end of each fiscal year or part thereof that the State agency administered the Program. Obligations shall be reported only for the fiscal year in which they occur. FNS will not be responsible for reimbursing Program obligations reported later than 120 days after the close of the fiscal year in which they were incurred. Grant closeout procedures are to be carried out in accordance with 7 CFR Part 3015.

§ 210.6 Use of Federal funds.

General. State agencies shall use Federal funds made available under the Program to reimburse or make advance payments to school food authorities in connection with lunches served in accordance with the provisions of this part; *except that,* with the approval of FNS, any State agency may reserve an amount up to one percent of the funds earned in any fiscal year under this part for use in carrying out special developmental projects. Advance payments to school food authorities may be made at such times and in such amounts as are necessary to meet the current fiscal obligations. All Federal funds paid to any State in place of donated foods shall be used as provided in Part 240 of this chapter.

§ 210.7 Reimbursement for school food authorities.

(a) *General.* Reimbursement payments to finance nonprofit school food service operations shall be made only to school food authorities operating under a written agreement with the State agency. Subject to the provisions of § 210.8(b), such payments may be made for lunches served in accordance with provisions of this part and Part 245 in the calendar month preceding the calendar month in which the agreement is executed. These reimbursement payments include general cash assistance for all lunches served to children under the National School Lunch Program and special cash assistance payments for free or reduced price lunches served to children determined eligible for such benefits under the National School Lunch and Commodity School Programs. The school food authority shall not claim reimbursement for any lunches produced in excess of the one lunch per child per day limitation specified under § 210.10(b). Any excess lunches that are produced may be served, but shall not be claimed for general or special cash assistance provided under § 210.4. Nor shall any school food authority claim or be eligible for special cash assistance reimbursement for free or reduced price lunches in excess of the number of children approved for and served such lunches in each school food authority. Approval shall be in accordance with Part 245 of this chapter.

(b) *Assignment of rates.* At the beginning of each school year, State agencies shall establish the per meal rates of reimbursement for school food authorities participating in the Program. These rates of reimbursement may be assigned at levels based on financial need; *except that,* the rates are not to exceed the maximum rates of reimbursement established by the Secretary under § 210.4(b) and are to permit reimbursement for the total number of lunches in the State from funds available under § 210.4. Within each school food authority, the State agency shall assign the same rate of reimbursement from general cash assistance funds for all lunches served to children under the Program. Assigned rates of reimbursement may be changed at any time by the State agency, *provided that* notice of any change is given to the school food authority. The total general and special cash assistance reimbursement paid to any school food authority for lunches served to children during the school year are not to exceed the sum of the products obtained by multiplying the total reported number of lunches, by type, served to eligible children during the school year by the applicable maximum per lunch reimbursements prescribed for the school year for each type of lunch.

§ 210.8 Method of reimbursement.

(a) *Monthly claims.* To be entitled to reimbursement under this part, each school food authority shall submit to the State agency, a monthly Claim for Reimbursement, as described in paragraph (b) of this section. A final Claim for Reimbursement shall be postmarked or submitted to the State agency not later than 60 days following the last day of the full month covered by the claim. State agencies may establish shorter deadlines at their discretion. Claims not postmarked and/or submitted within 60 days shall not be paid with Program funds unless otherwise authorized by FNS. The State agency shall promptly take corrective action with respect to any Claim for Reimbursement as determined necessary through its claims review process or otherwise. In taking such corrective action, State agencies may make adjustments on claims filed within the 60-day deadline if such adjustments are completed within 90 days of the last day of the claim month and are reflected in the final Report of School Program Operations (FNS–10) for the claim month required under § 210.5(d). Upward adjustments in Program funds claimed which are not reflected in the final FNS–10 for the claim month shall not be made unless authorized by FNS. Downward adjustments in amounts claimed shall always be made, without FNS authorization, regardless of when it

is determined that such adjustments are necessary.

(b) *Content of claim.* The Claim for Reimbursement shall include data in sufficient detail to justify the reimbursement claimed and to enable the State agency to provide the Report of School Program Operations required under § 210.5(d). The State agency may authorize a school food authority to submit a consolidated Claim for Reimbursement for all schools under its jurisdiction, *provided that* the data on each school's operations required in this section are maintained on file at the local office of the school food authority, and the claim separates consolidated data for commodity schools from data for other schools. Unless otherwise approved by FNS, the Claim for Reimbursement for any month shall include only lunches served in that month except if the first or last month of Program operations for any year contains 10 operating days or less, such month may be combined with the Claim for Reimbursement for the appropriate adjacent month. However, Claims for Reimbursement may not combine operations occurring in two fiscal years.

(c) *Advance funds.* The State agency may advance funds available for the Program to a school food authority in an amount equal to the amount of reimbursement estimated to be needed for one month's operation. Following the receipt of claims, the State agency shall make adjustments, as necessary, to ensure that the total amount of payments received by the school food authority for the fiscal year does not exceed an amount equal to the number of lunches by reimbursement type served to children times the respective payment rates assigned by the State in accordance with § 210.7(b). The State agency shall recover advances of funds to any school food authority failing to comply with the 60-day claim submission requirements in paragraph (a) of this section.

Subpart C—Requirements for School Food Authority Participation

§ 210.9 Agreement with State agency.

(a) *Application.* An official of a school food authority shall make written application to the State agency for any school in which it desires to operate the Program. Applications shall provide the State agency with sufficient information to determine eligibility. The school food authority shall also submit for approval a Free and Reduced Price Policy Statement in accordance with Part 245 of this chapter.

(b) *Annual agreement.* The school food authority shall annually enter into a written agreement with the State agency. The State agency may allow school food authorities to extend by amendment a previous year's agreement in lieu of taking a new agreement annually *provided* that each year a current written agreement is on file at the State agency. The agreement shall contain a statement to the effect that the "School Food Authority and participating schools under its jurisdiction, shall comply with all provisions of 7 CFR Parts 210 and 245." This agreement shall provide that each school food authority shall, with respect to participating schools under its jurisdiction:

(1) Maintain a nonprofit school food service and observe the limitations on the use of nonprofit school food service revenues set forth in § 210.14(a) and the limitations on any competitive school food service as set forth in § 210.11(b);

(2) Limit its net cash resources to an amount that does not exceed 3 months average expenditures for its nonprofit school food service or such other amount as may be approved in accordance with § 210.19(a);

(3) Maintain a financial management system as prescribed under § 210.14(c);

(4) Comply with the requirements of the Department's regulations regarding financial management (7 CFR Part 3015);

(5) Serve lunches, during the lunch period, which meet the minimum requirements prescribed in § 210.10;

(6) Price the lunch as a unit;

(7) Serve lunches free or at a reduced price to all children who are determined by the school food authority to be eligible for such meals under 7 CFR Part 245;

(8) Claim reimbursement at the assigned rates only for lunches served in accordance with the agreement;

(9) Submit Claims for Reimbursement in accordance with § 210.8;

(10) Comply with the requirements of the Department's regulations regarding nondiscrimination (7 CFR Parts 15, 15a, 15b);

(11) Make no discrimination against any child because of his or her eligibility for free or reduced price meals in accordance with the approved Free and Reduced Price Policy Statement;

(12) Enter into an agreement to receive donated foods as required by 7 CFR Part 250;

(13) Maintain, in the storage, preparation and service of food, proper sanitation and health standards in conformance with all applicable State and local laws and regulations;

(14) Accept and use, in as large quantities as may be efficiently utilized in its nonprofit school food service, such foods as may be offered as a donation by the Department;

(15) Maintain necessary facilities for storing, preparing and serving food;

(16) Upon request, make all accounts and records pertaining to its school food service available to the State agency and to FNS, for audit or review, at a reasonable time and place. Such records shall be retained for a period of 3 years after the date of the final Claim for Reimbursement for the fiscal year to which they pertain, except that if audit findings have not been resolved, the records shall be retained beyond the 3 year period as long as required for resolution of the issues raised by the audit;

(17) Maintain files of currently approved and denied free and reduced price applications, respectively. If applications are maintained at the school food authority level, they shall be readily retrievable by school;

(18) Retain the individual applications for free and reduced price lunches submitted by families for a period of 3 years after the end of the fiscal year to which they pertain or as otherwise specified under paragraph (b)(16) of this section.

§ 210.10 Lunch components and quantities.

(a) *Meal pattern definitions.* For the purpose of this section:

(1) "Infant cereal" means any iron-fortified dry cereal especially formulated and generally recognized as cereal for infants and that is routinely mixed with formula or milk prior to consumption.

(2) "Infant formula" means any iron-fortified formula intended for dietary use solely as a food for normal, healthy infants; excluding those formulas specifically formulated for infants with inborn errors of metabolism or digestive or absorptive problems. Infant formula, as served, must be in liquid state at recommended dilution.

(b) *General.* School food authorities shall ensure that participating schools provide nutritious and well-balanced lunches to children in accordance with the provisions of this section. The requirements and recommendations of this section are designed so that the nutrients of the lunch, averaged over a period of time, *approximate* one-third of the Recommended Dietary Allowances for children of each age/grade group as specified in paragraph (c) of this section. School food authorities shall ensure that each lunch is priced as a unit. Except as otherwise provided herein, school food authorities shall ensure that sufficient quantities of food are planned and

produced so that lunches provided contain all the required food items in at least the amounts indicated in the table presented under paragraph (c) of this section. School food authorities shall ensure that lunches are planned and produced on the basis of participation trends, with the objective of providing one reimbursable lunch per child per day. Production and participation records shall be maintained to demonstrate positive action toward providing one reimbursable lunch per child per day. Any excess lunches that are produced may be served, but shall *not* be claimed for general or special cash assistance provided under § 210.4.

(c) *Minimum required lunch quantities.* Schools that are able to provide quantities of food to children solely on the basis of their ages or grade level should do so. Schools that cannot serve children on the basis of age or grade level shall provide all school age children Group IV portions as specified in the table presented in this paragraph. Schools serving children on the basis of age or grade level shall plan and produce sufficient quantities of food to provide Groups I–IV no less than the amounts specified for those children in the table presented in this paragraph, and sufficient quantities of food to provide Group V no less than the specified amounts for Group IV. It is recommended that such schools plan and produce sufficient quantities of food to provide Group V children the larger amounts specified in the table. Schools that provide increased portion sizes for Group V may comply with children's requests for smaller portion sizes of the food items; however, schools shall plan and produce sufficient quantities of food to at least provide the serving sizes required for Group IV. Schools shall ensure that lunches are served with the objective of providing the per lunch minimums for each age and grade level as specified in the following table:

SCHOOL LUNCH PATTERN—PER LUNCH MINIMUMS

Food Components and Food Items	Minimum Quantities				Recommended quantities: Group V, 12 years and older (7–12)
	Group I, age 1–2 (Preschool)	Group II, age 3–4 (Preschool)	Group III, age 5–8 (K–3)	Group IV, age 9 and older (4–12)	
Milk (as a beverage): Fluid whole milk *and* fluid unflavored lowfat milk, skim milk or buttermilk must be offered (Flavored fluid milk optional).	¾ cup (6 fl. oz.)	¾ cup (6 fl. oz.)	½ pint (8 fl. oz.)	½ pint (8 fl. oz.)	½ pint (8 fl. oz.)
Meat or Meat Alternate (quantity of the edible portion as served):					
Lean meat, poultry, or fish	1 oz	1½ oz	1½ oz	2 oz	3 oz.
Cheese	1 oz	1½ oz	1½ oz	2 oz	3 oz.
Large egg	½	¾	¾	1	1½
Cooked dry beans or peas	¼ cup	⅜ cup	⅜ cup	½ cup	¾ cup
Peanut butter or other nut or seed butters	2 Tbsp	3 Tbsp	3 Tbsp	4 Tbsp	6 Tbsp.
The following may be used to meet no more than 50% of the requirement and must be used in combination with any of the above:					
Peanuts, soynuts, tree nuts, or seeds, as listed in program guidance, or an equivalent quantity of any combination of the above meat/meat alternate (1oz. of nuts/seeds = 1oz. of cooked lean meat, poultry, or fish.	½ oz.=50%	¾ oz.=50%	¾ oz.=50%	1 oz.=50%	1½ oz.=50%
Vegetable or Fruit: 2 or more servings of vegetables or fruits or both.	½ cup	½ cup	½ cup	¾ cup	¾ cup.
Bread or Bread Alternate (Servings per week): Must be enriched or whole grain. A serving is a slice of bread or an equivalent serving of biscuits, rolls, etc., or ½ cup of cooked rice, macaroni, noodles, other pasta products or cereal grains.	5 per week—minimum of ½ day.	8 per week—minimum of 1 per day.	8 per week—minimum of 1 per day.	8 per week—minimum of 1 per day.	10 per week—minimum of 1 per day.

(d) *Lunch components.* This section specifies the basic food components of the school lunch pattern which shall be served as food items in quantities specified in paragraph (c) of this section.

(1) *Milk.* Schools shall offer students fluid whole milk *and* at least one of the following:

(i) Fluid unflavored milk containing two percent or less milk fats;

(ii) Fluid unflavored skim milk; or

(iii) Buttermilk.

All milk served shall be pasteurized fluid types of milk which meet State and local standards for such milk; *except that,* in the meal pattern for infants under 1 year of age, the milk shall be unflavored types of whole fluid milk or an equivalent quantity of reconstituted evaporated milk which meets such standards. All milk shall contain vitamins A and D at levels specified by the Food and Drug Administration and consistent with State and local standards for such milk. School food authorities that served ¾ cup (6 fluid ounces) of milk to Group III children prior to May 1, 1980, may continue to do so. Such school food authorities shall retain documentation of the date on which they began such service and the reasons for adopting this portion size.

(2) *Meat or meat alternate.* The quantity of meat or meat alternate shall be the quantity of the edible portion *as served.* When the school determines that the portion size of a meat alternate is excessive, it shall reduce the portion size of that particular meat alternate and supplement it with another meat/meat alternate to meet the full requirement. To be counted as meeting the requirement, the meat or meat alternate shall be served in a main dish or in a main dish and only one other menu item. The Department recommends that if schools do not offer children choices of meat or meat alternates each day, they serve no one meat alternate or form of meat (e.g., ground, diced, pieces) more than three times in a single week.

(i) Vegetable protein products, cheese alternate products, and enriched

macaroni with fortified protein defined in Appendix A may be used to meet part of the meat or meat alternate requirement when used as specified in Appendix A. An enriched macaroni product with fortified protein as defined in Appendix A may be used as part of a meat alternate or as a bread alternate, but not as both food components in the same meal.

(ii) Nuts and seeds and their butters listed in program guidance are nutritionally comparable to meat or other meat alternates based on available nutritional data. Acorns, chestnuts, and coconuts shall not be used as meat alternates due to their low protein and iron content. Nut and seed meals or flours shall not be used as a meat alternate except as defined in this part under Appendix A: Alternate Foods for Meals. As noted in the School Lunch Pattern table of this section, nuts or seeds may be used to meet no more than one-half of the meat/meat alternate requirement. Therefore, nuts and seeds must be used in the meal with another meat/meat alternate to fulfill the requirement.

(3) *Vegetable or fruit.* Full strength vegetable or fruit juice may be counted to meet not more than one-half of the vegetable/fruit requirement. Cooked dry beans or peas may be used as a meat alternate or as a vegetable, but not as both food components in the same meal.

(4) *Bread or bread alternate.* (i) All breads or bread alternates such as bread, biscuits, muffins or rice, macaroni, noodles, other pastas or cereal grains such as bulgur or corn grits, shall be enriched or whole grain or made with enriched or whole grain meal or flour.

(ii) Unlike the other component requirements, the bread requirement is based on minimum daily servings *and* total servings per week. Schools shall serve daily at least one-half serving of bread or bread alternate to children in Group I *and* at least one serving to children in Groups II–V. Schools which serve lunch at least 5 days a week shall serve a total of at least five servings of bread or bread alternate to children in Group I and eight servings per week to children in Groups II–V. Schools serving lunch 6 or 7 days per week should increase the weekly quantity by approximately 20 percent (⅕) for each additional day. When schools operate less than 5 days per week, they may decrease the weekly quantity by approximately 20 percent (⅕) for each day less than five. The servings for biscuits, rolls, muffins, and other bread alternates are specified in the *Food Buying Guide for Child Nutrition Programs (PA 1331),* an FNS publication.

(e) *Offer versus serve.* Each school shall *offer* its students all five required food items as set forth in the table presented under paragraph (c). Senior high students shall be permitted to decline up to two of the five required food items. At the discretion of the school food authority, students below the senior high level *may* be permitted to decline one or two of the required five food items. The price of a reimbursable lunch shall not be affected if a student declines food items or accepts smaller portions. State educational agencies shall define "senior high."

(f) *Choice.* To provide variety and to encourage consumption and participation, schools should, whenever possible, provide a selection of foods and types of milk from which children may make choices. When a school offers a selection of more than one type of lunch or when it offers a variety of foods and milk for choice within the required lunch pattern, the school shall offer all children the same selection regardless of whether the children are eligible for free or reduced price lunches or pay the school food authority designated full price. The school may establish different unit prices for each type of lunch served provided that the benefits made available to children eligible for free or reduced price lunches are not affected.

(g) *Lunch period.* At or about mid-day schools shall serve lunches which meet the requirements of this part during a period designated as the lunch period by the school food authority. Such lunch periods shall occur between 10:00 a.m. and 2:00 p.m., unless otherwise exempted by FNS. With State approval, schools that serve children 1–5 years old are encouraged to divide the service of the specified quantities and food items into two distinct service periods. Such schools may divide the quantities and/or food items between these service periods in any combination that they choose.

(h) *Infant lunch pattern.* Infants under 1 year of age shall be served an infant lunch as specified in this paragraph when they participate in the Program. Foods within the infant lunch pattern shall be of texture and consistency appropriate for the particular age group being served, and shall be served to the infant during a span of time consistent with the infant's eating habits. For infants 4 through 7 months of age, solid foods are optional and should be introduced only when the infant is developmentally ready. Whenever possible the school should consult with the infant's parent in making the decision to introduce solid foods. Solid foods should be introduced one at a time on a gradual basis with the intent of ensuring health and nutritional well-being. For infants 8 through 11 months of age, the total amount of food authorized in the meal patterns set forth below must be provided in order to qualify for reimbursement. Additional foods may be served to infants 4 months of age and older with the intent of improving their overall nutrition. Breast milk, provided by the infant's mother may be served in place of infant formula from birth through 11 months of age. However, meals containing only breast milk do not qualify for reimbursement. Meals containing breast milk served to infants 4 months of age or older may be claimed for reimbursement when the other required meal component or components are supplied by the school. Although it is recommended that either breast milk or iron-fortified infant formula be served for the entire first year, whole milk may be served beginning at 8 months of age as long as infants are consuming one-third of their calories as a balanced mixture of cereal, fruits, vegetables, and other foods in order to ensure adequate sources of iron and vitamin C. The infant lunch pattern shall contain, as a minimum, each of the following components in the amounts indicated for the appropriate age group:

(1) Birth through 3 months—4 to 6 fluid ounces of iron-fortified infant formula.

(2) 4 through 7 months—(i) 4 to 8 fluid ounces of iron-fortified infant formula; (ii) 0 to 3 tablespoons of iron-fortified dry infant cereal (optional); and (iii) 0 to 3 tablespoons of fruit or vegetable of appropriate consistency or a combination of both (optional).

(3) 8 through 11 months—(i) 6 to 8 fluid ounces of iron-fortified infant formula or 6 to 8 fluid ounces of whole milk; (ii) 2 to 4 tablespoons of iron-fortified dry infant cereal and/or 1 to 4 tablespoons meat, fish, poultry, egg yolk, or cooked dry beans or peas, or ½ to 2 ounces (weight) of cheese or 1 to 4 ounces (weight or volume) of cottage cheese, cheese food or cheese spread of appropriate consistency; and (iii) 1 to 4 tablespoons of fruit or vegetable of appropriate consistency or a combination of both.

(i) *Exceptions.* Lunches claimed for reimbursement shall meet the school lunch pattern requirements specified in paragraphs (c) and (d) of this section. However, lunches served which accommodate the exceptions and variations authorized under this paragraph are also reimbursable. Exceptions and variations are restricted to the following:

(1) *Medical or dietary needs.* Schools shall make substitutions in foods listed in this section for students who are

considered handicapped under 7 CFR Part 15b and whose handicap restricts their diet. Schools may also make substitutions for nonhandicapped students who are unable to consume the regular lunch because of medical or other special dietary needs. Substitutions shall be made on a case by case basis only when supported by a statement of the need for substitutions that includes recommended alternate foods, unless otherwise exempted by FNS. Such statement shall, in the case of a handicapped student, be signed by a physician or, in the case of a nonhandicapped student, by a recognized medical authority.

(2) *Ethnic, religious or economic variations.* FNS may approve variations in the food components of the lunch on an experimental or on a continuing basis in any school where there is evidence that such variations are nutritionally sound and are necessary to meet ethnic, religious, or economic needs.

(3) *Foreign meal patterns.* Schools in American Samoa, Puerto Rico and the Virgin Islands may serve a starchy vegetable such as yams, plantains, or sweet potatoes to meet the bread or bread alternate requirement. For the Commonwealth of the Northern Mariana Islands, FNS has established a meal pattern which is consistent with local food consumption patterns and which, given available food supplies and food service equipment and facilities, provides optimum nutrition consistent with sound dietary habits for participating children. The State agency shall attach to and make a part of the written agreement required under § 210.9, the requirements of that pattern.

(4) *Natural disaster.* In the event of a natural disaster or other catastrophe, FNS may temporarily allow schools to serve lunches for reimbursement that do not meet requirements of this section.

(5) *Insufficient milk supply.* The inability of a school to obtain a supply of milk shall not bar it from participation in the Program and is to be resolved as follows:

(i) If emergency conditions temporarily prevent a school that normally has a supply of fluid milk from obtaining delivery of such milk, the State agency may approve the service of lunches during the emergency period with an available alternate form of milk or without milk.

(ii) If a school is unable to obtain a supply of fluid whole milk and fluid unflavored milk containing two percent or less milk fats on a continuing basis, the State agency may approve the service of either fluid whole milk or fluid unflavored milk containing two percent or less milk fats. The Department recommends that the State agency approve for service the available fluid milk with the lowest fat and sugar content. In Alaska, Hawaii, American Samoa, Guam, Puerto Rico, the Commonwealth of the Northern Marianas, and the Virgin Islands, if a sufficient supply of fluid milk cannot be obtained, "milk" shall include reconstituted or recombined milk, or as otherwise provided under written exception by FNS.

(iii) If a school is unable to obtain a supply of any type of fluid milk on a continuing basis, the State agency may approve the service of lunches without milk if the school uses an equivalent amount of canned, whole or nonfat dry milk in the preparation of the lunch.

§ 210.11 Competitive food services.

(a) *Definitions.* For the purpose of this section:

(1) "Competitive foods" means any foods sold in competition with the Program to children in food service areas during the lunch periods.

(2) "Food of minimal nutritional value" means: (i) In the case of artificially sweetened foods, a food which provides less than five percent of the United States Recommended Dietary Allowances (USRDA) for each of eight specified nutrients per serving; and (ii) in the case of all other foods, a food which provides less than five percent of the USRDA for each of eight specified nutrients per 100 calories and less than five percent of the USRDA for each of eight specified nutrients per serving. The eight nutrients to be assessed for this purpose are—protein, vitamin A, vitamin C, niacin, riboflavin, thiamine, calcium, and iron. All categories of food of minimal nutritional value and petitioning requirements for changing the categories are listed in Appendix B of this part.

(b) *General.* State agencies and school food authorities shall establish such rules or regulations as are necessary to control the sale of foods in competition with lunches served under the Program. Such rules or regulations shall prohibit the sale of foods of minimal nutritional value, as listed in Appendix B of this part, in the food service areas during the lunch periods. The sale of other competitive foods may, at the discretion of the State agency and school food authority, be allowed in the food service area during the lunch period only if all income from the sale of such foods accrues to the benefit of the nonprofit school food service or the school or student organizations approved by the school. State agencies and school food authorities may impose additional restrictions on the sale of and income from all foods sold at any time throughout schools participating in the Program.

§ 210.12 Student, parent and community involvement.

(a) *General.* School food authorities shall promote activities to involve students and parents in the Program. Such activities may include menu planning, enhancement of the eating environment, Program promotion, and related student-community support activities. School food authorities are encouraged to use the school food service program to teach students about good nutrition practices and to involve the school faculty and the general community in activities to enhance the Program.

(b) *Food service management companies.* School food authorities contracting with a food service management company shall comply with the provisions of § 210.16(a) regarding the establishment of an advisory board of parents, teachers and students.

(c) *Residential child care institutions.* Residential child care institutions shall comply with the provisions of this section, to the extent possible.

§ 210.13 Facilities management.

(a) *Health standards.* The school food authority shall ensure that food storage, preparation and service is in accordance with the sanitation and health standards established under State and local law and regulations.

(b) *Storage.* The school food authority shall ensure that the necessary facilities for storage, preparation and service of food are maintained. Facilities for the handling, storage, and distribution of purchased and donated foods shall be such as to properly safeguard against theft, spoilage and other loss.

§ 210.14 Resource management.

(a) *Nonprofit school food service.* School food authorities shall maintain a nonprofit school food service. Revenues received by the nonprofit school food service are to be used only for the operation or improvement of such food service, *except that,* such revenues shall not be used to purchase land or buildings, unless otherwise approved by FNS, or to construct buildings. Expenditures of nonprofit school food service revenues shall be in accordance with the financial management system established by the State agency under § 210.19(a) of this part. School food authorities may use facilities, equipment, and personnel supported with nonprofit school food revenues to

support a nonprofit nutrition program for the elderly, including a program funded under the Older Americans Act of 1965 (42 U.S.C. 3001 *et seq.*).

(b) *Net cash resources.* The school food authority shall limit its net cash resources to an amount that does not exceed 3 months average expenditures for its nonprofit school food service or such other amount as may be approved by the State agency in accordance with § 210.19(a).

(c) *Financial management system.* The school food authority shall maintain a financial management system in accordance with § 210.19(a) of this part. School food authorities shall keep records for the nonprofit school food service cited in paragraph (a) of this section separate from records for any other food service which may be operated by the school food authority.

(d) *Use of donated foods.* The school food authority shall enter into an agreement with the distributing agency to receive donated foods as required by Part 250 of this chapter. In addition, the school food authority shall accept and use, in as large quantities as may be efficiently utilized in its nonprofit school food service, such foods as may be offered as a donation by the Department.

§ 210.15 Reporting and recordkeeping.

(a) *Reporting summary.* Participating school food authorities are required to submit forms and reports to the State agency or the distributing agency, as appropriate, to demonstrate compliance with Program requirements. These reports include, but are not limited to:

(1) A Claim for Reimbursement as specified by the State agency in accordance with § 210.8;

(2) An application and agreement for Program operations between the school food authority and the State agency, and a Free and Reduced Price Policy Statement as required under § 210.9;

(3) Documentation of corrective action taken for any program deficiency found on any review/audit as required under § 210.18(k);

(4) A formal corrective action plan whenever AIMS performance standard violations in excees of error tolerances are disclosed on either a first or second review as specified under § 210.18(i);

(5) A written response to AIMS audit findings under § 210.18(k);

(6) A commodity school's preference whether to receive part of its donated food allocation in cash for processing and handling of donated foods as required under § 210.19(b);

(7) A written response to audit findings pertaining to the school food authority's operation as required under § 210.22; and

(8) Information on civil rights complaints, if any, and their resolution as required under § 210.23.

(b) *Recordkeeping summary.* In order to participate in the Program, a school food authority shall maintain records to demonstrate compliance with Program requirements. These records include but are not limited to:

(1) Documentation of participation data by school in support of the Claim for Reimbursement, as required under § 210.8(b);

(2) Production and participation records to demonstrate positive action toward providing one lunch per child per day as required under § 210.10(b);

(3) Records of revenues and expenditures to demonstrate that the food service is being operated on a nonprofit basis, as required under § 210.14(a) including net cash resources, or the information necessary for the State to compute net cash resources through a review or audit as specified under § 210.18(b); and

(4) Currently approved and denied applications for free and reduced price lunches and a description of the verification activities, as required under 7 CFR Part 245.

§ 210.16 Food service management companies.

(a) *General.* Any school food authority (including a State agency acting in the capacity of a school food authority) may contract with a food service management company to manage its food service operation in one or more of its schools. However, no school or school food authority may contract with a food service management company to operate an a la carte food service unless the company agrees to offer free, reduced price and paid reimbursable lunches to all eligible children. Any school food authority that employs a food service management company in the operation of its nonprofit school food service shall:

(1) Adhere to the procurement standards specified in § 210.21 when contracting with the food service management company;

(2) Ensure that the food service operation is in conformance with the school food authority's agreement under the Program;

(3) Monitor the food service operation through periodic on-site visits;

(4) Retain control of the quality, extent, and general nature of its food service, and the prices to be charged the children for meals;

(5) Retain signature authority on the State agency-school food authority agreement, free and reduced price policy statement and claims;

(6) Ensure that all federally donated foods received by the school food authority and made available to the food service management company accrue only to the benefit of the school food authority's nonprofit school food service and are fully utilized therein;

(7) Maintain applicable health certification and assure that all State and local regulations are being met by a food service management company preparing or serving meals at a school food authority facility; and

(8) Establish an advisory board composed of parents, teachers, and students to assist in menu planning.

(b) *Invitation to bid.* In addition to adhering to the procurement standards under § 210.21, school food authorities contracting with food service management companies shall ensure that:

(1) The invitation to bid or request for proposal contains a 21-day cycle menu to be used as a standard for the purpose of basing bids or estimating average cost per meal. If a school food authority has no capability to prepare a cycle menu, it may, with State agency approval, request that a 21-day cycle menu be developed and submitted by each food service management company which intends to submit a bid or proposal to the school food authority. The food service management company must adhere to the cycle for the first 21 days of meal service. Changes thereafter may be made with the approval of the school food authority.

(2) Any invitation to bid or request for proposal indicate that nonperformance subjects the food service management company to specified sanctions in instances where the food service management company violates or breaches contract terms. The school food authority shall indicate these sanctions in accordance with the procurement provisions stated in § 210.21.

(c) *Contracts.* Contracts that permit all income and expenses to accrue to the food service management company and "cost-plus-a-percentage-of-cost" and "cost-plus-a-percentage-of-income" contracts are prohibited. Contracts that provide for fixed fees such as those that provide for management fees established on a per meal basis are allowed. Contractual agreements with food service management companies shall include provisions which ensure that the requirements of this section are met. Such agreements shall also include the following:

(1) The food service management company shall maintain such records as the school food authority will need to support its Claim for Reimbursement under this part, and shall, at a minimum, report claim information to the school food authority promptly at the end of each month. Such records shall be made available to the school food authority, upon request, and shall be retained in accordance with § 210.23(c).

(2) The food service management company shall have State or local health certification for any facility outside the school in which it proposes to prepare meals and the food service management company shall maintain this health certification for the duration of the contract.

(3) No payment is to be made for meals that are spoiled or unwholesome at time of delivery, do not meet detailed specifications as developed by the school food authority for each food component specified in § 210.10, or do not otherwise meet the requirements of the contract. Specifications shall cover items such a grade, purchase units, style, condition, weight, ingredients, formulations, and delivery time.

(d) *Duration of contract.* The contract between a school food authority and food service management company shall be a of a duration of no longer than 1 year; and options for the yearly renewal of a contract signed after February 16, 1988, may not exceed 4 additional years. All contracts shall include a termination clause whereby either party may cancel for cause with 60-day notification.

Subpart D—Requirements for State Agency Participation

§ 210.17 Matching Federal funds.

(a) *State revenue matching.* For each school year, the amount of State revenues appropriated or used specifically by the State for program purposes shall not be less than 30 percent of the funds received by such State under section 4 of the National School Lunch Act during the school year beginning July 1, 1980; *provided that,* the State revenues derived from the operation of such programs and State revenues expended for salaries and administrative expenses of such programs at the State level are not considered in this computation. However, if the per capita income of any State is less than the per capita income of the United States, the matching requirements so computed shall be decreased by the percentage by which the State per capita income is below the per capita income of the United States.

(b) *Private school exemption.* No State in which the State agency is prohibited by law from disbursing State appropriated funds to nonpublic schools shall be required to match general cash assistance funds expended for meals served in such schools, or to disburse to such schools any of the State revenues required to meet the requirements of paragraph (a) of this section. Furthermore, the requirements of this section do not apply to schools in which the Program is administered by a FNSRO.

(c) *Territorial waiver.* American Samoa and the Commonwealth of the Northern Mariana Islands shall be exempted from the matching requirements of paragraph (a) of this section if their respective matching requirements are under $100,000.

(d) *Applicable revenues.* The following State revenues, appropriated or used specifically for program purposes which are expended for any school year shall be eligible for meeting the applicable percentage of the matching requirements prescribed in paragraph (a) of this section for that school year:

(1) State revenues disbursed by the State agency to school food authorities for program purposes, including revenue disbursed to nonprofit private schools where the State administers the program in such schools;

(2) State revenues made available to school food authorities and transferred by the school food authorities to the nonprofit school food service accounts or otherwise expended by the school food authorities in connection with the nonprofit school food service program; and

(3) State revenues used to finance the costs (other than State salaries or other State level administrative costs) of the nonprofit school food service program, i.e.:

(i) Local program supervision;

(ii) Operating the program in participating schools; and

(iii) The intrastate distribution of foods donated under Part 250 of this chapter to schools participating in the program.

(e) *Distribution of matching revenues.* All State revenues made available under paragraph (a) of this section are to be disbursed to school food authorities participating in the Program, *except as* provided for under paragraph (b) of this section. Distribution of matching revenues may be made with respect to a class of school food authorities as well as with respect to individual school food authorities.

(f) *Failure to match.* If, in any school year, a State fails to meet the State revenue matching requirement, as prescribed in paragraph (a) of this section, the general cash assistance funds utilized by the State during that school year shall be subject to recall by and repayment to FNS.

(g) *Reports.* Within 120 days after the end of each school year, each State agency shall submit an Annual Report of Revenues (FNS–13) to FNS. This report identifies the State revenues to be counted toward the State revenue matching requirements specified in paragraph (a) of this section.

(h) *Accounting system.* The State agency shall establish or cause to be established a system whereby all expended State revenues counted in meeting the matching requirements prescribed in paragraph (a) of this section are properly documented and accounted for.

§ 210.18 Monitoring responsibilities.

(a) *General program compliance.* Each State agency shall require that school food authorities comply with the applicable provisions of this part. The State agency shall ensure compliance through audits, supervisory assistance reviews, visits to participating schools, or by other means.

(b) *Net cash resources.* Each State agency shall monitor through review or audit or by other means, the net cash resources of the nonprofit school food service in each school food authority participating in the Program. In the event that such resources exceed 3 months average expenditures for the school food authority's nonprofit school food service or such other amount as may be approved in accordance with § 210.19(a), the State agency may require the school food authority to reduce the price children are charged for meals, improve food quality or take other action designed to improve the nonprofit school food service. In the absence of any such action, the State agency shall make adjustments in the rate of reimbursement under the Program.

(c) *Improved management.* The State agency shall work with the school food authority toward improving the school food authority's management practices where the State agency has found poor food service management practices leading to decreasing or low student participation and/or poor student acceptance of the Program or of foods served. Poor student acceptance may be indicated by a substantial number of students who routinely and over a period of time:

(1) Do not favorably accept a particular menu item;

(2) Return foods; or

(3) Choose less than all five food items as authorized under § 210.10(e).

(d) *Food service management companies.* Each State agency shall annually review each contract between any school food authority and food service management company to ensure compliance with all the provisions and standards set forth in § 210.16. Each State agency shall perform an on-site review of each school food authority contracting with a food service management company at least once during each 4-year period. Such reviews shall include an assessment of the school food authority's compliance with § 210.16. The State agency may require that all food service management companies that wish to contract for food service with any school food authority in the State must register with the State agency. State agencies shall provide assistance upon request of a school food authority to assure compliance with Program requirements.

(e) *Investigations.* Each State agency shall promptly investigate complaints received or irregularities noted in connection with the operation of the Program, and shall take appropriate action to correct any irregularities. State agencies shall maintain on file evidence of such investigations and actions. FNS and OIG may make investigations at the request of the State agency or where FNS or OIG determines investigations are appropriate.

(f) *Assessment, Improvement and Monitoring System (AIMS).* Each State agency shall perform AIMS reviews, audits or a combination thereof of all school food authorities participating in the Program in accordance with the provisions of this section; or a State agency may develop an alternate monitoring system as specified in paragraph (n) of this section.

(g) *AIMS definitions.* The following definitions are provided in order to clarify AIMS requirements:

(1) "AIMS audits" means on-site evaluations of school food authorities participating in the Program for compliance with AIMS performance standards, by State auditors or State contracted auditors once every 2 years, in accordance with USDA's audit guide or an audit guide approved by FNS and USDA's OIG.

(2) "AIMS error tolerance level" means the degree of error of an AIMS performance standard as specified in paragraph (i)(4) of this section which, if exceeded in a reviewed school food authority, triggers a second AIMS review in all large school food authorities and in at least 25 percent of those small school food authorities which exceed error tolerance levels on a first AIMS review.

(3) "AIMS performance standards" means the following standards which measure compliance with Program regulations:

(i) Performance Standard 1—Certification—Within the school food authority, each child's application for free and reduced price meals is correctly approved or denied in accordance with the applicable provisions of Part 245.

(ii) Performance Standard 2—Claims—The numbers of free and reduced price meals claimed for reimbursement by each school for any review period are, in each case, less than or equal to the number of children in that school correctly approved for free and reduced price meals, respectively for the review period, times the days of operation for the review period.

(iii) Performance Standard 3—Counting—The *system* used for counting and recording meal totals, by type, claimed for reimbursement at both the school food authority and school levels yields correct claims.

(iv) Performance Standard 4—Components—Meals claimed for reimbursement within the school food authority contain food items as required by § 210.10.

(4) "AIMS reviews" means on-site evaluation, of all school food authorities participating in the Program during each 4-year AIMS review period, by the State agency or State auditors for compliance with the AIMS performance standards and follow-up reviews, as required.

(5) "Corrective action plan" means the written description a school food authority submits to the State agency to explain how and when a program deficiency will be corrected.

(6) "Large school food authority" means, in any State:

(i) All school food authorities that participate in the Program and have enrollments of 40,000 students or more each; and

(ii) The two largest school food authorities that participate in the Program and have enrollments of 2,000 students or more each.

(7) "Small school food authority" means, in any State, a school food authority that participates in the Program and is not a large school food authority.

(h) *Number of schools reviewed or audited under AIMS.* The number of schools within the school food authority which must be included in a review or audit is dependent upon the total number of schools in the school food authority. The minimum number of schools the State agency shall review or audit is illustrated in Table A:

TABLE A

Number of schools in the school food authority	Minimum[1]
1 to 5	1
6 to 10	2
11 to 20	3
21 to 40	4
41 to 60	6
61 to 80	8
81 to 100	10
101 or more	[2]12

[1] Minimum number of schools to be reviewed or audited.

[2] Twelve plus 5 percent of the number of schools over 100. Fractions shall be rounded to the nearest whole number.

(i) *AIMS reviews.* States performing AIMS reviews shall monitor compliance with the AIMS performance standards described in paragraph (g) of this section. On the first AIMS review, the State agency shall review the school food authority for Performance Standards 1–4. On second AIMS reviews, the State agency shall, at a minimum, review the school food authority for the performance standards which exceeded error tolerances in the first review.

(1) *Scope of AIMS reviews.* In reviewing performance standards:

(i) The State agency shall analyze and determine the adequacy of local approval procedures for free and reduced price meals by examining the eligibility determinations made within the school food authority. The State agency shall review the applications for all children for whom application was made attending the reviewed schools, or a statistically valid sample of the applications for such children. The State agency shall also ensure that the system to update the application file is adequate. If the State agency chooses to review a statistically valid sample of applications, the State agency shall ensure that the sample size is large enough so that there is a 95 percent chance that the actual error rate for all applications is not less than 2 percentage points less than the error rate found in the sample (i.e., the lower bound of the one-sided 95 percent confidence interval is no more than 2 percentage points less than the point estimate). In addition, the State agency shall determine the need for a second review and base fiscal action upon the error rate found in the sample.

(ii) The State agency shall ensure that, at a minimum, for each school reviewed, the number of free meals claimed in the school food authority's most recent Claim for Reimbursement does not exceed the number of children correctly

approved for free meals for the claim period times the days of operation of that school, as reported to the school food authority for the claim month. The State agency shall apply the same procedure to the claim for reduced price meals.

(iii) The State agency shall ensure that each school reviewed has an adequate system for counting and recording meals served by reimbursement type and that the school food authority properly consolidates meal counts from its schools.

(iv) The State agency shall determine by observation of a representative sample of meals that meals contain food items as required in § 210.10.

(2) *Timing of AIMS reviews.* During each 4-year AIMS review period, the first AIMS review of a school food authority shall be completed within the school year in which the review was begun. A second AIMS review, when required, is recommended to be conducted in the same school year as the first review and is required to be conducted no later than December 31 of the school year following the first review.

(3) *Method of selecting school food authorities and schools to review.*

(i) Each school year, the State agency shall use its own criteria to select school food authorities for AIMS reviews; *provided that* all participating school food authorities are reviewed at least once every 4 years and that school food authorities found on the first review to exceed error tolerance levels are subject to second reviews as specified in paragraph (i)(4) of this section.

(ii) on A first AIMS review of a school food authority, the State agency shall select, to the extend practicable, the required minimum number of schools to review on a proportionate basis from each type of attendance unit (e.g., elementary school, middle school, high school), and shall select schools within attendance unit grouping either randomly or by using State agency criteria which shall be kept on file at the State agency. If using its own criteria, the State agency shall ensure that some of the schools selected are chosen because of the likelihood of problems. On a second AIMS review, the State agency shall choose schools using State agency criteria, which may include random selection. State agency criteria for selecting schools for second AIMS reviews shall also be kept on file. The minimum number of schools to be selected and reviewed during a first or second AIMS review of a school food authority is specified in paragraph (h) of this section.

(4) *Error tolerance for AIMS review.* State agencies shall ensure that corrective action plans are completed by all school food authorities which are found on first reviews to exceed the error tolerance described below. Further, State agencies shall conduct second reviews of: all large school food authorities found to exceed such tolerances on first reviews; and at least 25 percent of small school food authorities found to exceed such tolerances on first reviews. An error tolerance is exceeded when:

(i) For AIMS Performance Standard 1, 10 percent or more (but not less than 10 children) of the children listed on reviewed applications and attending reviewed schools in a school food authority are incorrectly approved or denied for free or reduced price meal benefits; and/or

(ii) For AIMS Performance Standard 2, a number of schools reviewed in a school food authority, as specified in Table B of paragraph (i)(5), claim reimbursement for more free or more reduced price meals, respectively, than the number of children correctly approved for such meals for the test period times the days of operation for the period; and/or

(iii) For AIMS Performance Standard 3, a number of schools reviewed in a school food authority, as specified in Table B of paragraph (i)(5), have an inadequate system for counting and recording meal totals by type claimed for reimbursement, or the school food authority does not use valid procedures for consolidating claims; and/or

(iv) For AIMS Performance Standard 4, 10 percent or more of the total meals observed in a school food authority are missing one or more required food items.

(5) *Performance standards 2 and 3 tolerances.* Table B indicates the number of schools violating Performance Standards 2 or 3, thus necessitating a corrective action plan in the applicable school food authority and a second review in all large school authorities and at least 25 percent of the small school food authorities which exceed error tolerance levels on a first AIMS review.

TABLE B

Number of schools reviewed	Number of schools [1]
1 to 10	1
11 to 20	2
21 to 30	3
31 to 40	4
41 to 50	5
51 to 60	6
61 to 70	7
71 to 80	8
81 to 90	9
91 to 100	10
101 or more	[2] 10

[1] Number of schools violating Performance Standards 2 or 3 respectively, thus necessitating a second review of the school food authority.

[2] 10 plus the number identified above for the appropriate increment.

(6) *Corrective action plans for AIMS reviews.* Corrective action plans are required to address AIMS performance standard deficiencies exceeding the error tolerance levels described in this section. The following procedures shall be followed to develop a corrective action plan:

(i) The State agency shall assist the school food authority in developing a mutually agreed upon corrective action plan.

(ii) The corrective action plan shall identify the corrective actions and timeframes needed to correct the deficiencies found during the review. Corrective action shall include all necessary fiscal actions as described in § 210.19(c), including adjusting data to be used in preparing the Claim for Reimbursement.

(iii) The plan shall be written, signed by the proper official of the school food authority, and submitted to and approved by the State agency within 60 days following the exit conference of a review. State agencies may extend this deadline to 90 days. Extensions beyond 90 days may be made, for cause, with written justification to and approval by FNSRO.

(iv) The State agency shall require the school food authority to implement an amended or extended corrective action plan when error tolerance levels are exceeded on a second AIMS review.

(7) *New violations found on a second AIMS review.* If, during the course of a second AIMS review, a performance standard violation is found that has not been noted on a previous AIMS review, the State agency shall institute and document appropriate corrective action. If the violation exceeds the error tolerance level, the State agency shall require a corrective action plan and the completion of corrective action. The State agency shall take fiscal action as described in § 210.19(c) of this part for any degree of violation of AIMS Performance Standards 2, 3, and 4.

(j) *AIMS audits.* Audits by State agency, State or State-contracted auditors may be used as an alternative to AIMS reviews. if the State agency

chooses this option, the audit must ensure that the four performance standards listed under paragraph (g) of this section are being complied with by the audited school food authority. This includes performing all activities described in paragraph (i)(1) of this section. Additionally, a State using AIMS audits in place of AIMS reviews shall:

(1) Audit school food authorities once every 2 years;

(2) Take fiscal action in accordance with § 210.19(c);

(3) Have a documented system for achieving corrective action;

(4) Select schools within a school food authority based upon generally accepted audit principles; and

(5) Use a State audit guide approved by FNS. A State agency shall submit its guide to FNSRO by February 1 of each year; except that portions of the guide which do not change annually need not be resubmitted. State agencies shall provide the title of the sections that remain unchanged, as well as the year of the last guide in which the sections were submitted.

(k) *AIMS exit conference, notification and corrective action.* The State agency and the school food authority shall hold an exit conference at the close of an AIMS review or audit to discuss the deficiencies observed, the extent of the deficiencies and the corrective action needed to correct the deficiencies. If a corrective action plan is required as described in paragraph (i)(6) of this seciton, it shall be discussed during the exit conference. After every AIMS review or audit, the State shall provide written notification of the review or audit findings to the school food authority's superintendent or authorized representative who signed the State agency/school food authority agreement or who is otherwise authorized to represent the superintendent. The State shall require that the school food authority take and document corrective action for any program deficiency found on any review or audit. Corrective action may include training, assistance, recalculation of data to ensure the correctness of any claim that the school food authority is preparing at the time of the review, or other actions.

(l) *AIMS reporting.* Each State agency shall report to FNSRO:

(1) The name of any school food authority which exceeds an error tolerance level on a second AIMS review in any review period and the type and extent of the regulatory violations; and

(2) Beginning March 1, 1989, the results of AIMS reviews/audits by March 1 of each school year, on a form designated by FNS. In such annual reports, the State agency shall include the results of all AIMS reviews/audits conducted in the preceding school year and any consequent second AIMS reviews performed in the preceding school year or by December 31 of the current school year.

(m) *AIMS recordkeeping.* Each State agency shall keep records which document the details of all AIMS reviews or audits and demonstrate the degree of compliance with AIMS performance standards. AIMS records shall be kept on file by the State agency for a minimum of 3 years after the end of the school year in which the review or audit was conducted or after the school year in which problems have been resolved, whichever is later. Such records shall include documentation of AIMS first reviews and any consequent second reviews. When necessary, the records must include a corrective action plan as described in this section. Additionally, the State agency must have on file:

(1) Criteria for selecting schools on first and second reviews, if the selection is not random;

(2) Its system for selecting small school food authorities for second reviews; and

(3) Documentation demonstrating compliance with the statistical sampling requirements specified in § 210.18(i).

(n) *State alternate to AIMS.* Any State developed monitoring system shall:

(1) Be equivalent to AIMS in scope;

(2) Monitor compliance with AIMS Performance Standards 1–4;

(3) Include on-site visits of all school food authorities on a cyclical basis;

(4) Require that corrective action be taken and documented for any Program deficiency found;

(5) Provide for fiscal action and set forth the State agency's criteria for taking such action;

(6) Provide for the maintenance of a detailed description of the system and records of all monitoring visits and activities which demonstrate the degree of compliance with AIMS performance standards, corrective action needed and taken, and fiscal action taken;

(7) Receive approval by the appropriate FNSRO prior to implementation; and

(8) Beginning March 1, 1989, submit annual reports of the results of such alternate State monitoring reviews to FNSRO on a form designated by FNS.

§ 210.19 Additional responsibilities.

(a) *General program management.* Each State agency shall provide an adequate number of consultative, technical and managerial personnel to administer programs and monitor performance in complying with all program requirements. Such personnel shall, at a minimum, visit participating schools to monitor for compliance with Program regulations and instructions, the Department's nondiscrimination regulations (7 CFR Parts 15, 15a and 15b), and the Department's Uniform Federal Assistance Regulations (7 CFR Part 3015). Each State agency shall establish a financial management system under which school food authorities shall account for all revenues and expenditures of their nonprofit school food service. The system shall prescribe the allowability of nonprofit school food service expenditures in accordance with this part, and, as applicable, 7 CFR Part 3015. The system shall permit determination of school food service net cash resources, and shall include any criteria for approval of net cash resources in excess of 3 months' average expenditures.

(b) *Commodity distribution information.* The State agency shall periodically assess school needs for donated foods under 7 CFR Part 250, notify the distributing agency of the schools' commodity needs, and recommend appropriate variations in rates of distribution. In assessing the commodity needs of schools, usage history and existing donated food inventories should be considered. As early as practicable each school year, but later than September 1, the State agency shall forward to the distributing agency and FNSRO an estimate of the average daily number of Program lunches to be served by school food authorities; an estimate of the average daily number of lunches to be served by commodity schools; and the amount of any cash payments in lieu of commodities for donated food processing and handling expenses to be received by or on behalf of commodity schools in accordance with § 240.5 of this chapter. That State agency shall promptly revise the information required by this paragraph to reflect additions or deletions of eligible schools and provide any necessary adjustment in the number of lunches served.

(c) *Fiscal action.* Fiscal action includes, but is not limited to, the recovery of overpayments through direct assessment or offset of future claims; disallowance of overclaims as reflected in unpaid Claims for Reimbursement; and correction of records to ensure that unfiled Claims for Reimbursement are corrected when filed. State agencies are responsible for ensuring program integrity at the school food authority level. As such, they shall take fiscal

action against school food authorities for Claims for Reimbursement that are not properly payable under this part. In taking fiscal action, State agencies shall use their own procedures, within the constraints of this part, and shall maintain all records pertaining to action taken under this section. The State shall determine the extent of fiscal action based on the severity and longevity of the problems. The State agency may refer to FNS for assistance in making a claims determination under this paragraph.

(1) *AIMS.* When a State agency chooses to conduct AIMS reviews, as described in § 210.18(i), fiscal action may be taken on a first review: *except* fiscal action shall be taken when, under Performance Standard 3, the number of meals claimed for school food authority reimbursement has been incorrectly aggregated from individual school reports so that an excessive number of meals has been claimed. State agencies shall take fiscal action on the second review for any degree of violation of AIMS Performance Standards 2, 3 and 4. When a State agency chooses to conduct AIMS audits, as described in § 210.18(j), fiscal action shall be assessed for any degree of violation of Performance Standards 2, 3 and 4. When a State agency develops its own compliance monitoring system in accordance with § 210.18(n), fiscal action shall be taken in accordance with the criteria established under that system. The criteria shall be consistent in principle with the fiscal action requirements for AIMS reviews and audits as set forth in this section.

(2) *Failure to collect.* If a State agency fails to disallow a claim or recover an overpayment from a school food authority, as described in this section, FNS will notify the State agency that a claim may be assessed against the State agency. In all such cases, the State agency shall have full opportunity to submit evidence concerning overpayment. If after considering all available information, FNS determines that a claim is warranted, FNS will assess a claim in the amount of such overpayment against the State agency. If the State agency fails to pay any such demand for funds promptly, FNS will reduce the State agency's Letter of Credit by the sum due in accordance with FNS' existing offset procedures for Letter of Credit. In such event, the State agency shall provide the funds necessary to maintain Program operations at the level of earnings from a source other than the Program.

(3) *Interest charge.* If an agreement cannot be reached with the State agency for payment of its debts or for offset of debts on its current Letter of Credit, interest will be charged against the State agency from the date the demand leter was sent, at the rate established by the Secretary of Treasury.

(4) *Use of recovered payment.* The amounts recovered by the State agency from school food authorities may be utilized during the fiscal year for which the funds were initially available, first, to make payments to school food authorities for the purposes of the Program; and second, to repay any State funds expended in the reimbursement of claims under the Program and not otherwise repaid. Any amounts recovered which are not so utilized shall be returned to FNS in accordance with the requirements of this part.

(5) *Exception.* In the event that the State agency finds, during a State review or State audit, that a school food authority is failing to meet the quantities for each food item required under the meal pattern in § 210.10, the State agency need not disallow payment or collect an overpayment arising out of such failure, if the State agency takes such other action as, in its opinion, will have a corrective effect.

(6) *Claims adjustment.* FNS will have the authority to determine the amount of, to settle, and to adjust any claim arising under the Program, and to compromise or deny such claim or any part thereof. FNS will also have the authority to waive such claims if FNS determines that to do so would serve the purposes of the Program. This provision shall not diminish the authority of the Attorney General of the United States under section 516 of Title 28, U.S. Code, to conduct litigation on behalf of the United States.

(d) *Management evaluations.* Each State agency shall provide FNS with full opportunity to conduct management evaluations of all State agency Program operations and shall provide OIG with full opportunity to conduct audits of all State agency Program operations. Each State agency shall make available its records, including records of the receipt and disbursement of funds under the Program and records of any claim compromised in accordance with paragraph (d)(1) of this section, upon a reasonable request by FNS, OIG, or the Comptroller General of the United States. FNS and OIG retain the right to visit schools and OIG also has the right to make audits of the records and operations of any school.

(1) *Disregard overpayment.* In conducting management evaluations or audits for any fiscal year, the State agency, FNS, or OIG may disregard any overpayment which does not exceed $35 or, in the case of State agency administered programs, does not exceed the amount established under State law, regulations, or procedure as a minimum amount for which claim will be made for State losses. However, no overpayment is to be disregarded where there are unpaid claims of the same fiscal year from which the overpayment can be deducted or there is substantial evidence of violations of criminal law or civil fraud statutes.

(2) *AIMS.* As a part of its management evaluation of a State agency, FNS will evaluate the State's progress in effectively meeting the AIMS requirements consistent with administrative responsibilities placed upon the State agency by this part.

(e) *Additional requirements.* Nothing contained in this part shall prevent a State agency from imposing additional requirements for participation in the Program which are not inconsistent with the provisions of this part.

§ 210.20 Reporting and recordkeeping.

(a) *Reporting summary.* Participating State agencies shall submit forms and reports to FNS to demonstrate compliance with Program requirements. The reports include but are not limited to:

(1) Requests for cash to make reimbursement payments to school food authorities as required under § 210.5(a);

(2) Information on the amounts of Federal Program funds expended and obligated to date (SF–269) as required under § 210.5(d);

(3) Statewide totals on Program participation (FNS–10) as required under § 210.5(d);

(4) Information on State funds provided by the State to meet the State matching requirements (FNS–13) specified under § 210.17(g);

(5) Names of school food authorities found in violation of AIMS performance standards on AIMS second reviews, together with information on the type and extent of violations, as required under § 210.18(l);

(6) Result of AIMS reviews/audits as required under § 210.18(l); and

(7) Results of the commodity preference survey and recommendations for commodity purchases as required under § 210.27(d).

(b) *Recordkeeping summary.* Participating State agencies are required to maintain records to demonstrate compliance with Program requirements. The records include but are not limited to:

(1) Accounting records and source documents to control the receipt,

custody and disbursement of Federal Program funds as required under § 210.5(a);

(2) Documentation supporting all school food authority claims paid by the State agency as required under § 210.5(d);

(3) Documentation to support the amount the State agency reported having used for State revenue matching as required under § 210.17(h);

(4) Records supporting the State agency's review of net cash resources as required under § 210.18(b);

(5) Reports on the results of investigations of complaints received or irregularities noted in connection with Program operations as required under § 210.18(e)

(6) Confirmation of a State agency's approval of a school food authority's AIMS corrective action plan as required under § 210.18(i) and records of all AIMS reviews and audits, including records of action taken to correct program deficiencies as required under § 210.18(m);

(7) State agency criteria, for selecting schools for AIMS reviews and small school food authorities for AIMS second reviews as required under § 210.18(m);

(8) Documentation of action taken to disallow improper claims submitted by school food authorities, as required by § 210.19(c) and as determined through claims processing, resulting from actions such as AIMS reviews, AIMS audits, and USDA audits;

(9) Records of USDA audit findings, State agency's and school food authorities' responses to them and of corrective action taken as required by § 210.22(a);

(10) Records pertaining to civil rights responsibilities as defined under § 210.23(b); and

(11) Records pertaining to the annual food preference survey of school food authorities as required by § 210.27(d).

Subpart E—State Agency and School Food Authority Responsibilities

§ 210.21 Procurement.

(a) *General.* State agencies and school food authorities shall comply with the requirements of 7 CFR Part 3015 concerning the procurement of supplies, food, equipment and other services with Program funds. These requirements ensure that such materials and services are obtained for the Program efficiently and economically and in compliance with applicable laws and executive orders.

(b) *Contractual responsibilities.* The standards contained in 7 CFR Part 3015 do not relieve the State agency or school food authority of any contractual responsibilities under its contracts. The State agency or school food authority is the responsible authority, without recourse to FNS, regarding the settlement and satisfaction of all contractual and administrative issues arising out of procurements entered into in connection with the Program. This includes, but is not limited to source evaluation, protests, disputes, claims, or other matters of a contractual nature. Matters concerning violation of law are to be referred to the local, State, or Federal authority that has proper jurisdiction.

(c) *Procurement procedure.* The State agency or school food authority may use its own procurement procedures which reflect applicable State and local laws and regulations, *provided that* procurements made with Program funds adhere to the standards set forth in 7 CFR Part 3015.

§ 210.22 Audits.

(a) *General.* State agencies and school food authorities shall comply with the requirements of 7 CFR Part 3015 concerning the audit requirements for recipients and subrecipients of the Department's financial assistance.

(b) *Audit procedure.* These requirements call for organization-wide financial and compliance audits to ascertain whether financial operations are conducted properly; financial statements are presented fairly; recipients and subrecipients comply with the laws and regulations that affect the expenditures of Federal funds; recipients and subrecipients have established procedures to meet the objectives of federally assisted programs; and recipients and subrecipients are providing accurate and reliable information concerning grant funds. States and school food authorities shall use their own procedures to arrange for and prescribe the scope of independent audits, provided that such audits comply with the requirements set forth in 7 CFR Part 3015.

§ 210.23 Other responsibilities.

(a) *Free and reduced price lunches.* State agencies and school food authorities shall ensure that lunches are made available free or at a reduced price to all children who are determined by the school food authority to be eligible for such benefits. The determination of a child's eligibility for free or reduced price lunches is to be made in accordance with 7 CFR Part 245.

(b) *Civil rights.* In the operation of the Program, no child shall be denied benefits or be otherwise discriminated against because of race, color, national origin, age, sex, or handicap. State agencies and school food authorities shall comply with the requirements of: Title VI of the Civil Rights Act of 1964; Title IX of the Education Amendments of 1972; Section 504 of the Rehabilitation Act of 1973; the Age Discrimination Act of 1975; Department of Agriculture regulations on nondiscrimination (7 CFR Parts 15, 15a, and 15b); and FNS Instruction 113–6.

(c) *Retention of records.* State agencies and school food authorities may retain necessary records in their original form or on microfilm. State agency records shall be retained for a period of 3 years after the date of submission of the final Financial Status Report for the fiscal year. School food authority records shall be retained for a period of 3 years after submission of the final Claim for Reimbursement for the fiscal year. In either case, if audit findings have not been resolved, the records shall be retained beyond the 3-year period as long as required for the resolution of the issues raised by the audit.

Subpart F—Additional Provisions

§ 210.24 Suspension, termination and grant closeout procedures.

Whenever it is determined that a State agency has materially failed to comply with the provisions of this part, or with FNS guidelines and instructions, FNS may suspend or terminate the Program in whole, or in part, or take any other action as may be available and appropriate. A State agency may also terminate the Program by mutual agreement with FNS. FNS and the State agency shall comply with the provisions of the Department's Uniform Federal Assistance Regulations, 7 CFR Part 3015, Subpart N concerning grant suspension, termination and closeout procedures. Furthermore, the State agency shall apply these provisions to suspension or termination of the Program in school food authorities.

§ 210.25 Penalties.

Whoever embezzles, willfully misapplies, steals, or obtains by fraud any funds, assets, or property provided under this part whether received directly or indirectly from the Department, shall if such funds, assets, or property are of a value of $100 or more, be fined no more than $10,000 or imprisoned not more than 5 years or both; or if such funds, assets, or property are of a value of less than $100, be fined not more than $1,000 or imprisoned not more than 1 year or both. Whoever

receives, conceals, or retains for personal use or gain, funds, assets, or property provided under this part, whether received directly or indirectly from the Department, knowing such funds, assets, or property have been embezzled, willfully misapplied, stolen, or obtained by fraud, shall be subject to the same penalties.

§ 210.26 Educational prohibitions.

In carrying out the provisions of the Act, neither the Department nor the State agency shall impose any requirements with respect to teaching personnel, curriculum, instructions, methods of instruction, or materials of instruction in any school as a condition for participation in the Program.

§ 210.27 State Food Distribution Advisory Council.

(a) *Council composition.* Each State educational agency, in cooperation with the State distributing agency, shall establish a State Food Distribution (SFD) Advisory Council which is composed of at least five representatives, excluding ex officio representatives, of schools which participate in the Program in the State. The State should make every effort to appoint individuals who represent large urban public schools; small rural public schools; residential child care institutions; private schools; parent teacher organizations; students from junior or senior high schools; nutritionists; school administrators; and teachers. These representatives shall be appointed for not more than 3 years.

(b) *Council leadership.* The Chairman and Vice Chairman of the SFD Advisory Council shall be elected by members of the Council. The Chief State School Officer, or designee, shall be an ex officio member of the SFD Advisory Council acting in an advisory capacity and as a non-voting member. The Chief Officer of the State distributing agency which distributes USDA donated foods to schools within the State, or designee will be an ex officio member of the SFD Advisory Council, also acting in an advisory capacity and as a non-voting member. If the State educational agency and the State distributing agency are the same entity within the State, the ex officio member of the SFD Advisory Council shall be the Chief Food Distribution Officer of the State educational agency, or designee.

(c) *Council timeframe.* The Council shall meet at least once a year and shall report to the State educational agency and State distributing agency, if it is a different entity, no later than March 30 of each year, recommendations concerning the manner of selection and distribution of commodity assistance for the next school year. The State educational agency shall inform FNSRO of the Council's recommendations no later than April 30 of each year.

(d) *Council responsibilities.* Major responsibilites of the Council include providing the State educational and distributing agencies with information concerning the most desired foods and the least desired foods. This information shall be obtained in a survey of school food authorities within the State. The Council shall also advise the State educational and distributing agencies on the types and amounts of available donated food items to order, the preferred available package size, and donated foods school food authorities would like processed and desired end products. The Council may also advise the State educational and distributing agency on intra State distribution systems, delivery schedules, and State food distribution program operations. Recommendations for the Department regarding national purchasing practices, changes in donated food specifications and packaging improvements may also be included in the report.

(e) *State responsibilities.* In reporting the Council's recommendations to FNSRO, the State educational agency shall include the number of school food authorities providing the required information to the Council; the average daily number of lunches served by schools in these school food authorities during April of the previous year; and the average daily number of lunches served by all school food authorities within the State during April of the previous year.

(f) *State recordkeeping.* The State educational agency shall maintain records concerning the survey of school food authorities including, at a minimum, a description of survey methods and a copy of the format used to obtain food preferences; the name and address of each school food authority included in the survey; and a record of the data obtained from each school food authority.

(g) *Expenses.* The State educational agency may make payment for justified expenses incurred for or by the SFD Advisory Council from State Administrative Expense funds. In instances when State Administrative Expense funds are used, payments shall be made in accordance with Part 235 of this chapter. State agencies which are the same entity as the State distributing agency may also use food distribution assessment funds as provided for in § 250.6 (i) and (j) of this chapter. Members of the SFD Advisory Council shall serve without compensation. The State educational agency shall provide compensation for necessary travel and subsistence expenses incurred by Council members in the performance of Council duties. Parent and student participant members, in addition to necessary travel and subsistence expenses, shall be compensated for personal expenses related to participation on the Council, such as child care expenses and lost wages during scheduled Council meetings. The State educational agency shall establish a system whereby expenses are paid in advance for any member who indicates that they cannot financially afford to meet any of the allowed expenses. In instances where members can meet these expenses, a reimbursement shall be provided in a timely manner.

§ 210.28 Regional office addresses.

School food authorities desiring information concerning the Program should write to their State educational agency or to the appropriate Regional Office of FNS as indicated below:

(a) In the States of Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont: Northeast Regional Office, FNS, U.S. Department of Agriculture, 10 Causeway Street, Room 501, Boston, Massachusetts 02222–1065.

(b) In the States of Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee: Southeast Regional Office, FNS, U.S. Department of Agriculture, 1100 Spring Street, N.W., Atlanta, Georgia 30367.

(c) In the States of Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin: Midwest Regional Office, FNS, U.S. Department of Agriculture, 50 E. Washington Street, Chicago, Illinois 60602.

(d) In the States of Arkansas, Louisiana, New Mexico, Oklahoma, and Texas: Southwest Regional Office, FNS, U.S. Department of Agriculture, 1100 Commerce Street, Room 5–C–30, Dallas, Texas 75242.

(e) In the States of Alaska, American Samoa, Arizona, California, Guam, Hawaii, Idaho, Nevada, Oregon, the Commonwealth of the Northern Mariana Islands, and Washington: Western Regional Office, FNS, U.S. Department of Agriculture, 550 Kearny Street, Room 400, San Francisco, California 94108.

(f) In the States of Delaware, District of Columbia, Maryland, New Jersey, Pennsylvania, Puerto Rico, Virginia, Virgin Islands, and West Virginia: Mid-Atlantic Regional Office, FNS, U.S. Department of Agriculture, Mercer

Corporate Park, Corporate Boulevard, CN 02150, Trenton, New Jersey 08650.

(g) In the States of Colorado, Iowa, Kansas, Missouri, Montana, Nebraska, North Dakota, South Dakota, Utah, and Wyoming: Mountain Plains Regional Office, FNS, U.S. Department of Agriculture, 1244 Speer Boulevard, Suite 903, Denver, Colorado 80204.

§ 210.29 OMB control numbers.

The following control numbers have been assigned to the information collection requirements in 7 CFR Part 210 by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980, Pub. L. 96–511.

7 CFR section where requirements are described	Current OMB control No.
210.3(b)	0584-0327
210.5(d)	0584-0006
210.5(d)(1)	0584-0002
210.5(d)(2)	0584-0341
210.5(d)(3)	0584-0341
210.6(b)	0584-0006
210.8	0584-0006
	0584-0284
210.9	0584-0006
	0584-0026
	0584-0329
210.10(b)	0584-0006
210.10(i)(1)	0584-0006
210.14(c)	0584-0006
210.16	0584-0006
210.17	0584-0006
210.17(g)	0584-0075
210.18	0584-0006
210.19	0584-0006
210.22	0584-0006
210.23(c)	0584-0006
210.24	0584-0006
210.27	0584-0006

2. In Part 210, Appendix A thru C as published on September 30, 1986 (51 FR 4864), are adopted as final with the following changes:

a. In Appendix A—Alternate Food For Meals—Enriched Macaroni Products With Fortified Protein, paragraph 3.(b)(1) is amended by removing the word "thiamin" and adding, in its place, "thiamine".

b. In Appendix A—Alternate Food For Meals—Cheese Alternate Products, in the chart contained in paragraph 3.(c), the word "Thiamin" in the Nutrient column is removed and "Thiamine" is added.

c. In Appendix A—Alternate Food For Meals—Vegetable Protein Products, paragraph 1. introductory text, paragraph 1.(d), paragraph 1.(e) and paragraph 3., is amended by removing the citations "§ 225.10 or § 226.21" and adding, in their place, "§ 225.20 or § 226.20".

d. In Appendix A—Alternate Food For Meals—Vegetable Protein Products, paragraph 2.(b)(1) is amended by removing the word "flour," and adding, in its place "——— flour,".

e. In Appendix A—Alternate Food For Meals—Vegetable Protein Products, in the chart contained in paragraph 2.(e)(3), "1.5" in the Amount column corresponding to Magnesium is removed and "1.15" is added.

f. In Appendix C—Child Nutrition Labeling Program, paragraph 2.(a), paragraph 3.(c)(2) and paragraph 6., is amended by removing the citation "§ 225.21" and adding, in its place, "§ 225.20".

Dated: July 26, 1988.

Anna Kondratas,

Administrator, Food and Nutrition Service.

[FR Doc. 88–17196 Filed 8–1–88; 8:45 am]

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Federal Register

Tuesday
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Part IV

Environmental Protection Agency

40 CFR Part 248

Guideline for Procurement of Building Insulation Products Containing Recovered Materials; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 248

[SWH-FRL 3409-8]

Guideline for Procurement of Building Insulation Products Containing Recovered Materials

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) today is proposing a guideline for Federal procurement of certain insulation products containing recovered materials. The guideline would implement section 6002(e) of the Resource Conservation and Recovery Act of 1976, as amended (RCRA), which requires EPA: (1) To designate items which can be produced with recovered materials and (2) to prepare guidelines to assist procuring agencies in complying with the requirements of section 6002. Once EPA has designated an item, section 6002 requires that any procuring agency using appropriated Federal funds to procure that item must purchase such items containing the highest percentage of recovered materials practicable. This guideline designates building insulation products as products for which the procurement requirements of RCRA section 6002 apply. The guideline also contains recommendations for implementing the section 6002 procurement requirements as well as the requirements for revising specifications.

DATE: EPA will accept public comments on this proposed guideline until September 1, 1988.

ADDRESS: Comments on this proposed guideline should be addressed to the EPA RCRA Docket Clerk, Office of Solid Waste, WH-562, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC, 20460. Comments should identify the docket number, which is F-88-PIPP-FFFFF.

The public docket is available for viewing in Room LG-100, U.S. EPA, 401 M Street, SW., Washington, DC from 9:00 AM to 4:00 PM, Monday through Friday, excluding holidays. To review docket materials, the public must make an appointment by calling (202) 475-9327. Materials may be copied from any regulatory docket at a cost of 15 cents per page. Copying totaling less than $15 is free.

FOR FURTHER INFORMATION CONTACT: RCRA Hotline, toll free, at (800) 424-9346 or at (202) 382-3000. For technical information, contact William Sanjour, Office of Solid Waste, WH-563, U.S. EPA, 401 M Street, SW., Washington, DC 20460, telephone: (202) 382-4502.

SUPPLEMENTARY INFORMATION:

Preamble Outline

I. Authority

This guideline is proposed under the authority of sections 2002(a) and 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. 6912(a) and 6962.

II. Introduction

A. Purpose and Scope

The Environmental Protection Agency (EPA) is today proposing one in a series of guidelines designed to encourage the use of products containing materials recovered from solid waste. Section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 (RCRA or the Act), as amended, 42 U.S.C. 6962, states that if a procuring agency, defined as any Federal agency or any State or local procuring agency which is using appropriated Federal funds, purchases certain designated items, such items must be composed of the highest percentage of recovered materials practicable. EPA is required to designate these items and to prepare guidelines to assist procuring agencies in complying with the requirements of section 6002.

EPA issued the first of these guidelines, for cement and concrete containing fly ash, on January 28, 1983 (48 FR 4230; 40 CFR Part 249). EPA issued a second guideline, for paper and

paper products containing recovered materials, on October 6, 1987 (52 FR 37293; 40 CFR Part 250) with concurrently proposed amendments (52 FR 37335). A revised final paper guideline was promulgated on June 22, 1988 (53 FR 23546). EPA promulgated a final guideline for lubricating oils containing re-refined oil on June 30, 1988 (53 FR 24699). A guideline for asphalt materials containing ground tire rubber was proposed on February 20, 1986 (51 FR 6202), while a guideline for retread tires was proposed on May 2, 1988 (53 FR 15624).

This preamble describes the requirements for Section 6002, explains the basis for designating building insulation products as procurement items subject to section 6002, and discusses the provisions of the proposed guideline. It also provides information regarding the price, availability, and performance of building insulation products.

B. Requirements of Section 6002

Section 6002 of RCRA, "Federal Procurement," directs all procuring agencies which use appropriated Federal funds to procure items composed of the highest percentage of recovered materials practicable, considering competition, availability, technical performance, and cost. Two factors trigger this requirement. First, EPA must designate items to which this requirement applies. Second, the requirement only applies when the purchase price of the item exceeds $10,000 or when the quantity of such items or of functionally equivalent items purchased or acquired in the course of the preceding fiscal year was $10,000 or more.

Section 6002(c) requires procuring agencies to obtain from vendors an estimate of and certification regarding the percentage of recovered materials contained in their products. Federal agencies responsible for drafting or reviewing specifications for procurement items were required under section 6002(d)(1) to review and revise them by May 8, 1986 in order to eliminate both exclusions of recovered materials and requirements that items be manufactured from virgin materials. In addition, within one year from the date of publication of a procurement guideline by EPA, the Federal agencies must revise their specifications to require the use of recovered materials in such items to the maximum extent possible without affecting the intended use of the item.

Section 501 of the Hazardous and Solid Waste Amendments of 1984 (Pub. L. 98-616) added paragraph (i) to section 6002 of RCRA. This provision requires procuring agencies to develop an affirmative procurement program for procuring items designated by EPA. The program must assure that items composed of recovered materials will be purchased to the maximum extent practicable, be consistent with applicable provisions of Federal procurement law, and contain at least four elements:

(1) A recovered materials preference program;

(2) An agency promotion program;

(3) A program for requiring estimates, certification, and verification of recovered material content; and

(4) Annual review and monitoring of the effectiveness of the procurement program.

Under section 6002(e), EPA is required to issue guidelines for use by procuring agencies in complying with the requirements of section 6002. The EPA guidelines must designate those items which can be produced with recovered materials and whose procurement by procuring agencies will fulfill the objectives of section 6002. They also must provide recommendations for procurement practices and information on availability, relative price, and performance.

Section 6002 is designed to promote materials conservation and thereby to reduce the quantity of materials in the solid waste stream. By using products containing recovered materials, Federal procurement can demonstrate their technical and economic viability. In addition, Federal procurement guidelines can provide guidance to state and local governments interested in procuring products containing recovered materials, and Federal procurement of such products is expected to result in increased procurement by these agencies as well.

C. Criteria for Selection of Procurement Items

In the preamble to the fly ash guidelines, EPA established the following four criteria for the selection of procurement items for which guidelines will be prepared (48 FR 4231-4232, January 28, 1983):

(1) The waste material must constitute a significant solid waste management program due either to volume, degree of hazard, or difficulties in disposal;

(2) Economic methods of separation and recovery must exist;

(3) The material must have technically proven uses; and

(4) The Federal government's ability to affect purchasing or use of the final product or recovered material must be substantial.

These criteria incorporate all of the factors which section 6002(e) requires EPA to consider in designating items subject to the section 6002 procurement requirements.

Section III of this preamble demonstrates that building insulation products made with recovered materials meet the criteria for designation. Industrial byproducts currently used to produce building insulation products are also discussed in more detail.

D. Background Information on Insulation Products Containing Recovered Materials

1. *Introduction to Insulation.* There are many applications for insulation, including building insulation to provide human comfort, equipment insulation, pipe insulation, and refrigeration or cold storage insulation. Building insulation accounts for by far the largest volume of insulation manufactured and is least likely to require specialty products or materials for special insulation purposes. Moreover, the building insulation market is dominated by products which can and often do contain recovered materials.

In this guideline, "building insulation", "building insulation products", and "insulation products" all refer to the insulation uses and product types that follow.

Building insulation refers to a material, primarily designed to resist heat flow, which is installed between the conditioned (heated and/or mechanically cooled) volume of a building and adjacent, unconditioned volumes or the outside. This term includes but is not limited to products such as blanket, board, spray-in-place, and loose-fill insulation

Locations suitable for the installation of building insulation include but are not limited to ceilings, floors, foundations, and walls. Ceiling insulation is used between the conditioned area of a building and an unconditioned attic, in common ceiling floor assemblies between separately conditioned units in multi-unit structures, and between the underside and upperside of the roof where the conditioned area of a building extends to the roofs. Floor insulation is used between the first level conditioned area of a building and an unconditioned basement, a crawl space, or the outside beneath it; and around the perimeter of or on a ground level concrete slab where the first level conditioned area of a building is on a slab. Foundation insulation is used at foundation walls between conditioned volumes and unconditioned volumes and the outside or surrounding earth, at the perimeters

of concrete slab-on-grade foundations, and at common foundation wall assemblies between conditioned basement volumes. Wall insulation is used within or on the walls between conditioned areas of a building and unconditioned areas of a building or the outside, and in common wall assembles between separately conditioned units in multiple unit structures.

The principal categories of insulating materials are fiberglass, plastic rigid foams (polyurethane, polyisocyanurate, polystyrene, and phenolic), rock wool, and cellulose. These materials are sometimes used in combination in composite products. Insulation products made from these materials dominate the insulation market and are the primary focus of this guideline.

There also are specialty materials, principally calcium silicate, vermiculite, and perlite, used for insulation products. These materials are virgin minerals which are neither practical nor economical to recover for recycling, and they represent a relatively small part of the insulation market. These minerals, as well as other specialty materials, however, can also be mixed in composite products with other materials which can contain recovered materials.

The primary factors in the choice of insulating material are thermal resistance (R-value); performance standards; price; availability; life-cycle cost considering the installed cost of insulation in relation to the estimated reduction in energy cost over the life of the product in use; flammability; corrosiveness of the insulating materials to metallic building components; ease and cost of installation; durability; resistance to moisture absorption; strength; retention of insulating value with time; the dimensions of and access to the space to the insulated and the thickness of the insulation desired.

The process of selecting appropriate thermal insulation for buildings may be broken down in steps as follows:

1. The building type and function is first established, with a view to local, national or government codes and standards requirements. Of particular importance are fire safety and life safety considerations, which affect necessary insulation characteristics, such as insulation flamespread and potential smoke or off-gassing of ignited or smoldering insulation.

2. The preliminary design of the exterior building envelope is examined, in relation to the appropriate insulation form and the availability of space for the insulation, within the anticipated exterior building assemblies. At this point, a preliminary decision may be made as to whether loose fill, flexible blanket, or rigid materials (or combinations of these) will be finally selected. Thermal resistance (R-value) requirements are then finalized, coordinating these as necessary to dimensions and other considerations such as codes.

3. Installation requirements are then considered. Does the insulation require additional support, installed by other skilled workers? Is some form of facing or covering material required for fire safety? Will the workers normally installing the insulation be familiar with the material specified and how it should be placed? Will scheduling of other workers be affected? What level of supervision or inspection is necessary? Other installation considerations may apply, depending on the size and complexity of the building.

4. The level of material and installation costs to be expected is estimated, both as a flat figure and in relation to anticipated building heating and cooling requirements. Installation costs should include all ancillary costs as outlined above.

5. Material specification compliance with code or owner requirements are checked, and provision of certificates of compliance, as appropriate, is added as a specification clause.

6. Specification sections, covering necessary inspections, clean-up and any other prepayment requirements are added, as desired.

2. *Types of Recovered Materials Used.* At present, several of the major types of insulation are commercially available with recovered materials content, as defined by RCRA section 1004(19):

> The term 'recovered material' means waste material and byproducts which have been recovered or diverted from solid waste, but such term does not include those materials and byproducts generated from, and commonly reused within, an original manufacturing process.

Some types of insulation are produced using postconsumer materials as feedstocks.[1] An example of this is cellulose insulation, which is made from old newspaper. Others rely on recovered byproducts as feedstocks, such as rock wool insulation, which is primarily made from slags from smelting processes. Fiberglass manufacturers use waste glass from other industries. Plastic foam insulation is made with chemical byproducts, such as dimethyl terepthalate (DMT), which would otherwise be disposed.

3. *The Insulation Industry.* The following information puts the insulation industry in perspective. The national energy conservation movement caused the insulation industry to grow substantially until 1984. From 1984 to the present, the insulation industry has shown little or no growth. According to the estimated market share based on dollar volume, fiberglass is the predominant insulation material (68 percent), followed by rigid plastic foams (21 percent), rock wool (3 percent), cellulose (3 percent) and all other types including vermiculite, perlite and other specialties (5 percent). Recently, rock wool and fiberglass have lost the greatest share of the market, while plastic foams have been growing most substantially.

During the energy crunch of the late 70s, producers of fiberglass and mineral wool were not able to meet demand. From the mid-70s to the early 80s, fiberglass slipped from 85 percent of the market to around 70 percent, losing market share to cellulose and foam plastics. Neither fiberglass nor rock wool have recovered their market positions.

Cellulose fiber plants expanded from 98 in 1973 to 750 in 1978, but the industry contracted severely after 1977, losing 60 percent of production capacity by 1984.

An estimate of the 1986 total dollar volume of building insulation at manufacturer's net price is $2,901,090,000 as shown in Table 1.

TABLE 1.—1986 SALES OF INSULATION

Commercial and industrial roofs	$1,150,000,000
Residential building	825,000,000
Attic	340,000,000
Cavity	220,000,000
Sheathing	165,000,000
Slab and basement	100,000,000
Residential retrofit	666,090,000
Non-residential building	260,000,000
Cavity	225,000,000
Slab and foundation	35,000,000
Total	2,901,090,000

Source: Hull & Company and A.W. Johnson.

[1] "Postconsumer material" is not defined in RCRA. The term is defined in various State and local solid waste management laws, however. For example, the following definition from the State of New Jersey Mandatory Statewise Source Separation and Recycling Act, Pub. L. 1987, Chapter 2, section 2, has been used as a model by other governments:

> Postconsumer waste material means any product generated by a business or a consumer which has served its intended end use, and which has been separated from solid waste for the purposes of collection, recycling or disposition, and which does not include secondary waste material * * *
>
> "Secondary waste material" refers to preconsumer materials such as manufacturing wastes, industrial byproducts, or other wastes resulting from the production of an end use product.

Although there are numerous estimates of relative market share by insulation material, these are not consistently broken down between residential, commercial and industrial uses. Morever, because government funds are used for all types of construction, distinctions between uses have not been considered necessary.

III. Rationale for Designating Building Insulation Products

This section of the preamble demonstrates that building insulation products satisfy EPA's criteria for designating items subject to the procurement requirements of RCRA section 6002.

A. Significant Solid Waste Disposal Problem

The first criterion is that the waste material constitutes a significant solid waste management problem. The waste materials of immediate concern is the production of building insulation are postconsumer newspaper, container glass, and plastics. Each material represents a significant fraction of the municipal solid waste stream as shown by the data in Table 2. In addition, metallurgical slags and certain chemicals are industrial byproducts which would contribute to the industrial waste stream if they were not used in products like insulation. Some manufacturing wastes, such as plate glass and plastics, raise the same concerns. Although use of these byproducts and manufacturing wastes is already substantial, concerns remain about the contribution of the unrecycled portion to the industrial waste stream because of the large quantity of material involved. In every case, the management problems deal with quantity, not toxicity, of the recyclable materials.

TABLE 2.—SELECTED ITEMS IN THE MUNICIPAL SOLID WASTE STREAM

[In percent of total discards and thousands of tons]

	Total discards	Newspaper	Glass containers	Plastic containers
1980	125,700			
Percent of total		6.5	10.5	1.7
Tons per year		8,100	13,200	2,100
1982	124,900			
Percent of total		6.1	10.2	1.6
Tons per year		7,600	12,800	2,000
1984	133,000			
Percent of total		6.7	8.9	1.8
Tons per year		9,000	11,800	2,400
1990	141,400			
Percent of total		6.7	8.0	2.1
Tons per year		9,700	11,300	2,900
1995	149,900			
Percent of total		7.0	7.4	2.3
Tons per year		10,500	11,100	3,400
2000	158,800			
Percent of total		7.2	6.8	2.5
Tons per year		11,400	10,800	3,900

Note.—Total discards are net of materials recovery prior to disposal but do not reflect energy recovery. Municipal solid waste consumed for energy recovery is estimated to grow from 2,700,000 tons in 1980 to 32,000,000 tons in 2000.
Source: Franklin Associates, Ltd.

Each of the solid waste categories shown in Table 2 result from different industries and are used in different insulation materials. Therefore each category is discussed separately.

1. *Newspaper.* Newspaper is the most easily recycled material in the residential waste stream and therefore is targeted for collection most frequently. Problems of oversupply of recycled old newspaper have appeared on the East Coast. The number of recycling programs mandated by municipal and State requirements nationwide that are currently in place or in the planning stages suggests that the oversupply problem may become severe nationwide in the near future.

The category "old newspaper" contains overissue newspapers (newspapers unsold to the public which do not always enter the municipal waste stream) and postconsumer newspaper. Old newspaper is primarily consumed by the paper industry for a variety of recycled paper products and by the cellulose insulation industry. Substantial quantities are also exported out of the country.

In 1983, actual demand for old newspaper, including demand from the paper industry, exporters, and the cellulose insulation industry was 3.67 million short tons. Estimated 1984, 1985, 1986 and 1987 demand was 3.93 million, 3.96 million, 4.23 million, and 4.58 million short tons, respectively. The estimated growth in demand from 1983 to 1987 was therefore 915,700 short tons or 24.9 percent.

To compare demand with supply, total United States and Canadian production capacity for newsprint in 1985 was 16.58 million short tons, with consumption of newsprint by United States publishers being 13.1 million short tons in 1986. In 1987, the newsprint industry announced a production capacity expanion of 1.63 million short tons to be in place by 1990, approximately a 10 percent increase, with 338,000 tons of this new capacity to be produced from old newspaper.

In 1986, unused old newspaper supply (total U.S. newsprint consumption less demand for old newspaper) was 8.71 million short tons. Assuming newspaper quickly enters the waste flow, the 1986 national recovery efforts represented just under 33 percent of available supplies. National recovery of a feasible 50 percent of available supplies would recycle an additional 2.32 million tons. Assuming all factors remain the same, this would require an increase in demand for old newspapers of 55 percent over 1986 levels. This is more than twice the growth in demand for the past four years. The new North American production capacity which is expected to be on line by late 1990 would raise the necessary growth rate in old newspaper use to over 65 percent in order to achieve the same 50 percent recovery rate.

2. *Glass.* The largest volume of waste glass in the solid waste stream comes from containers. According to industry

spokesmen, recycling of glass has increased, with glass container plants currently using an average of 20 to 30 percent of cullet [2] in their mix. Some plants use considerably higher percentages if the cullet is readily available.

U.S. Department of Commerce data on container production shows that 309 million gross containers with a net packed weight of 12.7 million tons were produced in 1982. In 1985 and 1986, production was 273 million and 283 million gross with net packed weight of 11.10 million and 11 million tons, respectively. The increase in container quantities may be due to the stronger economy or to increased use of glass in microwave, wine cooler and other specialty containers.

According to 1982 Census of Manufacturers data, the glass container industry consumed 1.66 million tons of glass cullet (in-plant, pre- and post-consumer) and 13.82 million tons of other materials, including 8 million tons of sand. This represents 11 percent cullet to the total feedstocks. If all documented 1982 cullet consumption in the container industry was postconsumer glass, an unlikely assumption, it would have represented only 13 percent of potential postconsumer cullet supplies, which as previously stated, were 12.7 million tons.

Another use of postconsumer bottle cullet, as a substitute aggregate in asphalt paving, has been explored since the 1960s. Experimentation has increased in the 1980s and this use appears to be very promising. However, no data exist for the quantities of cullet in current use nor for the potential demand if "glassphalt" becomes a common paving practice.

As of January 1988, it was not difficult to find buyers for postconsumer bottle cullet within reasonable transportation radii. The container industry, using existing equipment, is capable and willing to double its consumption. The only limitation is lack of supplies that are consistent in quantity and quality. The market for postconsumer bottle cullet will also increase as "glassphalt" is used more commonly.

Published data on preconsumer (or manufacturing waste glass including flat and window glass, table and cookware and so on) which is brokered to other users is not available. The glass processing industry estimates that approximately 500,000 tons per year changes hands. Such waste glass, with the exception of automotive windshield wastes which are very difficult to process, enter the waste disposal system only when consumers of cullet are beyond economic transportation distances.

3. *Plastic.* Plastics have increased steadily in the waste stream according to data presented in the EPA waste characterization report.[3] Plastic disposal grew from 0.5 million tons in 1960 to 9.6 million tons in 1984 or 7 percent of total residential waste. Plastics are expected to increase to 10 percent of the waste in the year 2000. Although many types of plastic are included in the general trend, polyethylene terephthalate (PET), polystyrene (PS), and manufacturing wastes (DMT and phthalic anhydride bottoms) were analyzed for solid waste management impacts because they are the only recovered plastics apt to be used in insulation products.

Data from the U.S. Department of Commerce's Bureau of Trade indicates that PET use is growing faster than other plastic container resins. From 1985 to 1986, PET use grew 37.5 percent compared with high density polyethylene (12.9 percent), low and medium density polyethylene (25.9 percent), polypropylene (4.8 percent), polyvinyl chloride (9.5 percent), polystyrene and others (29.4 percent). The quantity of PS in containers is small, and miscellaneous other resins are included in the data. The rapid growth in PET use is presented in Table 3.

TABLE 3.—CONSUMPTION OF PET IN PLASTIC BOTTLE MATERIALS

Year	Million lbs.	Tons	Percent growth
1983	420.5	210,250	
1984	452.0	226,000	7%.
1985	480.0	240,000	6% estimate.
1986	660.0	330,000	37.5% estimate.
1987	800.0	400,000	21% forecast.

Source: U.S. Department of Commerce.

There are two types of postconsumer PET easily available, containers and used film stock. Industry sources state that PET production for packaging is approaching 1 billion pounds per year with approximately 150 million pounds (or 15 percent) currently recycled. The industry is targeting 2 billion pounds of PET for packaging by 1990. All film stock, including x-ray, photographic and micrographic, is extruded PET. According to industry sources, approximately 600 million pounds of PET film stock is producted annually. About one third, or 200 million pounds, is x-ray film. While specific data on disposal of used x-ray film is not gathered, one source stated that approximately 200 million pounds of used x-ray film is disposed of annually, of which about 10 percent or 20 million pounds is recycled.

In addition to postconsumer plastic bottles and film, an average of 5 percent of every type of plastic resin production becomes manufacturers' or industrial waste plastic annually. Polyester resin production was 6.3 billion pounds in 1985. The amount of manufacturer's polyester waste generated in 1985 was estimated to be 315 million pounds. Total supplies of recyclable PET from bottles, x-ray film and industrial wastes can be roughly estimated to be 1.25 billion pounds annually.

The Society of the Plastics Industry reported 1986 production of PS resin to be 4.47 billion pounds. Approximately 1.36 billion pounds were produced for packaging and 418 million pounds for building construction. Production capacity was reported to be 5.39 billion pounds.

Recycling of postconsumer PS from the municipal waste stream has not been attempted and data on manufacturers' waste PS is not gathered. For 1986, industrial waste was estimated to be 5 percent of production or 223.5 million pounds. Manufacturing waste PS is regularly brokered.

EPA has identified another industrial waste that could be used to produce plastic rigid foam insulation, DMT. Bottoms are the heavy fraction, or residue, from plastics production, which may or may not have recoverable materials. An EPA data base of plastic industry waste products suggests that DMT wastes that potentially had value were not recovered for sale in 1981; this data base contained only a partial sample of 1981 data, however. Those DMT wastes with value were recovered for internal use or were burned to extract energy value. DMT wastes without apparent value (e.g., very dilute) did not appear to be recovered at all but were disposed in a variety of ways.

Phthalic anhydride bottoms may also be used, but this has not been documented nor are quantity data and information on phthalic anhydride wastes currently available from the EPA data base.

[2] Crushed or processed waste glass is called cullet. In-plant manufacturing waste (home scrap) is also called cullet and has always been used in the glass container and fiberglass industries. However, unless otherwise noted, references to cullet throughout this preamble and guideline refer only to pre- and postconsumer waste glass in accordance with the RCRA definition of recovered materials.

[3] Office of Solid Waste, U.S. Environmental Protection Agency, *Characterization of Municipal Solid Waste in the United States, 1960 to 2000 (Update 1988)*, Franklin Associates, Ltd., March 30, 1988.

4. *Slag.* Slag is a by-product from blast furnaces and other metal smelting processes. According to the National Slag Association, metallurgical slags from the production of iron and steel do not represent a significant solid waste management problem. Stockpiles are said to be used efficiently in most, though not all, parts of the country. Iron-blast-furnace slag (the general term) sold or used totaled 15.4 million short tons in 1986, of which 88 percent or 13.5 million tons were air-cooled iron blast furnace slag. Road construction materials, such as road base and substitute aggregates in concrete and asphalt, absorbed 81 percent of the total supply. Rock wool manufacturers purchased 519,000 short tons, or 3.8 percent of the air-cooled iron blast furnace slag. According to recent Bureau of Mines data, purchases of slag for rock wool fell from 617,000 short tons in 1985 to 519,000 short tons in 1986.

Based on current data, EPA believes that the major volumes of metallurgical slags are recycled and do not currently represent a nationwide solid waste management problem. However, increased iron and steel production, increasing competition from other recovered materials in roadbuilding, and changes in the national economy could adversely affect the balance of supply and demand for metallurgical slags in the future with a resulting impact on solid waste disposal.

5. *Conclusions.* EPA concludes that newspaper and plastics (PET and PS) in the municipal waste stream represent solid waste management problems based on quantity. Supplies of postconsumer glass are currently used efficiently, and the container industry is capable of doubling its consumption of postconsumer cullet. Manufacturing wastes (such as plate glass and plastic scrap) as well as industrial byproducts (such as metallurgical slags and chemical bottoms), which qualify under the RCRA definition of recovered materials, would also represent solid waste management problems based on quantity if current markets are interrupted.

B. Feasible Methods of Recovery

The second EPA criterion for selection of reclaimed materials for affirmative procurement under RCRA Section 6002 is the existence of economic methods of separation and recovery.

Source separation programs in operation and in the planning stages all target newspaper and container glass, and some target container plastics (particularly PET in bottle bill states). Materials are picked up through curb-side collection programs, drop-off centers, charity drives and so on. There is no national count of such recycling programs, but in some states they are as many as 200 local programs. More programs are being implemented each year. Government-sponsored collection programs are being subsidized because state-sponsored economic analyses have indicated that recycling is less expensive than other disposal options.

Three states and one city (Rhode Island, New Jersey, Connecticut and Philadelphia), passed mandatory recycling legislation by the end of 1987. Numerous municipalities and counties around the country have passed similar local legislation. There also is a healthy system of brokers for materials collected by source separation programs as well as all types of manufacturers' waste materials.

1. *Newspaper.* Recycling programs mandated by municipal and State laws always target postconsumer newspaper because it is one of the easiest materials to collect. The waste paper brokerage system handles a large proportion of this postconsumer newspaper as well as the pre-consumer or overissue waste newspaper.

Recovery rates in the two leading states have set precedents that others are trying to equal. New Jersey, according to the American Paper Institute (API), recovered 207,134 tons of old newspaper in 1983. API estimated the total recoverable tonnage to be 370,000 tons and the 1983 recovery rate to be 56 percent. The average recovery rate for the nation was 30 percent the same year. Oregon, with excellent markets for old newspaper, has achieved a recovery rate of 75 percent according to the Oregon Department of Environmental Quality.

2. *Glass.* The Glass Packaging Institute reported in 1987 that seventeen non-bottle bill states and the District of Columbia have joined individual state or joint state associations to foster collection of glass containers and publicize redemption centers. For example, the Pennsylvania Glass Recycling Corporation publishes a newsletter that listed forty-three "glass for cash" centers within the state in 1987. Beverage Industry Recycling Programs serve some of the same non-bottle bill states as well as three others. In addition, ten bottle bill states have developed glass collection and processing systems. The EPA waste characterization report estimated that 1.25 million tons of glass were recycled in 1986, just under ten percent of the available supply. This compares with 368,000 tons or barely three percent ten years earlier.

Processing centers have been established in both bottle bill and non-bottle bill states to crush and clean glass to market specifications. A new center in Pennsylvania opened in the summer of 1987 with annual processing capacity of over 100,000 tons per year. The center is operated by a private company with 17 other glass processing facilities and depots around the country. Other privately owned and operated glass processing facilities exist nationwide. While national data is not gathered on the numbers of these facilities nor the quantities of cullet they handle, new processing centers, both public and private, are opening in urban areas all around the country.

The container glass industry requires bottle cullet to be color-sorted, a labor intensive process which either requires citizens to do the color separating or requires hand sorting lines at the processing centers. Mixed-color cullet is suitable for aggregate substitute in "glassphalt". THe fiberglass industry has accepted color-mixed cullet in the past, although fiberglass furnaces are much more sensitive than container furnaces to contaminants such as carbon, plastics and metals. Recycling programs are being proposed and implemented that stress quantity over color separation. If sufficient demand develops for color-mixed cullet, it should become available because it is less expensive to collect and process. The technology has already been developed to prepare cullet for aggregate substitutes. Additional processing to remove contaminants and prepare color-mixed cullet to fiberglass industry specifications is more complex and therefore more expensive. However, processing lines will be developed if supplies of postconsumer cullet are greater than other markets can absorb.

3. *Plastic.* Postconsumer PET containers are recovered primarily in the bottle bill states, although some additional state and local governments are planning collection for PET and other plastic containers. According to the EPA waste characterization report, 63,000 tons of soft drink bottles (PET with high density polyethylene (HDPE) base cups) were recovered in 1984 from collection in bottle bill states. This represented 18 percent of national production and 1 percent of gross plastic discards.

Used x-ray film and other film stock is processed to recover silver nitrate and other metals, then is disposed or routed for further contaminant removal and sale or to disposal facilities. At least one company has been established to decontaminate x-ray plastics and

market clean PET film scrap. In 1987, throughput at this mill was about 6 million pounds per year. The design capacity for the mill is 48 million pounds (or 24,000 short tons) per year. This capacity represents approximately 25 percent of the estimated used x-ray stock.

Postconsumer PS is not currently recovered for recycling. Although data is not gathered systematically for manufacturing waste PS, one broker roughly estimated that 200 million pounds of crystalline and foam PS are purchased and sold in some form to other users. If waste PS can be accumulated in 40,000 pound truckloads, and if these wastes meet specifications for contamination, users can be found.

The network of waste plastic brokers will handle any plastic waste for which it can find an economically feasible market. This entails a market value high enough to cover the costs of processing and transportation.

The DMT bottoms are definitely in commercial use and therefore must be economically feasible to recover as explained above. The use of phthalic anhydride bottoms has not yet been documented.

4. *Slag.* Metallurgical slag is used as an aggregate substitute in road construction and as the raw material for most rock wool insulation made in the United States. Collection and transportation of this industrial byproduct appears to be well established.

5. *Conclusions.* EPA has concluded that feasible recovery methods exist for postconsumer newspaper, glass, and PET plastics. The industrial byproducts, slag and DMT bottoms, as well as preconsumer, or manufacturing waste, PET and PS, are also recovered efficiently.

C. Technically Proven Uses

The third EPA criterion for selection of reclaimed materials for affirmative procurement under RCRA Section 6002 is that the material has technically proven uses in the designated items. Recovered materials are currently commercially acceptable feedstocks in five types of insulating materials covered by the guideline proposed today: cellulose, composites, fiberglass, plastic rigid foam, and rock wool.

1. *Cellulose.* There are two types of cellulose insulation products—cellulose insulation and cellulose fiberboard.

a. *Cellulose loose-fill and spray-on insulation.* Cellulose insulation is made from approximately 75 percent waste paper; the remaining portion consists of chemicals to retard flammability and to deter insects and pests. While there is some spray-on cellulose insulation made from waste paper, the industry predominately makes loose-fill insulation which is blown into walls and attics.

Cellulose insulation comprises about 3 percent of the insulation market according to a 1987 industry estimate. The cellulose insulation produced in 1984 consumed approximately 480,000 tons of recycled paper. More recent data has not been obtained.

The Department of Commerce listed 371 manufacturers of cellulose insulation in 1983. Four years later, in July 1987, the Cellulose Industry Standards Enforcement Program (CISEP) identified 138 active firms. This indicates continued shrinkage in the cellulose insulation industry. Thirteen of the companies identified by CISEP produced approximately 20 percent of the cellulose insulation manufactured in 1987. Cellulose insulation manufacturers are located all across the country; consequently availability to procurement agencies should present no problems.

b. *Cellulose fiberboard.* A range of fiberboards are made with postconsumer recovered paper, which provides short fibers that complement longer, coarser fibers from wood. Some boards are made entirely from postconsumer paper. Cellulose fiberboards are made in panels of varying thicknesses. They are often called insulating boards, although they are used for structural reasons as well as for their insulation properties. The American Society of Heating Refrigeration and Air Conditioning Engineers (ASHRAE) includes two paper-based categories under the general term vegetable fiberboard: "Laminated paperboard" and "homogenous board from repulped paper". R-value, according to ASHRAE, is about 2.

Cellulosic fiberboard, a related product, is predominantly made with wood fibers, and is more frequently identified as a structural product. EPA was unable to determine whether any or all cellulosic fiberboards contain postconsumer recovered paper. Therefore, EPA solicits comments on whether the category "cellulosic fiberboard" as defined by the American Society of Testing and Materials (ASTM) can be produced with postconsumer recovered paper.

Manufacturers of cellulose fiberboards no longer have a trade association, and data regarding market share is not available. The American Paper Institute groups data about "insulating boards" within the construction paper and board category. Estimated production of insulating board for 1986 to 1989 remained flat at 1,178,000 short tons. The entire construction paper and board category was estimated at 2.2 million short tons, with estimated consumption of recovered paper materials growing from 929,000 short tons in 1986 to just over 1 million short tons in 1989. The recovered paper feedstocks were predominantly postconsumer newspaper, mixed paper and corrugated. There is no estimate of recovered paper consumption for insulating boards alone.

At least one company, Homasote, uses 100 percent postconsumer recovered paper material in its products. This was not true for all other companies. One uses preconsumer kraft paper trimmings, others use a proportion of postconsumer paper with virgin ingredients such as wood fibers, binders, waxes, clays, starches and so on.

2. *Perlite Insulation Board.* Some composite boards are made with expanded perlite aggregate (a virgin mineral), small amounts of selected binders, and waste newsapers. The materials are mixed together and formed into rigid, flat, rectangular units which may have facings on one or both sides according to the ASTM C–728–82 standard specification. Perlite board is primarily used for commerical- and industrial-type roof insulation. Market growth for this specialty product follows growth in the gross national product and is expected to remain at 1987 levels for the next few years.

Approximately 0.2 pounds of newspaper is used per board foot of the finished product. Approximately 500 million board feet were produced in 1987 by the only two known manufacturers, consuming about 50,000 tons of waste newspaper. The percentage of newspaper to other ingredients varies from 23 percent to 30 percent according to individual product characteristics, with the average about 24 percent. Product availability to government procuring agencies is limited only because it is manufactured by just two companies.

3. *Fiberglass Insulation.* Fiberglass insulation is primarily made from sand, limestone, soda ash, and boron. There are other material added to product mixes in small quantities. The materials are melted together and spun into filaments called "batt". Cullet is a substitute for sand, limestone, and soda ash. Boron, the most expensive primary ingredient, is not contained in bottle or plate glass cullet.

Recovered materials used in fiberglass insulation products include

pre-consumer waste glass from other manufacturing processes, such as plate glass, container glass, transition cullet (material from glass furnaces produced while mixes are being changed), as well as postconsumer bottle cullet in isolated instances. Home scrap (scrap produced in the fiberglass manufacturing process) is always consumed by the generator. Mixed-color waste glass can be used by the fiberglass industry if the mixtures are consistent batch to batch. However, green and amber bottle cullet introduces trace metals used to create the colors which can cause difficulties in fiberglass furnaces. Variations in quantities of the colors change the characteristics of melt, and therefore require costly process adjustments.

Some manufacturers have stated that there are production advantages in using recycled glass. Melting cullet instead of melting virgin materials provides a 10–15 percent energy savings, and use of cullet can speed up production lines, increasing the production rate. At least one fiberglass plant was using 40 percent or more recycled material in 1986, including postconsumer bottle cullet. However, this is not common to the industry nor consistently done within the parent company.

Other manufacturers dispute this finding; they generally consider bottle cullet to be an unacceptable feedstock for a number of reasons. First, and most important, it is not consistently available, which would interrupt long term contracts from feedstock suppliers of limestone, soda ash and sand. Long term contracts for feedstocks tend to stabilize the costs of production and assure preferred customer status in times of raw material scarcity. Second, as discussed above, batches of postconsumer mixed-color bottle cullet do not consistently contain the same percentages of individual colors which causes processing disruptions. Third, price is a restraint on using bottle cullet. At 1986 costs of production, a price of $.02–.025 per pound ($40–$50 per ton) for green glass cullet was said to be acceptable. The fourth factor is contaminants. While cullet does not have to be color sorted, even minor contamination with metal, plastics, ceramics, or carbon causes problems in fiberglass processing lines.

Glass processors do sell postconsumer bottle cullet to fiberglass manufacturers in most parts of the country, although not in great amounts. The broader category of preconsumer or manufacturing waste cullet is used more commonly. While data is not gathered, knowledgeable sources estimate 175,000 tons of preconsumer cullet is sold to the fiberglass industry annually. Unlike the glass container industry which favors bottle cullet partly because it contains the key ingredient soda ash, the fiberglass industry obtains much of the needed soda value from other raw materials containing alumina and boron. Therefore, neither soda ash costs nor scarcities have much impact on the costs of producing fiberglass.

Some fiberglass manufacturers indicated interest in using postconsumer cullet if it was available in consistent quantities and quality at competitive prices. These companies believed that cullet processing technology would have to be improved to meet their specifications for consistent color mix and low contaminant levels.

With nearly 70 percent market share, fiberglass dominates the total insulation industry. In 1987, there were six companies producing fiberglass insulation at 26 locations. The manufacturers have fairly good geographic spread around the country; availability is only in question when the entire insulation industry has difficulty meeting demand, as happened during the energy crisis of the 1970s.

4. *Rigid Plastic Foams.* Rigid plastic foam insulation is made by expanding resins to create cells. Blowing agents are used to enhance the formation of cells and, in some cases, the blowing agent remains trapped within the cells to increase insulating properties. Rigid foam insulations have higher R-values than equivalent thicknesses of other insulations, although they tend to cost more. The higher the R-value, the better the insulating properties.

There are several basic types of plastic rigid foam in general use, including polyurethane, polyisocyanurate, polystyrene, and phenolics. Phenolics represent and very small though growing fraction of the total. The use of plastic rigid foam insulation appears to be growing the most rapidly of all types of insulation, although data is not consistently published, and information from different sources rarely agrees. However, despite variations in the data, it is established that polyurethane, polyisocyanurate, and polystyrene foams have an important share of the total market. An estimate of total rigid foam boardstock consumption in residential and commercial applications was presented at a Society of the Plastics Industry conference in 1985. Polyurethane foam use was expected to grow from 230 million pounds in 1984 to 249 million pounds and 280 million pounds in 1986 and 1990, respectively. Projected polystyrene growth for the same years was from 285 to 315 to 375 million pounds. Phenolic growth, again for 1984, 1986, and 1990, was estimated at 10 to 11 to 15 million pounds.

a. *Polyurethane and polyisocyanurate insulation.* References to polyurethane (PU) and polyisocyanurate (PIR) insulations tend to be confusing. The term polyurethane foam can also refer to the flexible foams used for cushioning. Data for PU and PIR feedstocks and insulation production quantities are frequently grouped together under the term polyurethane and sometimes are included under the broader term urethane (U). The differences between PU and PIR rigid foam are slight and do not affect the use of recovered materials. For simplification, in this proposed guideline, the term polyisocyanurate/polyurethane (PIR/PU) will be used, although the original terms will be preserved in cited data.

PIR/PU insulation is primarily board and laminated board products used to insulate walls, roofing, and doors in residential and commercial buildings. The physical blowing agent is trapped in the cells of PIR/PU rigid foams and contributes to the high R- value.

PIR/PU board insulation is made with various formulas depending on the requirements of the final product. Ingredients are used in the following ranges:

- Isocyanate—53–57%.
- Aromatic polyester polyol—30–20%.
- Blowing agent—15–20%.
- Surfactants and catalysts—2–3%.

PIR/PU foam-in-place insulation (with two sub-categories, spray-in-place and pour-in-place) is a smaller segment of the market. It is used primarily for roofing insulation and injection into cavities, with some used in wall insulation. PIR/PU foam-in-place ingredients are combined on site and injected into position where the mixture expands and hardens in place. An estimate of the size of the PIR/PU foam-in-place market was developed for the Department of Energy. In 1982, approximately 65 million pounds of foam were used, primarily in roofs, expanding to approximately 88 million pounds in 1986.

The formulation percentages of PIR/PU foam-in-place are basically 40 percent isocyanate to 40 percent polyol to 20 percent blowing agent and other ingredients. Unlike boardstock, where the ingredients are mixed as they are used, PIR/PU foam-in-place is premixed and sold to installers in drums. Shelf-life of six months is the industry standard. Formulations with more than 30 percent polyester in the polyol fraction break

down in less than six months and viscosity is seriously impaired.

Polyol is the component in all types of PIR/PU rigid foam insulation that can contain recovered materials. ASTM defines polyol in cellular plastic usage to "include compounds containing alcoholic hydroxyl groups such as polyethers, glycols, polyesters, and castor oil used in urethane foam." Industry sources have stated that the foam insulation market for polyol is approximately 100 million to 120 million pounds per year. Two types of polyol are used by the PIR/PU industry, aromatic polyester polyol and polyether polyol:

- *Aromatic polyester polyol* can be derived from recycled pre- and postconsumer PET or from the chemicals DMT and phthalic anhydride. The polyol is made by reacting glycol with the other ingredients. In some cases, waste DMT bottoms are used; phthalic anhydride possibly are used, as well. Various manufacturers contacted between 1986 and 1988 suggested the DMT bottoms and possibly phthalic anhydride bottoms were commonly recovered to produce feedstock resins for plastic rigid foam insulation products. PET polyols are 45 percent PET to 50 percent glycol. DMT polyols are 50 percent DMT to 50 percent glycol.
- *Polyether polyol* is derived from polypropelene oxide, a virgin material process. The insulation industry has switched almost entirely from polyether polyols to the less expensive polyester polyols for boardstock. Premixed foam-in-place insulation uses about 70 percent polyether and 30 percent polyester to avoid loss of viscosity in storage.

At least one company, Freeman Chemical, is marketing polyols made from both postconsumer and manufacturing waste PET bottles as well as x-ray and other films. X-ray film has a lower intrinsic viscosity (IV) than PET beverage bottles and is therefore less valuable for other uses. However, as long as demand for PET bottle materials remains lower than supplies, PET bottle scrap will continue to be used. Other companies are marketing polyols derived from chemical bottoms.

Twenty manufacturers of PIR/PU board have been identified with production facilities in 36 locations. Distribution across the country is fairly good in the northwest and mid-northern states. Although it was not determined how many of these insulation manufacturers use polyols derived from recovered materials, nor exactly how many polyol producers are using recovered materials rather than virgin feedstocks, one third of the polyols currently marketed for PIR/PU rigid foam insulation are said to be derived from recovered materials.

b. *Polystyrene insulation.* Polystyrene insulation for building construction is produced by two processes. Expanded polystyrene foams incorporate a blowing agent, usually pentane, with polystyrene beads which are expanded with steam or hot air. The resulting "prepuff" is aged for six to twenty-four hours before the final product is made in a heated mold. The product is then cooled in the mold to assure uniformity and good quality.

Extruded polystyrene is made by combining polystyrene base resin with a blowing agent in one extruder, feeding the melt through a cooling extruder then through a die for the desired shape. Flame retardants are also added to the product mix. Like the PIR/PU foams, blowing agents are generally retained within the cellular structure to improve R-values.

Representatives from several manufacturers of polystyrene insulation indicated that use of recovered material content is technically feasible. However, one source stated that polystyrene with flame retardants could not be reused, which would appear to restrict the use of home scrap in polystyrene insulation manufacture. Despite indications that research and development efforts may be underway, current use of recovered materials could not be documented.

EPA identified 77 manufacturers of polystyrene insulation. These include producers of both extruded polystyrene and expanded polystyrene products. Numerous other small companies are said to be in business around the country. Geographically, the identified polystyrene insulation manufacturers are spread as widely as the producers of other types of insulation products.

c. *Phenolic insulation.* Phenolic rigid foam insulation is said to have very high R-values per inch, good fire retardation, and potentially low cost, among other characteristics. It is a fairly new product, but the relative market share is expected to grow rapidly from its current small base. Phenolic foam production is similar to PIR/PU foam, although the ingredients differ. Aromatic polyester polyols are used in small quantities as a plasticizer. The product formulations vary according to specific product and manufacturer. Product mixes are also guarded competitive secret because the product is new. Therefore, the following list of ingredients do not add to 100 percent.

- Phenolic resin—65%–85%.
- Blowing agent —5%–15%.
- Catalyst and surfactants—5.5%–21.5%.
- Polyester polyol—3%–10%.

Unlike the approximate 1 to 1 ratio of glycol to other ingredients in PIR/PU polyols, aromatic polyester polyol in phenolic foam manufacture uses 10 percent glycol to other ingredients. The 90 percent fraction of the polyol contains the recovered material. However, one manufacturer stated that larger percentages of polyol used as a plasticizer produce an end product that is too soft for commercial application with mechanized roofing equipment, and therefore a higher percentage of recovered material is technically impracticable.

Only two manufacturers of phenolic foam were identified, which is the only limit on availability for government procurement.

5. *Rock Wool.* Rock Wool is used as loose-fill insulation and also is sold in batts and blankets, although production of batts and blankets is phasing out. While rock wool and fiberglass insulation manufacturers are not necessarily the same companies, they all belong to the same trade associations and the two products are usually tracked together under the general heading mineral fibers.

Rock wool insulation is most frequently made from metallurgical slag, such as slag from steel mills. Approximately 70 percent of the rock wool produced in 1980 was primarily made from blast furnace slag, the other 30 percent was primarily made from steel and copper slag. Not all rock wool manufacturers depend entirely on slag for their feedstock needs, however. Some use trap rock or basaltic rock. Use of slag or alternatives depends on the availability and costs of the materials and their location to production facilities. The rock wool industry is shrinking, and data is no longer consistently gathered. However, conversations with manufacturers in 1988 indicated that more companies are using higher percentages of natural rock than were in 1980.

Natural rock is said to have a lower comparative yield. Slag has a higher melting alumina silicate than natural rock, which makes slag-based insulation attractive in commercial and residential installations where fire protection is important. For comparative purposes, fiberglass is affected by heat at 1,200–1,300 degrees Fahrenheit, compared to rock wool, where temperatures must exceed 1,800–2,000 degrees Fahrenheit before the wool is affected.

The manufacture of rock wool with slag is linked to the metal smelting industries, which provide the principal feedstocks. Smelting in the United States is decreasing, and there is strong

demand for metallurgical slags as aggregate substitutes in asphalt and concrete for road construction. Slag for rock wool must be of higher quality and contain fewer contaminants than slag for substitute aggregates. Although rock wool manufacturers are said to pay premium prices, some slag suppliers are said to prefer volume to specialty customers. For example, in 1986, the demand for slag for rock wool production was 3.8 percent of total slag supplies, compared to demand for slag for use as aggregates, which was 81 percent of total supplies of slag. Rock wool manufacturers have reported some difficulties in obtaining slag supplies in the southern part of the country. There are no sources of postconsumer recovered material for this type of insulation.

Rock wool insulation's market share has been decreasing in recent years. One estimate based on data gathered in 1985 was 9–10 percent of the total market; the percentage dropped to 3 percent in another estimate in 1987. Changes in the industry and in trade associations have made it difficult to make a more accurate assessment. The most recent data cited was for 1982, when U.S. production of rock wool was estimated to be 1.0 billion pounds (453,500 metric tons). Ten manufacturers of rock wool insulation were identified, with plants in 18 locations. Trade association representatives stated that a number of small companies do not belong to the associations and therefore may not be included in this total. Rock wool insulation manufacturers are primarily located in the mid-west and the southern states, with a few companies located in the northeast.

6. *Conclusions.* EPA concludes that six of the principal types of insulation materials used in the United States are commercially available with recovered materials content: Cellulose, cellulose fiberboard, fiber in perlite boards, polyurethane/polyisocyanurate rigid foam, phenolic rigid foam, and rock wool. Moreover, industry sources have suggested that polystyrene insulation containing recovered materials is technically feasible; commercial use of recovered materials was not identified, however.

Based on the evidence reviewed above, EPA further notes that insulation meeting a wide range of construction design applications is available with recovered materials content. EPA did not evaluate the potential for recovered materials usage in specialty types of insulation made with virgin materials because they represent such a small portion of the insulation market.

EPA further concludes that fiberglass insulation often contains preconsumer manufacturing waste glass and may contain some postconsumer cullet, but the percentages are not consistent from manufacturer to manufacturer nor from batch to batch. Representatives from some of the fiberglass companies have indicated willingness to use more postconsumer cullet if it can meet their specifications for contaminants and if consistent supplies are made available at competitive prices.

D. Federal Purchasing Power

The fourth EPA criterion for selection of a procurement item for affirmative procurement under RCRA Section 6002 is that the Federal government's ability to affect purchasing or use of the item, when it contains recovered materials, be substantial.

The dollar volume of the building insulation industry was estimated by Hull & Company in 1986 to be $2.24 billion excluding retrofit of residential buildings. A.W. Johnson estimated the 1986 residential retrofit insulation market to be $6.7 million. The total 1986 building insulation market, at manufacturer's net price is estimated to be $2.9 billion. Other industry spokesmen estimated the total market to be $3 billion in 1985. The same sources stated that the industry was holding even, with neither major growth nor shrinkage.

1. *Federal Government.* Government agencies purchase, or finance purchases with appropriated Federal funds, residential, industrial, and commercial types of insulation products. Expenditures for insulation purchased with appropriated Federal dollars is conservatively estimated to be $148 million. This figure represents only those expenditures that could be estimated based on assured insulation use by an agency. Open market expenditures at the local level may be considerable but could not be estimated because centralized records are not currently maintained. Based on 1986 estimates of market size and identified government purchases, the Federal government accounts for approximately 5.1 percent of the insulation market. Procurements by individual agencies are summarized in Table 4.[4]

TABLE 4.—SUMMARY OF ESTIMATED GOVERNMENT EXPENDITURES FOR INSULATION

Department of Energy (1985)	
Weatherization	$38,000,000
Institutional Conservation	4,593,000
Total DOE	42,593,000
Health & Human Services (1985)	
Low Income Home Energy Assistance Program	45,750,000
Housing and Urban Development (1986)	
Public Housing Modernization Fund	14,000,000
Housing for Elderly and Handicapped	3,800,000
Community Development Block Grants	5,700,000
Indian Housing Program	2,392,000
Total HUD	25,892,000
General Services Administration (1986)	
Direct purchases	487,300
New construction, repairs and alterations	12,344,600
Total GSA	12,831,900
Department of Defense (1986)	
Direct purchases	nominal
New construction and rehabilitation	20,893,600
Total Estimated Government Purchases	148,050,500

The value of Federal insulation purchases was estimated as conservatively as possible, using lowest percentages or lowest range when there was a choice. It is probable that appropriated Federal dollars account for a considerably higher percentage of market share. Insulation is rarely tracked as a line item in any budget. In the one case that EPA knows of, the data are not yet available.

The Department of Energy (DOE) estimates that 20 percent of its expenditures for the Weatherization Program is spent for insulation. Funds are distributed through state agencies, which in turn use a variety of methods to distribute monies through local housing authorities and local grantees. The Institutional Conservation program roughly estimated total insulation expenditures from which an average annual expenditure was computed.

The Department of Health and Human Services (HHS) distributes Low Income Home Energy Assistance Program (LIHEAP) funds. Under this program, states are allowed to spend up to 15 percent of their allocation on weatherization. As these funds are distributed by the same state agencies as DOE funds, the same 20 percent estimate for insulation was used.

Many Department of Housing and Urban Development (HUD) programs provide funds for building construction and/or rehabilitation. Insulation expenditures are not tracked at the national level. HUD funds are distributed many ways, for instance

[4] The basis for these estimates is explained in *Feasibility of a Federal Procurement Guideline for Recovered Materials in Insulation Products*, E.H. Pechan & Associates, Inc., September 1987, which is in the docket for this proposed guideline.

through the ten regional HUD offices, through local housing authorities or through block grants to states where priorities are determined locally.

Most HUD funds that are dispersed where they could be used to purchase insulation are considered loans. However, loans are repaid through Federal funds and subsidies, not from the private sector. In addition, HUD mortgage insurance programs range from $30 to $100 billion per year, and energy efficiency remains a high priority. The insulation component would be $228 to $760 million. This estimate derived from mortgage insurance was not included in the estimate of Federal purchases of insulation because it could not be established that direct or indirect expenditures of appropriated Federal funds actually take place in insurance programs.

At the General Services Administration (GSA), insulation is purchased directly for use by government agencies and is also purchased through construction contracts. The entire direct purchase program is being revised from warehoused purchases to requirement contracts which allow agencies to buy what they need directly from suppliers under annual contract. Direct expenditures were determined as available. All GSA expenditures for insulation are direct use of Federal funds.

Divisions of the Department of Defense (DOD), the Army, Navy and the Air Force, do not track direct purchases of insulation. Construction projects which would include insulation were estimated from the general construction budget (which includes non-insulated items like bridges). All DOD expenditures for insulation are direct use of Federal funds.

2. *Impact on State and Local Governments.* A significant number of the Federal programs disperse their funds through state, local and non-profit agencies. Funds are not specifically earmarked for insulation purchases; rather monies are used for weatherization, building construction, rehabilitation and so on, usually through construction contracts.

State and local agencies are required to comply with EPA procurement guidelines under the conditions described in Section IV(C) of this preamble. EPA believes that once affirmative procurement programs are established by state and local agencies in compliance with their obligations when using Federal funds, the same provisions that favor the use of recovered material content will be used for other insulation purchases.

3. *Conclusions.* EPA concludes that the expenditure of Federal funds for insulation would have a significant impact on the insulation market. EPA believes not only that direct Federal government agency purchases would have an impact, but also that a considerable ripple effect would develop through state and local governments that use local funds as well as Federal funds for major programs.

E. Other Considerations

There is an additional factor affecting insulation which EPA included in its development of the guideline proposed today. Both pre- and postconsumer waste materials (e.g., newspaper, glass, plastic) and industrial byproducts (e.g., slag and chemical bottoms) are used in many different types of building insulation products. Building insulation products produced with pre- and post-consumer materials and building insulation products produced with byproducts compete for the same end use. Although the byproducts and some pre-consumer materials used in building insulation products are not currently a solid waste management problem, EPA is concerned that a preference only for building insulation products containing certain pre- and post-consumer materials could possibly result in other materials and byproducts ending up in the solid waste stream. Therefore, EPA has intentionally included within the scope of the proposed guideline insulation products made with all pre-consumer materials and industrial byproducts that qualify as recovered materials under the RCRA definition. EPA solicits comments on including this range of insulation products within this guideline.

F. Conclusions Regarding the Designation of Building Insulation Products

Based on the analysis above, including economic and environmental considerations, EPA has determined that building insulation products containing "recovered materials" as defined by RCRA meet the criteria for designation as a procurement item under the provisions of section 6002.

IV. Proposed Guideline

This portion of the preamble explains each section of the proposed guideline.

A. Purpose

The purpose of this guideline is to (1) designate building insulation products, as described below, as items subject to the procurement requirements of section 6002 of RCRA; and (2) recommend procedures for complying with Section 6002.

Insulation products are not fungible items and consequently do not compete in the marketplace on the basis of price alone. Technical performance considerations may dictate use of one type of insulation material rather than another. EPA believes that the intent of RCRA would best be served by identifying and increasing the use of recovered materials content in as many different types of insulation products as possible. Competition between product type (e.g., loose-fill, blanket, board, or spray-in-place) or material type (e.g., cellulose, fiberglass, rock wool, rigid plastic foam, and specialty materials) would therefore continue, while use of recovered materials would increase. Consequently, EPA has sought to include all the major types of insulation in commercial use within this proposed guideline. EPA solicits comment on this approach to performance criteria.

B. Scope

This guideline applies to building insulation products. This term includes but is not limited to insulation products used in residential, commercial and industrial type applications such as blanket, board, spray-in-place, and loose-fill. As explained in Section II.D of this preamble, building insulation is used in four locations: Ceilings, floors, foundations, and walls. The types of materials from which these products are made include but are not limited to: Cellulose and cellulosic fiber, fiberglass, rock wool, plastic rigid foams, and specialty materials. Composite products made from more than one material are also included within the scope.

All of the predominant types of building insulation products are included within the scope of this proposed guideline, and all contain, or have the technical potential to contain, recovered materials. In addition, specialty materials for all types of building insulation or insulation ingredients where recovered material content use may not have been documented (e.g., vermiculite and polystyrene) *are* included within the scope of this guideline.[5]

[5] Section 6002(d)(2) of RCRA requires the "use of recovered materials to the maximum extent possible without jeopardizing the intended use of the item." This statutory provision effectively allows procuring agencies to exclude use of recovered materials from specifications when performance standards for an item cannot be met if recovered materials are

Continued

In this proposed guideline, recommendations for minimum content standards and any references to recovered material content refer only to the core material of an insulation product and do not include any facings, bindings, or other materials applied to the surfaces of the core materials. In the case of composite products made from more than one material, proposed minimum content standards apply to the respective materials used in the core unless the product is specifically addressed.

EPA has included insulation made with postconsumer recovered paper in the scope of this proposed guideline as well as stressed its use in building insulation products to meet EPA's responsibility under section 6002(c)(1). Section 501 of the Hazardous and Solid Waste Amendments of 1984 (Pub. L. 98–616), amended section 6002(c)(1) to stress the maximum practicable use, in the case of paper, of postconsumer recovered materials. These postconsumer paper materials are defined as:

> Paper, paperboard, and fibrous wastes from retail stores, office buildings, homes and so forth, after they have passed through their end-usage as a consumer item, including: used corrugated boxes, old newspapers, old magazines, mixed waste paper, tabulating cards, and used cordage, and all paper, paperboard, and fibrous wastes that enter and are collected from municipal solid waste.

There are other types of insulating products, such as air handling, acoustical, pipe, and cold storage insulation. Building insulation was chosen because it is by far the largest volume of insulation manufactured, is least likely to require virgin specialty materials for specialty purposes, and is dominated by the types of insulation products that for physical or chemical reasons can contain recovered materials. Government purchases of insulation products would also tend to have the greatest impact on this category.

Other types of insulation are defined as follows:

Air Handling Insulation may be in flexible or rigid board form and serves to control heat transfer from the inside to or from the ambient surround of rectangular, oval or round ducts, which usually contain conditioned air. The insulation system may include a factory or field-applied water vapor or weather resistant exterior membrane or covering jacket.

Acoustical Insulations are manufactured in flexible blanket, rigid board or specialty shaped sections and are intended for use in sound attenuation applications. They may include interior or facing membranes, which are factory applied.

Cold Storage Insulation is specifically designed for use in the exterior envelope of refrigerator and freezer storage buildings and rooms. It is usually applied to the inside structural building sections and is designed to perform at subzero temperatures. Critical performance requirements include compressive strength, minimum coefficient of expansion, and permanent thermal resistance.

Pipe Insulation is manufactured in performed sections as thermal insulation suitable for application to round piping or tubing which serves to transport liquids or gasses at temperatures above or below the ambient surroundings. The insulation system may include a factory or field-applied water vapor or weather resistant exterior membrane or covering jacket.

These other types of insulation products must meet different and frequently more stringent specifications and are believed to be less easily adapted to manufacture with recovered materials. EPA solicits comments on any or all of these other types of insulation products regarding whether (1) they contain recovered materials, (2) government expenditures represent a significant percentage of total purchases, and (3) they should be included within the scope of this proposed guideline.

C. Applicability

Many of the requirements of section 6002 apply to "procuring agencies," which is defined by RCRA in section 1004(17) as "any Federal agency, or any State agency or agency of a political subdivision of a State which is using appropriated Federal funds for such procurement, or any person contracting with any such agency with respect to work performed under such contract." Under section 6002(a), the procurement requirements apply to any purchase by a procuring agency of an item costing $10,000 or more or when the procuring agency purchased $10,000 worth of the item or of a functionally equivalent item during the preceding fiscal year.

In addition, the requirements of section 6002 apply to each Federal agency as a whole. This point is particularly important in determining whether the $10,000 threshold has been reached. For example, the Department of Housing and Urban Development as a whole, purchases, or causes the purchase of, more than $10,000 worth of building insulation products during each fiscal year. Therefore, the requirements of section 6002 will apply to all HUD procurements of building insulation products, including procurements by individual regions and subagencies, by state and local grantees and their contractors, and by HUD contractors.

1. *Direct Purchases.* For the purposes of this guideline, purchases made as a result of a solicitation by a procuring agency for its own general use or that of other agencies (for example, GSA purchases) are considered "direct". Insulation purchased as part of a construction contract is also considered a "direct purchase."

2. *Indirect Purchases.* The definition of "procuring agency" in RCRA section 1004(17) makes it clear that the requirements of section 6002 apply to "indirect purchases," i.e., purchases by a State or local agency or its contractors using appropriated Federal funds. Thus, the guideline applies to insulation purchases meeting the $10,000 threshold made by States and their localities or their contractors, subcontractors, grantees, or other persons which are funded by grants, loans, or other forms of disbursements of monies from Federal agencies. However, the guideline does not apply to such purchases if they are unrelated to or incidental to the Federal funding, i.e., not the direct result of the grant, loan, or funds disbursement. An example of an insulation purchase unrelated or incidental to Federal funding is where funds have been provided for public transit maintenance and a new facility is built in which vehicles are repaired. The contractor constructing the maintenance facility also builds a temporary on-site management structure. Any insulation purchases for the second structure are not subject to the requirements in section 6002 or this guideline, even though some of the grant funds supporting the contract might be used to finance the purchases.

EPA solicits comments on whether this guideline should be revised to exempt block grants from the section 6002 procurement requirements because it generally may not be possible to account separately for block grant funds from non-Federal funds. EPA also solicits comments on whether this guideline should be revised to exempt block grants only when it is not possible to account separately for such funds.

3. *The $10,000 Threshold.* RCRA section 6002(a) provides that the

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included in the content. Thus, the specifications for particular types of building insulation materials that do not or could not contain recovered materials must be based upon performance criteria. EPA suggests a procedure for Federal agencies to establish such an exclusion in § 248.11 of the proposed guideline as discussed below under Specifications.

requirements of section 6002 apply: (1) When the purchase price of an item exceeds $10,000 or (2) when the quantity of such items or of functionally equivalent items purchased during the preceding fiscal year was $10,000 or more. Thus, section 6002 clearly sets out a two-step procedure for determining whether the $10,000 threshold has been reached. First, a procuring agency must determine whether it purchased $10,000 worth of building insulation products during the preceding fiscal year. If so, the requirements of section 6002 apply to all building insulation purchases occurring in the current fiscal year. Second, if a procuring agency did not procure $10,000 worth of building insulation products during the preceding fiscal year, it is not subject to section 6002 unless it makes a $10,000 purchase of building insulation products during the current fiscal year. The requirements of section 6002 then apply to the $10,000 purchase of building insulation products; to all subsequent purchases of building insulation products made during the current fiscal year, regardless of size; and to all procurements of building insulation products made in the following fiscal year.

Section 6002(a) does not provide that the procurement requirements are triggered when the quantity of items purchased during the *current* fiscal year is $10,000 or more. EPA does not believe that Congress intended to require procuring agenices to keep a running tally of procurements of items designated by EPA. Maintaining such a running tally would be very burdensome. Rather, procuring agencies only need to compute their total procurements of building insulation products once at the end of the fiscal year and only if they intend to claim an exemption from the requirements of section 6002 in the following fiscal year.

4. *Functionally Equivalent Items.* In common usage, the term insulation covers many items manufactured to meet different uses and performance standards. EPA believes that restricting the applicability of section 6002 based on a vary narrow, technical definition of functional equivalency would limit the effectiveness of the guideline in meeting the objectives of RCRA, because an agency may purchase less than $10,000 of each type of building insulation product.

EPA has concluded that, in the case of building insulation, "functionally equivalent" items should be defined as a category of items having substantially or similar end use. This category, "building insulation," will assure broad applicability of this guideline. Further, building insulation types defined by design (such as loose-fill, blanket, board, and spray-in-place) and building insulation products defined by material content (such as fiberglass, cellulose, cellulose fiberboard, rock wool, rigid plastic foams, composites, and specialty materials) can be used almost interchangeably in ceilings, floors, foundations and walls. The choice of building insulation type and material content is based on technical considerations that are site specific.

Government procuring agencies rarely track building insulation purchases as a line item and certainly do not distinguish between material types or design types of building insulation products. EPA believes that the guideline will be more easily implemented by procuring agencies if all types of insulation used to resist heat flow within a building are included within the single category of building insulation.

Under § 248.3(b) of the guideline, all of the following types of insulation are encompassed by the term "building insulation" and therefore are "functionally equivalent" for purposes of the $10,000, threshold:

- Loose-fill insulation, including but not limited to cellulose fiber, fiberglass, rock wool, vermiculite, and perlite;
- Blanket and batt insulation, including but not limited to fiberglass and rock wool;
- Board (sheathing, roof decking, wall panel) insulation, including but not limited to cellulose fiberboard, glass fiberboard, foam glass, polyurethane, polyisocyanurate, polystyrene, phenolics, and composites; and
- Spray-in-place insulation, including but not limited to polyurethane, polyisoicyanurate and spray-on cellulose.

D. Definitions

Most of the definitions used in this proposed guideline are used in RCRA and therefore need no further explanation. Others are standard industry or purchsing definitions. A few are discussed in more detail in this section of the preamble to clarify the information that follows.

1. *Building Insulation.* "Building insulation" is defined as a material, primarily designed to resist heat flow, which is installed between the conditioned (heated and/or mechanically cooled) volume of a building and adjacent, unconditioned volumes or the outside. This term includes but is not limited to insulation products such as blanket, board, spray-in-place, and loose-fill. "Building insulation" is intended to cover all thermal insulation products used in all types of structures with the exception of cold storage and pipe insulation. The phrase "including but not limited to" in the insulation definitions is intended to insure that new types of products will be included within the scope of the guideline as they are developed.

2. *Practicable.* Section 6002(c) requires procuring agencies to procure items composed of the highest percentage of recovered materials *practicable* and section 6002(i) requires procuring agencies to develop programs to assure that recovered materials are purchased to the maximum extent *practicable* (emphasis added). EPA defined "practicable" in the final paper guideline (52 FR 37297, October 6, 1987) and is including the definition in this proposed guideline for insulation products.

EPA's definition of "practicable" combines the dictionary definition with certain statutory criteria for determining practicability. The dictionary definition of practicable is "capable of being used," and EPA believes that Congress intended the term to be defined in this way. Congress also provided four criteria for determining the maximum amount practicable: (1) Performance in accordance with applicable specifications; (2) availability at a reasonable price; (3) availability within a reasonable period of time; and (4) maintenance of a satisfactory level of competition. EPA's definition of practicable incorporates these criteria.

3. *Procurement Terms.* To simplify the Federal purchasing process, "commercial item descriptions" (CIDs), which reference industry standards, have generally replaced the multitude of individual insulation specifications previously used by Federal procurement agencies. When soliciting invitations to bid, procuring agencies can stipulate special terms and conditions (such as minimum content standards for recovered material content), in the "invitation to bid" or "request for proposal" documents. These phrases have been defined by the National Institute of Governmental Purchasing as follows:

- *"Commercial Item Descriptions"* are series of simplified item descriptions under the Federal specifications-and-standards program used in the acquisition of commercial off-the-self and commercial type products.
- *"Invitation For Bids (IFB)"* is the solicitation for prospective suppliers by a purchaser requesting their competitive price quotations.
- *"Request For Proposal (RFP)"* is a request for an offer by one party to another of terms and conditions with

references to some work of undertaking; the initial overture or preliminary statement for consideration by the other party to a proposed agreement.

4. *Insulation Terms.* Definitions for terms relating to insulation are directly quoted or have been adapted from the Association of Testing and Materials (ASTM) and the Department of Energy's Residential Conservation Service definitions, as they were available.

As explained above, EPA was unable to determine whether any or all cellulosic fiberboards contain postconsumer recovered paper. Therefore, in this proposed guideline, EPA is using the term "cellulose fiberboard" to refer to fiberboards containing recovered paper. EPA solicits comments on use of this term.

E. Requirements vs. Recommendations

RCRA section 6002 requires procuring agencies and contracting officers to perform certain activities, such as revising specifications for procurement items. It also requires EPA to prepare "guidelines for the use of procuring agencies in complying with" section 6002. EPA has incorporated the Section 6002 requirements into the proposed guideline for the benefit of procuring agencies. As a result, the guideline contains two types of provisions: requirements (mandated by Congress in section 6002) and recommendations (EPA's guidance for complying with the requirements of section 6002). As used in this guideline, the verbs "shall" and "must" indicate Section 6002 requirements, while verbs such as "recommend," "should," and "suggest" indicate recommendations for complying with those requirements.

Procuring agencies must comply with the requirements of section 6002, whereas EPA's recommendations are only advisory in nature. Procuring agencies may choose to use other approaches which satisfy the section 6002 requirements. However, EPA believes that if a procuring agency chooses to follow EPA's recommendations, that agency will be in compliance with the section 6002 requirements.

F. Specifications

Subpart B of the guideline, Specifications, contains two sections, Revisions and Recommendations.

1. *Revisions.*

a. *Federal agencies.* RCRA section 6002(d) contains two requirements for revising specifications for procurement items. First, Federal agencies that have the responsibility for drafting or reviewing specifications for procurement items procured by Federal agencies were required to revise their specifications, by May 8, 1986, to eliminate exclusions of recovered materials and requirements that items be manufactured from virgin materials [section 6002(d)(1)].

Second, within one year after the date of publication of a guideline as a final rule, Federal agencies must assure that their specifications for designated items require the use of recovered materials to the maximum extent possible without jeopardizing the intended end use of the item [section 6002(d)(2)]. EPA believes that this second requirement is more extensive than the first requirement. Simply eliminating discriminatory provisions, as required by section 6002(d)(1), is not sufficient to meet all the obligations of section 6002(d). EPA believes, however, that compliance with the affirmative procurement requirements of section 6002(i) fulfills the section 6002(d)(2) requirements because an affirmative procurement program should result in procurement to the maximum extent practicable.

b. *Procuring agencies.* EPA believes that the second specification revision requirement also applies to non-Federal procuring agencies which procure building insulation products with appropriated Federal funds. Unless their specifications (or purchasing practices with respect to building insulation products) are revised to allow the use of recovered materials in building insulation products, these agencies will be unable to implement the affirmative procurement requirements of RCRA section 6002(c)(1) and (i). For this reason, §§ 248.3 and 248.10(b) of the proposed guideline provide that all *procuring agencies* (rather than "Federal agencies" as provided in the Act) must assure that their specifications (or purchasing practices) for building insulation products require the use of recovered materials to the maximum extent possible without jeopardizing the intended end use of these items.

2. *Recommendations.* In the early 1980s, the Federal government began to use CIDs for insulation purchases, as they are available, rather than specifications written by each individual agency. CIDs are functional in nature and as generic as possible to permit the maximum number of suppliers to bid for contracts. In general, ASTM and American Society of Heating, Refrigeration and Air Conditioning Engineers (ASHRAE) specifications are referenced.

EPA has reviewed the materials requirements of the ASTM specifications and finds that they neither allow nor disallow recovered material content. ASHRAE specifications tend to be test and performance standards, and thus do not refer to specific material content. EPA has also reviewed specifications used by Federal agencies. HUD programs reference minimum property standards, which currently refer to local building codes. Local building codes reference the ASTM and ASHRAE specifications. DOE weatherization program specifications that deal with material content require conformance with equivalent ASTM specifications. GSA referenced ASTM and DOD military specifications and commercial item descriptions in 1986 procurements.

The military specifications address the issue of recycled content in one of two ways, depending on the specification. Either recycled content was neither allowed nor disallowed in the material description or there was a special clause requiring that recovered materials be used to the maximum extent practicable. Recovered materials was defined to mean "materials which have been collected or recovered from solid waste and reprocessed to become a source of raw materials as opposed to virgin raw materials. None of the above shall be interpreted to mean that the use of used or rebuilt products is allowed * * *".

As previously discussed, all procuring agencies must assure that their specifications require the use of recovered materials content to the maximum extent possible without jeopardizing the end use of the item. If the use of CIDs and standard specifications over which procuring agencies have no direct control continues, another method to assure maximum use of recovered material content in building insulation products must be employed.

a. *Use of commercial item descriptions.* EPA believes that the use of industry standards and CIDs is an efficient procurement practice and therefore recommends in § 248.11(a) of the proposed guideline that Commercial Item Descriptions and equivalent standards continue to be used whenever possible. However, the use of CIDs and industry standards does not absolve procuring agencies of the requirement to review specifications to assure that recovered materials are used to the maximum extent possible without jeopardizing the end use of the item. As CIDs or industry standards are adopted, procuring agencies must review them thoroughly to be certain that no unjustifiable discrimination against recovered materials exists.

b. *Use of invitations for bids and requests for proposals.* Bids are solicited

by all procuring agencies through invitations for bids or requests for proposals. Although contractors buy a large portion of the insulation purchased with appropriated Federal dollars as part of their work to build or renovate structures, they do so under contracts which originate with IFBs or RFPs. Procuring agencies can fulfill their obligations under the specification revision requirements of RCRA section 6002 by inserting preferences for building insulation with recovered material content in the special terms and conditions section of their invitations for bids or requests for proposals. Therefore, EPA recommends in § 248.11(b) of the proposed guideline that procuring agencies insert minimum content standards or equivalent preferences for recovered materials content in building insulation in their invitations for bids or in their requests for proposals.

c. *Exclusion of products that do not meet performance standards.* Certain building insulating products cannot be made with recovered materials content without jeopardizing performance standards. In general, this situation applies to specialty materials and insulation items that must meet very stringent performance requirements. In most cases, EPA does not believe that such items will be offered to procuring agencies with recovered materials content. If such items are offered and found to fail performance tests, proposed § 248.11(c) recommends that an agency document any finding that, for a particular end-use, an item containing recovered materials content will not meet reasonable performance standards. The documentation should reference the particular tests used to judge performance. Procuring agencies should also reference such documentation in subsequent solicitations for the specific item to avoid repetition of previously documented findings.

d. *New and adapted products.* EPA believes that as new building insulation products enter the marketplace and as recycling technologies advance for feedstocks used in insulation manufacture, additional types of building insulation with recovered content will become available. EPA recommends in § 248.11(d) of the proposed guideline that procuring agencies assure that language in new specifications for new building insulation products allows recovered materials content. EPA further recommends that as new building insulation products containing recovered materials are identified, the same approaches to procurement recommended in this guideline for existing products be inserted in invitations for bids and requests for proposals whenever the new products could be offered.

The annual review procedure detailed in § 248.24 of this guideline, the certification and estimation process detailed in § 248.23, and the case-by-case procurement approach detailed in § 248.21 provide methods to monitor the introduction of recovered materials content in building insulation products where such use may be developing.

G. Affirmative Procurement Program

RCRA section 6002(i) requires procuring agencies to adopt an affirmative procurement program to ensure that building insulation containing recovered materials is purchased to the maximum extent practicable. The program must contain four elements: (1) A recovered materials preference program; (2) a promotion program; (3) procedures for estimation, certification, and verification of recovered materials content; and (4) procedures for annual review and monitoring of the program's effectiveness. The program must be established within one year of the date of publication of this guideline as a final rule.

The following sections explain EPA's recommendations for each element of the affirmative procurement program.

1. *Recovered Materials Preference Program.* Under section 6002(i), procuring agencies have three options for implementing the preference program. They can employ a case-by-case approach, adopt minimum content standards, or choose an approach that is "substantially equivalent" to the preceding approaches. The proposed guideline recommends that procuring agencies adopt minimum content standards for those building insulation products commercially available with recovered materials content. In those cases where the use of recovered materials content is technically feasible but not currently commercially available, or where building insulation products with recovered material content become unavailable, EPA recommends that the case-by-case approach be used.

EPA notes that these approaches are *recommended,* not required. Procuring agencies may adopt "substantially equivalent" alternatives. However, EPA believes that if a procuring agency follows the recommendations, it will meet the requirements of RCRA. Procuring agencies that adopt other approaches must ensure that their preference programs achieve the procurement of building insulation products "with the maximum percentage of recovered materials practicable".

The following sections provide a detailed discussion of the basis for the minimum content standards, including legal and technical considerations.

a. *Background.* Considering the range of building insulation products commercially available with recovered materials content, EPA believes that the use of minimum content standards is the most practical approach for the procuring agencies to use. The minimum content standards approach would also be the most effective way to insure that building insulation products are purchased with the maximum percentage of recovered materials practicable, as required by RCRA sections 6002 (c) and (i).

EPA is proposing to recommend minimum content standards for most types of building insulation products. EPA believes that these minimum content standards are the highest that are currently practicable, and procuring agencies would therefore meet the requirements of section 6002 if the proposed minimum content standards are adopted. These standards are discussed further in section IV.G.1.d.

EPA also recommends that the case-by-case approach be used but only if the availability of products with the standard minimum content becomes uncertain, or when it is not certain that products with recovered material content have reached commercial distribution. This approach is discussed in Section IV.G.1.f.

b. *Alternatives considered.* In addition to minimum content standards and case-by-case procurement, EPA considered two other approaches for a preference program: price preferences and set-asides.

As discussed in the final paper guideline, 52 FR 37298–37299 (October 6, 1987), section 6002(i) requires that any affirmative procurement program be consistent with applicable provisions of Federal procurement law. From time to time, Congress has established preferential procurement programs in order to attain socioeconomic goals. Among those are the Small Business, Labor Surplus Area, and Minority Business procurement programs. EPA considered applying either or both of the mechanisms used in those programs—price preferences and set-asides—to this guideline. A price preference allows the procuring agency to pay a higher price, if necessary, for a specified product from preferred vendors. A set-aside requires the procuring agency to award a certain

percentage of its contracts to preferred vendors of a product regardless of price. Price preferences and set-asides are currently being used in some state programs for the procurement of paper and paper products containing recovered materials. As of January 1988, five states and two cities use price preference programs in which products containing recovered materials may cost from 5 to 10 percent more than virgin materials. Two states have set-aside programs, one for paper and paper products, the other for all types of products. These states report that they successfully procure products containing recovered materials.

EPA has considered recommending these programs at the Federal level. In the case of existing Federal preferential procurement programs that allow a price preference or set-aside, the Agency found that each had been established under explicit statutory authority or a specific Executive Order. Neither the statutory language nor the legislative history of section 6002 seems, however, to contemplate the adoption of either price preferences or set-asides, and doing so would conflict with existing Federal procurement regulations. Therefore, rather than recommending price preferences or set-asides, EPA is recommending that procuring agencies use the procurement mechanisms provided in RCRA section 6002(i)(3).

c. *Legal considerations.* RCRA section 6002(i)(1) requires that affirmative procurement programs be "consistent with applicable Federal procurement law." EPA was concerned that minimum content standards might violate the Competition in Contracting Act of 1984 (CICA) (10 USC Chapter 137) and the Federal Acquisition Regulation (FAR) (48 CFR Ch. 1). Both provide that specifications restricting what can be offered by bidders are legally permissible only to the extent that they reflect the Government's minimum needs or are authorized by law. [CICA 2711(a)(2), 48 CFR 10.002(a)(3)(ii).] EPA has concluded that RCRA section 6002 provides the necessary authorization. See 52 FR 38844 (October 19, 1987). Section 6002(i)(3)(B) expressly permits agencies to establish specifications which restrict bids to those which meet a minimum content standard. Therefore, minimum content standards are not in violation of general Federal procurement law.

CICA requires agencies to use full and open competitive procedures when procuring property and services. The term "full and open competition" means that all responsible sources must be permitted to submit a bid. In the case of a procurement against a restrictive specification, such as a minimum content standard, "full and open competition" means that all responsible sources who can meet the specification can bid. The preference program recommendation in the proposed guideline is consistent with this requirement, since any vendor of building insulation can submit a bid as long as the product offered contains the minimum recovered content.

d. *The minimum content recommendations.* RCRA provides four criteria for establishing a minimum content standard. Section 6002(i)(3)(B) provides that the minimim content required by a specification must be the maximum available without jeopardizing the intended end use of the item or violating the limitations of section 6002(c)(1) (A) through (C). Thus, the four criteria are (1) the intended end use of the item, (2) availability, (3) technical performance, and (4) price.

For the items designated by this proposed guideline, the criteria are satisfied by setting the minimum content standards at levels which do not interfere with the technical performance of the items and therefore the intended end uses. In general, the use of recovered materials content within the technical limitations is cost-effective in insulation production, regardless of the type. The third criterion, availability, will be the determining factor. There is a possibility, though not a probability, that industries other than insulation may eventually absorb most of the available supplies of recovered materials suitable for certain types of building insulation (e.g., slag). Should that occur, the case-by-case approach described below can be used until it is certain that market stimulation for the recovered material is no longer needed.

EPA believes that minimum content standards can be set most efficiently by the material type of the building insulation product. While there are variations in the technically acceptable levels of recovered materials content among the myriad types of building insulation products within most material types, they are not wide enough to warrant a separate minimum content standard for each building insulation item.

EPA is proposing to recommend in § 248.21(b)(3) of the guideline that procuring agencies adopt the minimum content standards in Table 5 for all types of building insulation products made with the respective types of material. The proposed standards are based on the core insulation material, disregarding the facings, bindings, or any materials surrounding or attached to the insulation core. (These other materials vary very widely from one insulation products to another and would interfere with meaningful minimum content standards.) The proposed minimum content standards would also apply to the portion(s) of the respective insulation material(s) that is used in composite products.

TABLE 5.—MINIMUM CONTENT STANDARDS FOR RECOVERED MATERIALS IN BUILDING INSULATION PRODUCTS

Material type	Percent by weight
Cellulose loose-fill and spray-on.	75% postconsumer recovered paper.
Cellulose fiberboard	50% postconsumer recovered paper.
Perlite composite board	23% postconsumer recovered paper.
Polyisocyanurate/ polyurethane:	
Rigid foam	9% recovered material.
Foam-in-place	5% recovered material.
Phenolic rigid foam	4% recovered material.
Rock wool	50% recovered material.

NOTE: The minimum content standards are based on the weight of material in the insulating core only.

For other building insulation products, EPA recommends that procuring agencies use the case-by-case approach as discussed in section IV.G.1.f. below.

Each of the proposed minimum content standards has been set based on technical constraints in the manufacturing processes used in 1988. EPA solicits comments on the appropriateness of these standards or specific alternatives to these standards.

The following subsections discuss the proposed minimum content standards.

i. *Cellulose loose-fill and spray-on insulation.* The principal feedstock for cellulose loose-fill and spray-on insulation is waste paper. In the case of spray-on insulation, the minimum content standard is applied to the insulating feedstock prior to the addition of adhesives.

Section 6002(i((2) states that "in the case of paper, the recovered materials preference program required * * * shall provide for the maximum use of the post consumer recovered materials * * *" Postconsumer waste paper, primarily old newspaper, is not only technically acceptable in cellulose insulation, it is most frequently used.

A variety of chemical additives are also combined with the fibers to retard flammability and to deter pests. The chemical additives are required to meet the performance standards that have been established for this industry. The ratio of fiber to chemicals is 75 to 25. A higher percentage of waste paper fiber

could jeopardize the performance of the end use product for many manufacturers. For these reasons, EPA is proposing to recommend a 75 percent postconsumer recovered paper minimum content standard for cellulose insulation. EPA believes that this percentage will provide the maximum amount practicable.

ii. *Cellulose fiberboard.* One of the principal feedstocks of cellulose fiberboard is postconsumer recovered paper, including old newspapers, mixed paper, and corrugated. Although at least one company produces a product with 100 percent postconsumer recovered paper, this is not true of all manufacturers. It is not apparent that all cellulose fiberboards could be made with only paper. Different structural properties and finishes of the various types of cellulose fiberboard also make it inappropriate to set the minimum content standard at such a high level. Therefore, EPA proposes a minimum content standard of 50 percent postconsumer recovered paper for this product. Although all cellulose fiberboard products may not currently meet this percentage, and some currently exceed it, it is the highest percentage practicable within the overall industry.

iii. *Perlite composite board.* The range of products in this type of insulation is made with various formulations of expanded perlite aggregate, selected binders, and old newspapers. The newspaper component is 23 percent to 30 percent. Although an increase in the newspaper component would be economically advantageous to the manufacturer, it would interfere with performance requirements in individual products. EPA therefore proposes to set the recommended minimum percentage at 23 percent postconsumer recovered paper.

iv. *Polyisocyanurate/polyurethane (PIR/PU) rigid foam board insulation.* The proposed minimum recovered materials content standard for the PIR/PU rigid foams applies only to the total feedstocks in the core materials. However, only the polyol fraction contains recovered materials; therefore, the minimum content standard cannot be very high. Recovered materials are not available for the other components. The terms polyisocyanurate and polyurethane are often used interchangeably, whether accurately or not. Further, the range of formulations in Table 6 is used within the industry to achieve special characteristics for different end use products.

Table 6.—*Components of Polyisocyanurate and Polyurethane Rigid Foam*

53–57%	isocyanate.
20–30%	aromatic polyester polyol.
15–20%	blowing agent.
2–3%	surfactants and catalysts.

As discussed above, there are also two types of recovered materials used in entirely different processes to make polyol, chemical bottoms (DMT and possibly phthalic anhydride) and PET plastic scrap. Based on information in the EPA data base and indications from manufacturers, EPA has concluded that DMT and phthalic anhydride waste bottoms qualify as recovered materials under the RCRA definition. EPA requests comments on this conclusion to include these chemical bottoms within the recovered materials definition and therefore within the scope of this guideline.

The constraints to increasing the minimum content standard are common to both types of recovered materials. Polyols with higher percentages of recovered materials have characteristics that inhibit the flow of the liquid, foaming mass prior to the hardening of the mass into rigid cells. This would have adverse affects on the performance characteristics of the finished products. Further, the PIR/PU rigid foam industry, including all the feedstock suppliers, is currently experimenting with blowing agents other than chlorofluorocarbons (CFCs). These substitute blowing agents are not as efficient as CFCs. Larger quantities by weight may be necessary in the product mixes and would therefore change the relative percentage of polyol. EPA has taken the second constraint into consideration in proposing to set the minimum recovered materials content standard at 9 percent, the highest percentage possible for the lowest percentage of PET-based polyol in the range of product formulations. To avoid confusion in terms and the application of minimum content standards to individual products, one minimum content standard, 9 percent, is proposed for all board products. EPA believes that this percentage will provide the maximum amount practicable.

v. *Polyisocyanurate/polyurethane foam-in-place insulation.* The proposed minimum content standard for PIR/PU foam-in-place insulation applies to the total feedstocks. However, only the polyester polyol fraction contains recovered materials. This type of PIR/PU foam has two sub-categories, pour-in-place and spray-in-place. It is premixed, with a shelf-life of six months. Formulations with more than 30 percent polyester in the polyol fraction break down in less than six months, and viscosity is seriously impaired. The percentages of ingredients is shown in Table 7. The other ingredients also vary compared with PIR/PU board.

Table 7.—*Components of PIR/PU Foam-in-Place*

40%	Isocyanate.	
40%	Polyol:	
	30%	Aromatic polyester.
	70%	Polyether.
20%	Blowing agent.	

As with aromatic polyester polyols for PIR/PU board products, the recovered DMT or PET is reacted with glycol in similar ratios. The same constraints regarding the eventual change from CFC to another blowing agent also apply to the PIR/PU foam-in-place products. EPA therefore proposes to set the recommended minimum content standard at 5 percent for PIR/PU foam-in-place rigid foam.

vi. *Phenolic rigid foam insulation.* The only component of phenolic rigid foam insulation that can contain recovered materials is the aromatic polyester polyol which is used in small quantities as a plasticizer. The product formulations vary according to specific product and manufacturer, and are expressed in ranges to protect competitive information. The polyol fraction is said to be 3 percent to 10 percent of the total. The mixture of glycol to DMT or PET differs from the PIR/PU foams when it is used in phenolics as a plasticizer. The ratio is 10 parts glycol to 90 parts other ingredients. Manufacturers recommend 4 percent as the highest practicable minimum content standard for phenolics. This represents approximately 4.5 percent polyol in the total product mix.

There are two technical constraints to setting a higher minimum content standard based on the use of polyol. First, larger percentages of polyol used as a plasticizer produce an end product that is too soft for commercial application with mechanized roofing equipment. Second, manufacturers need leeway in product formulations for different product types and to accommodate potential changes in blowing agents. Therefore, EPA is proposing a 4 percent minimum content standard for phenolic rigid foam insulation.

vii. *Rock wool insulation.* The rock wool industry uses either metallurgical slags or natural rock to make rock wool

fiber. Although some manufacturers are entirely dependent on slag as feedstock, this is not true in certain parts of the country, where good quality metallurgical slags are no longer easily available. EPA believes that the only constraint to setting a higher minimum content standard is the availability of the recovered material feedstock. EPA considered geographic availability of rock wool insulation when proposing to set the recommended minimum recovered material content standard at 50 percent. EPA believes that this percentage will provide the maximum amount practicable.

e. *Limitations set by RCRA.* As mentioned above, the proposed minimum content standard would be subject to the four limitations provided in RCRA section 6002, namely, not jeopardizing the intended end use of the product, reasonable availability, reasonable price, and ability to meet the specifications. Procuring agencies must also be able to maintain a reasonable level of competition. For example, if a procuring agency determines that it cannot obtain a type of building insulation containing the minimum amount of recovered content or that it cannot obtain the insulation at a reasonable price, or that an insufficient number of bids can be obtained to meet competition requirements, the procuring agency can re-evaluate the minimum content standard. Lower minimum content standards can be tested for the particular type of insulation product. Section 248.21(c) of the proposed guideline provides that the recommended procurement approaches, or any other approach used by a procuring agency, are subject to the RCRA limitations.

f. *Case-by-case procurement.* For procurement of building insulation, the case-by-case approach means that bids are to be solicited for the selected type of insulation with an unspecified percentage of recovered materials content. In other words, bidders may offer building insulation products made with recovered materials content from 1 percent to 100 percent of the total product or made entirely with virgin materials. The contract would be awarded to the lowest responsible and responsive bidder. In the case of otherwise identical low bids, preference would be granted to the vendor offering the insulation product with the highest percentage of recovered content. According to section 6002(i)(3)(A) of RCRA, "subject to the limitations of subsection (c)(1)(A)–(C), agencies may make an award to a vendor offering items with less than the minimum content standard."

The case-by-case approach allows procuring agencies to attract bids for building insulation products with less than the minimum recovered material content standard when items containing the minimum content are not available. The case-by-case approach also allows procuring agencies to express a preference for recovered material content in building insulation products when such products are being considered for commercial production.

EPA is proposing to recommend in § 248.21(b)(2)(i) of the guideline that procuring agencies use the case-by-case approach when there is information that a building insulation product can technically be made with recovered material content but is not commercially available. The best current examples are polystryrene and fiberglass. As previously discussed, industry sources have suggested that polystyrene insulation containing recovered materials is technically feasible. Consequently, the Agency has included polystyrene insulation within the scope of the proposed guideline. There are indications that research and development efforts are underway to introduce recovered materials into polystyrene insulation products. EPA solicits comments on the availability, price, and performance of all types of polystyrene insulation made with any percentage of recovered material.

In the case of fiberglass insulation, the use of recovered materials is primarily constrained by the availability of recovered material feedstocks. The case-by-case approach would also be useful to gather information on new types of building insulation materials as they enter commercial distribution.

EPA is further proposing to recommend in § 248.21(b)(2)(ii) of the guideline that the case-by-case approach be used when building insulation products become unavailable with the minimum content standard for recovered materials. An example would be rock wool insulation if supplies of metallurgical slags become unavailable.

g. *Procurement procedures.* Procuring agencies should examine their procedures and eliminate any procurement practice that discriminates against recovered materials content in building insulation products. For instance, invitations to bid a broad range of insulation products on an "all or none basis" may exclude suppliers of insulation with recovered content that can only supply a limited range of items. In § 248.21(e) of the proposed guideline, EPA recommends that procuring agencies eliminate this and any similar forms of discrimination.

2. *Promotion Program.* The second requirement of the affirmative procurement program is a promotional effort by procuring agencies. Proposed § 248.22 of the guideline would recommend several methods for procuring agencies to use for disseminating information about their preference programs, such as placing statements in invitations to bid, discussing the program at bidders' conferences, informing industry trade associations about the program, providing information about building insulation made with recovered materials in the product information programs sponsored by the Department of Housing and Urban Development, and issuing press releases discussing the affirmative procurement program to recycling industry publications.

Under section 521 of the National Housing Act, HUD is required to provide product-related services and publications. These should be used as avenues to publicize recovered materials content in insulation. HUD publications include:

- National Building Codes
- Bulletins
- Materials releases
- Engineering bulletins
- Use of materials information

EPA is proposing to recommend that procuring agencies use all such avenues to publicize their requirements for recovered material content in building insulation products.

3. *Estimation, Certification, and Verification.* The third requirement of the affirmative procurement program set forth in section 6002(i) covers estimation, certification, and verification of recovered material content in procurements. Estimates and certifications of content in an item are most easily expressed as a percentage of total content and can range from 0 percent to 100 percent, depending on the type of product or the feedstock used in manufacturing the item. Many issues have been raised about these requirements, such as when the information should be provided, who is to provide it, and how it is to be obtained. To clarify this subject, it is necessary to review the requirements of the statute.

a. *Estimation.* RCRA section 6002(c)(3)(B) and section 6002(i)(2)(C) require that, after the effective date of a guideline, vendors that supply procuring agencies with products covered by the guideline also must provide an *estimate* of the total percentage of recovered materials utilized in the performance of

the contract. Furthermore, contracting officers must require that this information be provided.

EPA believes that this requirement is for the purpose of gathering statistical information on price, quantity, availability, and performance of products made from recovered materials. EPA further believes that this requirement applies regardless of the approach used when a contract is solicited or awarded (i.e., minimum content standards, case-by-case procurement, or an equivalent alternative). Estimates may differ from percentages of minimum recovered content specified in certifications and will provide up-to-date information for the annual review which is required of procuring agencies.

Proposed § 248.23(a) would require that contracting officers require vendors to provide estimates of the total percentage of recovered content in building insulation products. Note that the percentage of recovered content refers to the total content of the insulation *core* rather than the entire insulation product, which includes other items such as facings or bindings. EPA is proposing to recommend that procuring agencies retain these data for three years by type of product, quantity purchased, and price paid.

b. *Certification.* The use of certifications is common in government procurement. It is written assurance that goods or services delivered will fulfill the specified requirements. Failure to meet the conditions which have been certified can result in penalties to a vendor. RCRA Section 6002(c)(3)(A) requires that after the effective date of this guideline, vendors must "certify that the percentage of recovered materials to be used in the performance of the contract will be at least the amount required by applicable specifications or other contractual requirements". RCRA section 6002(i)(2)(C) requires "certification of minimum recovered material content actually utilized * * *."

Together, these sections could be interpreted to mean that multiple certifications will be required; one when bids are offered, and another with each shipment. This issue was addressed in the paper guideline issued October 6, 1987 (52 FR 37300). EPA concluded that one certification would fulfill both statutory requirements and, by requiring the certification no matter which approach is used, procuring agencies could adapt their purchasing programs most easily. For the same reasons enunicated in the paper guideline, EPA is proposing to recommend in § 248.23(b) that procuring agencies meet the certification requirement in RCRA sections 6002(c)(3)(A) and 6002(i)(2)(C) by using a single certification when bids are offered.

Note that there is no requirement to certify the actual recovered content, but rather that the recovered content actually used meets the contract minimum. When minimum content standards are used, the contract minimum is the standard specified in the solicitation or invitation for bid. When case-by-case procurement is used, the contract minimum is the minimum as specified in the offer provided in response to the solicitation or IFB.

Accordingly, EPA recommends that procuring agencies require certification as a condition of a responsive bid when bids are offered, regardless of whether the case-by-case, minimum content standard, or a substantially equivalent approach is used. Also, as previously stated, the successful vendor must estimate the actual recovered content in building insulation products that are supplied. The estimate may or may not be different than the minimum percentage that is certified.

EPA understands that for both estimation and certification, the vendor will not have direct knowledge of recovered materials content. Only the manufacturer that produces the insulation product will have that information. However, there is no direct authority in RCRA section 6002 for the Federal government to require this information from anyone but the vendor. Therefore, vendors must make their own arrangements for obtaining this information from manufacturers.

c. *Verification.* Procuring agencies also are required to establish "reasonable verification procedures for estimates and certifications." See RCRA section 6002(i)(2)(C). If these verification procedures include access to manufacturers' records, then the procuring agency must use some authority other than RCRA to inspect these records or must require vendors to have an agreement with the manufacturer to supply such information or access to the procuring agency.

In general, insulation manufacturers maintain records of the feedstocks used in each "batch" for their own internal quality and specification controls. The optimum mix or recovered and virgin materials often remains the same for each type of insulation though variations may occur in individual batches.

In most cases, manufacturers will be able to provide a certification to vendors as to the specific feedstock content of the product shipped to a customer. It is not intended that the guideline require any additional records to be kept by the manufacturers; records normally kept should be complete enough to estimate or certify to recovered materials content accurately. However, to simplify the verification procedure and accommodate variations dictated by quality control and supply, the average of recovered materials used in each specific product over a one-month period may be used, if necessary, to meet the verification of estimates requirement.

EPA is proposing to recommend in § 248.23(c)(2) that one-month figures be used for estimates of feedstock percentages. If it is necessary to verify the exact content of a specific batch of insulation, the manufacturers' records for that batch can then be consulted.

However, if the vendor knows that the recovered materials content of an insulation product supplied to procuring agencies differs from the monthly average, then the average cannot be used. For example, if the monthly average is 30 percent recovered materials content but the insulation product supplied contains no recovered materials or conversely contains 60 percent recovered content, then the vendor cannot use the monthly average. Use of the average in such instances will be viewed as an attempt to circumvent the requirements of RCRA in supplying insulation products to the procuring agency.

Monthly *averages* cannot be used for certification. Every shipment may not contain recovered materials content equal to or greater than the average. However, the *minimum* percentage of recovered materials used in insulation products by the manufacturer can be determined from monthly records for certification purposes.

It has been suggested that the various insulation industries are very competitive and that the "recipes" for various insulation products are carefully guarded trade secrets. However, the special ingredients that distinguish one manufacturer's product from another's are used in very small quantities. The volumes of virgin and recovered material feedstocks in question are far larger and are the only feedstocks for which verification procedures would be necessary. EPA is proposing to recommend in § 248.23(c)(1) that, should it be necessary to consult manufacturers' records for verification, records of other ingredients should not be reviewed in order to protect trade secrets.

4. *Annual Review and Monitoring.* The fourth requirement of the affirmative procurement program is an annual review and monitoring of the

effectiveness of the program. EPA is proposing to recommend that the review include an estimate of the quantity of building insulation products purchased during the year, an assessment of the effectiveness of the agency promotion program, and an assessment of any remaining barriers to procurement of building insulation containing recovered materials. In assessing barriers to procurement, procuring agencies should determine whether they are internal or external. Internal barriers, such as resistance to use of building insulation with recovered content by agency personnel, without cause, can be corrected by the procuring agencies. External barriers, such as unavailability of building insulation with recovered content, may well be beyond the agencies' control.

EPA also believes that procuring agencies should review the range of estimates and certifications of recovered materials content provided by vendors during the year. Significant and repeated variations between standards, certifications and estimates would signal whether changes in approach (e.g., from case-by-case to minimum content standards) or different minimum content standards are warranted. EPA further believes that information provided by the estimation requirement will be particularly helpful to procuring agencies when they review their compliance with the requirement to purchase building insulation products with the highest percentage of recovered materials practicable.

EPA has determined that one intent of the requirement that vendors estimate the total percentage of recovered materials content is to provide information to procuring agencies that can be used in future procurements. Further, procuring agencies need to keep up-to-date on changes in recycling practices and availability of products containing recovered materials content. For these reasons, EPA believes that agencies should keep statistical records of building insulation product procurements to implement properly the intent of Congress in requiring an affirmative procurement program. A summary of these records should be included in the annual review and monitoring of the effectiveness of the program.

A program for gathering statistics need not be elaborate to be effective. However, agencies should monitor their procurements to provide data on the following:

(a) The percentages of recovered materials content in the products procured or offered;

(b) Comparative price information on competitive procurements;

(c) The quantity of each item procured over a fiscal year;

(d) The availability of the insulation products to procuring agencies;

(e) Type of performance tests conducted, together with the categories of building insulation products containing recovered materials content that failed the tests, the percentage of total virgin products and products containing recovered materials content supplied that failed each test, and the nature of the failure;

(f) Agency experience with the performance of the procured products.

Rather than keep records of each test performed, procuring agencies should identify the performance tests used and maintain records, by test, on the percentage of failures by building insulation products containing recovered materials content and on the nature of these failures.

EPA recommends that each procuring agency prepare a report on its annual review and monitoring of the effectiveness of its procurement program. If the agency is using the case-by-case approach, the report should discuss how that approach is maximizing the use of recovered materials content as required by RCRA section 6002. If the minimum content standard approach is used, the agency should discuss whether the standard should be raised, lowered, or remain constant for each item. The discussion should be based on reasonable determinations of price, quality, and availability as well as a comparison of estimates and certifications provided by the vendors. Agencies should also document their review of specifications and list those which are revised each year.

EPA notes that this guideline will apply to state and local procuring agencies as explained under "Applicability." Information drawn from the experience of Federal procuring agencies about purchases of insulation products containing recovered materials content would therefore be useful to state and local purchasing officials. Accordingly, EPA encourages Federal procuring agencies to make their reports available to the public.

V. Price, Competition, Availability, and Performance

As described above, Section 6002(c)(1) of RCRA provides that a procuring agency may decide not to purchase an item designated by EPA if it determines that the item is available only at an unreasonable price, a satisfactory level of competition cannot be maintained, the item is not reasonably available within a reasonable period of time, or the item fails to meet the performance standards. EPA has considered the effect of these limitations on insulation containing recovered material content procurement.

A. Price

Several factors will affect the market price, or bid price, of the designated insulation products, including the availability and cost of recovered material feedstocks, transportation costs, and so on. Becuase these factors can be site specific and are variable, EPA believes the best method of determining the price is through the marketplace. Further, fluctuation in the overall economy affects the prices of individual insulation products.

In many cases, more than one type of insulation could be selected for a particular installation. The different types of insulation do not compete on pricing alone; otherwise the least expensive insulation product would be used in all instances. There is no purchasing history based on relative prices of insulation products made with virgin versus recovered material content. The only price comparison EPA could make is by type of insulation made with virgin materials or with recovered materials content at a particular point in time. The price differences may be the result of factors other than recovered material content, such as special additives or features in one product as compared with another.

Further, manufacturers have suggested that the use of recovered materials rather than virgin materials rarely results in price differences. Cellulose and rock wool insulation is rarely available with primarily virgin content. Cellulose fiberboard and the polyisocyanurate/polyurethane rigid foams are commonly, though not always, made with recovered materials. Price differences between similar products are usually the result of factors unrelated to the choice of virgin or recycled feedstocks.

Each procuring agency may decide whether or not a "reasonable price" includes a price preference. As EPA stated in the paper guideline, 52 FR 37298–37299 (October 6, 1987), RCRA section 6002 does not provide explicit authority to EPA to authorize or recommend repayment of a price preference or to create a set-aside. Therefore, unless an agency has an independent authority to provide a price preference or to create a set-aside, EPA believes that a price is "unreasonable" if it is greater than the price of a

competing product made of virgin material.

However, it should be borne in mind that, when product specifications require a recovered material content, there is no way to guarantee that every item procured under those specifications was procured at a price no greater than the price that would have been paid in the absence of those specifications. On the contrary, EPA expects that there will be fluctuations in price in both directions. Therefore, EPA interprets the reasonable price provision of RCRA section 6002(c)(1)(C) for those specifications to mean that there is no projected or observed long-term or average increase over the price of comparable virgin items.

B. Competition

EPA recommends that determinations of "satisfactory" competition be made in accordance with Federal procurement law. For example, 48 CFR Part 14, Sealed Bidding, allows for award of bids even when a small number of bids have been received; see 48 CFR 14.407–1. In the case of negotiated contracts, 48 CFR 15.804–3(b) provides that competition exists if offers are solicited; two or more responsible offerors that can satisfy the Government's requirements submit price offers responsive to the solicitation's expressed requirements; and these offerors compete independently for a contract to be awarded to the responsible offeror submitting the lowest evaluated price.

EPA believes that the number of manufacturers for the designated types of building insulation products is sufficient to assure competitive bidding. Further, many vendors are able to bid products from a single manufacturer. EPA does not foresee insufficient competition for building insulation products made with recovered materials content. If a lack of competition results because of the recommended minimum content standards, EPA is proposing to recommend that procuring agencies re-evaluate the minimum content standards.

C. Availability

EPA believes that the building insulation products designated in the proposed guideline published today are currently available with recovered materials content in each of the following insulation categories: cellulose, cellulose fiberboard, perlite composite board, rock wool, polyurethane/polyisocyanurate rigid foam-in-place and board, and phenolic rigid foam. Although statistics on recovered material feedstock use have not been gathered for any type of building insulation product, both manufacturers and suppliers of recyclable feedstocks have indicated the flow of recovered materials into the insulation industries. Fiberglass insulation made with recovered cullet is not as widely available, and polystyrene insulation made with recovered materials may only be in developmental stages.

In the case of fiberglass insulation, EPA has determined that fiberglass is frequently available with manufacturer's waste cullet, but the percentages are not consistent batch to batch nor among different manufacturers. Currently there is more demand for both preconsumer and postconsumer cullet than there are available supplies. Although EPA has determined that cullet is a technically acceptable feedstock which is used by the fiberglass industry when it is available in constant quantities at competitive prices, the competition for bottle cullet from the glass container industry and for other types of preconsumer glass cullet from other industries makes it impractical to recommend a minimum cullet content standard for the fiberglass industry. However, these circumstances may change over time. Therefore EPA is proposing that procuring agencies use the case-by-case approach to purchase fiberglass insulation with recovered material content at this time.

Although EPA has not confirmed the use of recovered materials in polystyrene insulation, manufacturers have indicated that research and development efforts are underway. EPA therefore proposes that procuring agencies adopt a case-by-case approach for polystyrene insulation. This approach would provide the information necessary for the affirmative preference program required by Section 6002, without jeopardizing current procurements.

New types of insulation products may become available with recovered materials content. Procuring agencies can identify such new products and adaptations to existing products as they monitor new developments. These additional products must be included in the preference program as they become available.

D. Performance

In general, performance standards for building insulation products have been established without regard to the kind of feedstocks used. Manufacturers have indicated that the use of recovered materials rather than virgin feedstocks does not affect the performance of the insulation product in question. Performance is determined by other factors. Standard industry specifications for all but cellulose loose-fill insulation neither allow nor disallow recovered material content; cellulose loose-fill insulation specifically mentions that the basic materials is to be recycled. In many other types of insulation products, recovered material is commonly used. Therefore, EPA does not believe that product performance should be an issue of concern to procuring agencies.

VI. Implementation

Different parts of section 6002 refer to different dates by which procuring agencies must have completed or initiated a required activity: (1) May 8, 1986 (i.e., 18 months after enactment of HSWA), (2) one year after the date of publication of an EPA guideline, and (3) the date specified in an EPA guideline. As a result, there is some confusion with respect to which activities must be completed or initiated by each date. This section of the preamble explains these requirements.

First, under section 6002(d)(1), Federal agencies that have the responsibility for drafting or reviewing specifications for procurement items were to eliminate from such specifications any exclusion of recovered materials and any requirements that items be manufactured from virgin materials. This activity was to be completed by May 8, 1986.

Second, procuring agencies must assure that their specifications for procurement items designated by EPA require the use of recovered materials to the maximum extent possible without jeopardizing the intended end use of the item [section 6002(d)(2)]. In addition, procuring agencies must develop an affirmative procurement program for purchasing designated items, in this instance, building insulation products [section 6002(i)(1)]. Both of these activities must be completed within one year after the date of publication of this guideline as a final rule.

Third, procuring agencies which procure items designated by EPA must procure such items containing the highest percentage of recovered materials practicable [section 6002(c)(1)]. In addition, contracting officers must require vendors to submit estimates and certifications of recovered materials content [section 6002(c)(3)]. Both of these activities must begin after the date specified by EPA in the applicable guideline. EPA believes that procuring agencies should begin to procure the designated products as soon as the specification (or purchasing practice) revisions have been completed and the affirmative procurement

programs have been developed. Since these latter activities must be completed within one year after publication of this guideline as a final rule, affirmative procurement should begin no later than one year from publication as well. Section 248.26 specifies this implementation date.

EPA expects cooperation from affected procuring agencies in implementing this guideline. Under section 6002(g) of RCRA, the Office of Federal Procurement Policy (OFPP), in cooperation with EPA, is responsible for overseeing implementation of the requirements of section 6002 and for coordinating it with other Federal procurement policies. OFPP is required to report to Congress on actions taken by Federal agencies to implement section 6002.

VII. Summary of Supporting Analyses

A. General

Three background documents were prepared for EPA and have been placed in the docket for the proposed guideline: *Feasibility of a Procurement Guideline for Recovered Materials in Insulation Products* (E.H. Pechan & Associates, Inc., February, 1988), *Insulating Material Types and Manufacturers* (E.H. Pechan & Associates, Inc., June 1988), and *Energy and Economic Impacts of the Proposed Guideline for Procurement of Building Insulation Products Containing Recovered Materials* (E.H. Pechan & Associates, Inc., June 1988).

B. Environmental Impacts

Recently questions have arisen regarding the environmental consequences of use of chlorofluorocarbons (CFCs) in the manufacture of various items. One of the types of insulation covered by the proposed guideline, rigid plastic foams, contain CFCs. EPA is currently pursuing research and examining the regulatory issues.

Ozone depletion in the upper atmosphere has created environmental concerns. Fully halogenated CFCs are the primary suspects for causing substantial ozone depletion. EPA published a proposed rule on Protection of Stratospheric Ozone (40 CFR Part 82) on December 14, 1987 (52 FR 47486). The regulations would reduce consumption of CFCs and halons, are intended to reduce the release of CFCs and halons to the atmosphere, and would implement the Montreal protocols. The deadline for final EPA regulations is August, 1988.

CFCs are a key ingredient of PIR/PU, extruded PS, and phenolic rigid foam insulations. PIR/PU rigid foam insulation uses CFC–11 (fluorotrichloromethane). Extruded PS foam insulation is manufactured with CFC–12 (dichlorodifluoromethane). CFCs are used as a supplementary blowing agent and are retained within the closed insulation cells. CFCs have good thermal insulation properties and contribute significantly to the high R-values of the rigid foam insulations. Use of CFCs in closed cell foams has changed the emissions scenario from one of quick release (such as aerosol propellants) to a steady, very long term release. Industry sources have informally suggested that the half lives of CFCs in one-inch thick un-clad polyisocyanurate foam boards range 75 to 150 years.

Expandable foam polystyrene (EPS) is not made with CFCs. Instead, hydrocarbons such as pentane are used as blowing agents. R-values for equivalent thicknesses of EPS when compared with extruded polystyrene are said to be lower.

Insulation, by nature, is installed in the broadest range of building applications and geographies. Therefore, release of CFCs cannot be effectively controlled. Continued, and increasing use of CFCs in PIR/PU and extruded PS insulation as market share grows would effectively create a bank of CFCs slowly being released throughout the environment.

Unlike many other uses of CFCs, there are no currently available substitutes for PIR/PU and extruded PS rigid foam insulation. A substitute must interact suitably with the other chemical feedstocks, function as a supplementary blowing agent and also have superior thermal insulating properties. A substitute cannot be toxic in itself nor increase toxicities or flammability of the insulation product. The industry is faced with potential EPA CFC consumption reduction controls that could seriously impact manufacturers of this type of insulation. Consequently, research for a commercial substitute is being pursued aggressively.

EPA has not determined that the use of recovered materials content has any effect on use of chlorofluorocarbons and therefore solicits comments on this issue.

C. Energy Impacts

The primary energy impact of insulation is energy conservation as more buildings are insulated more efficiently. The use of recovered materials in the insulation products would not affect insulation or R-values.

The use of glass cullet rather than virgin materials in fiberglass insulation has been said to reduce energy consumption in fiberglass manufacture. DMT waste bottoms have been said to be burned to recover energy value if they are not recovered to produce products like insulation polyols. Data regarding quantities and potential energy impacts were not available. Therefore EPA solicits comments on the energy impacts of using glass cullet rather than virgin materials in fiberglass and in using DMT waste bottoms in polyols rather than as fuel.

D. Executive Order 12291

Under Executive Order 12291, EPA must determine whether a regulation is major or nonmajor. The proposed guideline is not a major rule because it is unlikely to result in:

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

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

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

EPA does not believe that this guideline will result in higher prices nor that adverse effects throughout the economy will result. In fact, the guideline may stimulate employment, competition, investment, productivity, innovation and United States enterprises may be able to compete more effectively with foreign based counterparts that are importing recovered materials.

This proposed rule was submitted to the Office of Management and Budget for review as required by Executive Order 12291.

E. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, whenever an agency publishes a general notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the impact of the rule on small entities (i.e., small businesses, small organizations, small governmental jurisdictions), unless the Administrator certifies that the rule will not have a significant economic impact on a substantial number of small entities.

As described in the environmental, energy, and economic impact document, the economic impact on both small businesses and small governmental jurisdictions is expected to be in some

cases, negligible and in other instances, beneficial. An extremely limited number of business and governmental entities are affected at all by the guideline.

For the above reasons, EPA certifies that the proposed guideline is not expected to have a significant economic impact on a substantial number of small entities. As a result, the guideline does not require a Regulatory Flexibility Analysis.

List of Subjects in 40 CFR Part 248

Commercial item descriptions, Government procurement, Insulation, Military specifications, Postconsumer materials, Recovered materials, Recycling, Resource recovery.

Dated: July 27, 1988.

Lee M. Thomas,

Administrator.

For the reasons set out in the preamble, it is proposed to amend Title 40 of the Code of Federal Regulations by adding a new Part 248 reading as follows:

PART 248—GUIDELINE FOR FEDERAL PROCUREMENT OF BUILDING INSULATION PRODUCTS CONTAINING RECOVERED MATERIALS

Subpart A—General

Sec.

Subpart B—Specifications

Subpart C—Affirmative Procurement Program

Authority: 42 U.S.C. 6912(a) and 6962.

Subpart A—General

§ 248.1 Purpose.

(a) The purpose of this guideline is to assist procuring agencies in complying with the requirements of section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (RCRA or the Act), as amended, 42 U.S.C. 6962, as that section applies to procurement of building insulation products designated in § 248.2 of this Part.

(b) This guideline contains recommendations for use in implementing the requirements of section 6002, including revision of specifications, purchasing activities and procurement.

(c) EPA believes that adherence to the recommendations in the guideline constitutes compliance with section 6002. However, procuring agencies may adopt other types of procurement programs consistent with section 6002.

§ 248.2 Designation.

EPA designates building insulation products as items which are or can be produced with recovered materials and whose procurement by procuring agencies will carry out the objectives of section 6002 of RCRA.

§ 248.3 Applicability.

(a)(1) This guideline applies to all procuring agencies and to all procurement actions involving building insulation products where the procuring agency purchases $10,000 or more worth of one of these items during the course of a fiscal year, or where the cost of such items or of functionally equivalent items purchased during the preceding fiscal year was $10,000 or more. For purposes of the $10,000 threshold, functional equivalency extends to all building insulation products used for ceilings, floors, foundations, and walls. All building insulation products are considered to be functionally equivalent and include the following product types and materials:

(i) Loose-fill insulation, including but not limited to cellulose fiber, mineral fibers (fiberglass and rock wool), vermiculite, and perlite;

(ii) Blanket and batt insulation, including but not limited to mineral fibers (fiberglass and rock wool);

(iii) Board (sheathing, roof decking, wall panel) insulation, including but not limited to cellulose fiberboard, glass fiberboard, foam glass, perlite, polyurethane, polyisocyanurate, polystyrene, phenolics, and composites; and

(iv) Spray-in-place insulation, including but no limited to foam-in-place polyurethane and polyisocyanurate, and spray-on cellulose.

(2) This guideline applies to Federal agencies, to State or local agencies using appropriated Federal funds, and to persons contracting with any such agencies with respect to work performed under such contracts. Federal agencies should note that the requirements of RCRA section 6002 apply to them whether or not appropriated Federal funds are used for procurement of items designated by EPA.

(3) The $10,000 threshold applies to procuring agencies as a whole rather than to agency subgroups such as regional offices or subagencies.

(b) The term "procurement actions" includes purchases made directly by a procuring agency and purchases made indirectly by any person in support of work being performed for a procuring agency (e.g., by a contractor).

(c) This guideline does not apply to purchases which are not the direct result of a contract, grant, loan, funds disbursement, or agreement with a procuring agency.

§ 248.4 Definitions.

As used in this guideline:

(a) "Act" or "RCRA" means the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, as amended, 42 U.S.C. 6901 *et seq.*

(b) "Blanket insulation" means relatively flat and flexible insulation in coherent sheet form, furnished in units of substantial area. Batt insulation is included in this term.

(c) "Board insulation" means semi-rigid insulation preformed into rectangular units having a degree of suppleness, particularly related to their geometrical dimensions.

(d) "Building insulation" means a material, primarily designed to resist heat flow, which is installed between the conditioned volume of a building and adjacent unconditioned volumes or the outside. This term includes but is not limited to insulation products such as blanket, board, spray-in-place, and loose-fill that are used as ceiling, floor, foundation, and wall insulation.

(e) "Ceiling Insulation" means a material, primarily designed to resist heat flow, which is installed between the conditioned area of a building and an unconditioned attic as well as common ceiling floor assemblies between separately conditioned units in multi-unit structures. Where the conditioned area of a building extends to the roof, ceiling insulation includes such a material used between the underside and upperside of the roof.

(f) "Cellular polyisocyanurate insulation" means insulation produced principally by the polymerization of polymeric polyisocyanates, usually in the presence of polyhydroxl compounds with the addition of catalysts, cell stabilizers and blowing agents.

(g) "Cellular polystyrene insulation" means an organic foam composed principally of polymerized styrene resin processed to form a homogenous rigid mass of cells.

(h) "Cellular polyurethane insulation" means insulation composed principally of the catalyzed reaction product of polyisocyanurates and polyhydroxl compounds, processed usually with a blowing agent to form a rigid foam

having a predominantly closed cell structure.

(i) "Cellulose fiber" means insulation composed principally of cellulose fibers usually derived from paper, paperboard stock or wood, with or without binders.

(j) "Cellulose fiber loose-fill" means a basic material of recycled wood-based cellulosic fiber made from selected paper, paperboard stock or ground wood stock, excluding contaminated materials which may reasonably be expected to be retained in the finished product, with suitable chemicals introduced to provide properties such as flame resistance, processing and handling characteristics. The basic cellulosic material may be processed into a form suitable for installation by pneumatic or pouring methods.

(k) "Cellulose fiberboard" means fibrous felted, homogenous, or laminated board, principally composed of cellulose fibers (usually derived from paper, paperboard stock, wood or cane), with or without binders, which provides thermal resistance among other properties.

(l) "Commercial Item Descriptions" are a series of simplified item descriptions under the Federal specifications-and-standards program used in the acquisition of commercial off-the-shelf and commercial type products.

(m) "Conditioned" means heated and/or mechanically cooled.

(n) "Federal agency" means any department, agency, or other instrumentality of the Federal government; any independent agency or establishment of the Federal government including any government corporation; and the Government Printing Office.

(o) "Floor insulation" means a material, primarily designed to resist heat flow, which is installed between the first level conditioned area of a building and an unconditioned basement, a crawl space, or the outside beneath it. Where the first level conditioned area of a building is on a ground level concrete slab, floor insulation includes such a material installed around the perimeter of or on the slab. In the case of mobile homes, floor insulation also means skirting to enclose the space between the building and the ground.

(p) "Foam-in-place insulation" foam is rigid cellular foam produced by catalyzed chemical reactions that hardens at the site of the work. The term includes spray-applied and injected applications such as spray-in-place and pour-in-place.

(q) "Foundation insulation" means a material, primarily designed to resist heat flow, which is installed in foundation walls between conditioned volumes and unconditioned volumes and the outside or surrounding earth, at the perimeters of concrete slab-on-grade foundations, and at common foundation wall assembles between conditioned basement volumes.

(r) "Invitation For Bids" is the solicitation for prospective suppliers by a purchaser requesting their competitive price quotations.

(s) "Loose-fill insulation" means insulation in granular, nodular, fibrous, powdery, or similar form, designed to be installed by pouring, blowing or hand placement.

(t) "Mineral fiber insulation" means insulation (rock wool or fiberglass) which is composed principally of fibers manufactured from rock, slag or glass, with or without binders.

(u) "Person" means an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, Federal agency, State, municipality, commission, political subdivision of a State, or any interstate body.

(v) "Phenolic insulation" means insulation made with phenolic plastics which are plastics based on resins made by the condensation of phenols, such as phenol or cresol, with aldehydes.

(w) "Plastic rigid foam insulation" means cellular polyurethane, cellular polyisocyanurate, cellular polystyrene, and phenolic foam insulation.

(x) "Postconsumer recovered materials" means any product generated by a business or a consumer which has served its intended end use, and which has been separated from solid waste for the purposes of collection, recycling, or disposition, and which does not include secondary (or manufacturing waste) material.

(y) "Postconsumer recovered paper" means (1) paper, paperboard and fibrous wastes from retail stores, office buildings, homes and so forth, after they have passed through their end-usage as a consumer item including: Used corrugated boxes; old newspapers; old magazines; mixed waste paper; tabulating cards and used cordage; and (2) all paper, paperboard and fibrous wastes that enter and are collected from municipal solid waste.

(z) "Practicable" means capable of being used consistent with: performance in accordance with applicable specifications, availability at a reasonable price, availability within a reasonable period of time, and maintenance of a satisfactory level of competition.

(aa) "Procurement item" means any device, good, substance, material, product, or other item, whether real or personal property, which is the subject of any purchase, barter, or other exchange made to procure such item.

(bb) "Procuring agency" means any Federal agency, or any State agency or agency of a political subdivision of a State which is using appropriated Federal funds for such procurement, or any person contracting with any such agency with respect to work performed under such contract.

(cc) "Purchasing" means the act of and the function of responsibility for the acquisition of equipment, materials, supplies, and services, including: Buying, determining the need, selecting the supplier, arriving at a fair and reasonable price and terms and conditions, preparing the contract or purchase order, and follow up.

(dd) "Purchasing activities" means all activities included in the purchasing function.

(ee) "Recovered materials" means waste material and byproducts which have been recovered or diverted from solid waste, but such term does not include those materials and byproducts generated from, and commonly reused within, an original manufacturing process.

(ff) "Request for Proposal" is a request for an offer by one party to another of terms and conditions with references to some work of undertaking; the initial overture or preliminary statement for consideration by the other party to a proposed agreement.

(gg) "Specification" means a description of the technical requirements for a material, product, or service that includes the criteria for determining whether these requirements are met. In general, specifications are in the form of written commercial designations, industry standards, and other descriptive references.

(hh) "Spray-in-place insulation" means insulation material that is sprayed onto a surface or into cavities and includes cellulose fiber spray-on as well as plastic rigid foam products.

(ii) "Spray-in-place (foam-in-place) foam" is rigid cellular polyurethane or polyisocyanurate foam produced by catalyzed chemical reactions that hardens at the site of the work. The term includes spray-applied and injected applications.

(jj) "Wall insulation" means a material, primarily designed to resist heat flow, which is installed within or on the walls between conditioned areas of a building and unconditioned areas of a building or the outside, as well as common wall assemblies between

separately conditioned units in multiple unit structures.

Subpart B—Specifications

§ 248.10 Revisions.

(a) Federal agencies that have the responsibility for drafting or reviewing specifications for procurement items procured by Federal agencies were required to revise their specifications, by May 8, 1986, to eliminate any exclusion of recovered materials and any requirement that items be manufactured from virgin materials.

(b) Within one year after the effective date of this guideline, each procuring agency must assure that its specifications for building insulation products require the use of recovered materials to the maximum extent possible without jeopardizing the intended end use of these items.

§ 248.11 Recommendations.

(a) Procuring agencies should continue to reference Commercial Item Descriptions or appropriate standards when purchasing building insulation products, after such Commercial Item Descriptions and industry standards (and specifications which are referenced) have been reviewed to be certain that the use of recovered materials is allowed.

(b) Procuring agencies should include minimum content standards or substantially equivalent methods to prefer recovered materials content in their invitations for bids and requests for proposals when purchasing building insulation products or causing the purchase of building insulation products in any contract.

(c) If a procuring agency determines that a building insulation product containing recovered materials cannot meet reasonable performance standards, then the agency can exclude the product on a case-by-case basis. Procuring agencies should document such determinations, and the documentation should reference the particular tests used to judge performance. Procuring agencies should also reference such documentation in subsequent solicitations for the specific item to avoid repetition of previously documented findings.

(d)(1) Procuring agencies should assure that language in new specifications for new insulation products, and for existing products which are introduced with recovered materials content, allows recovered materials content. Methods to monitor the introduction of new or adapted products are detailed in §§ 248.21 and 248.24 of this Part.

(2) As new building insulation products containing or capable of containing recovered materials are identified, minimum content standards or equivalent preferences for recovered material content should be inserted in invitations for bids and requests for proposals whenever such products could be offered.

Subpart C—Affirmative Procurement Program

§ 248.20 General.

Within one year after the date of publication of this guideline as a final rule, each procuring agency which procures building insulation products must establish an affirmative program for procuring such items containing recovered materials. The program must meet the requirements of section 6002(i) of RCRA, including the establishment of a preference program; a promotion program; procedures for obtaining estimates and certification of recovered materials content and for verifying the estimates and certifications; and an annual review and monitoring program. This subpart provides recommendations for implementing section 6002(i).

§ 248.21 Preference program.

(a)(1) EPA recommends that procuring agencies establish minimum recovered material content standards for building insulation products commercially available with recovered materials content, subject to the limitations described in paragraphs (a)(2) and (c) of this section, so as to achieve procurement of building insulation products containing recovered materials to the maximum extent practicable.

(2) EPA recommends the establishment of minimum postconsumer recovered paper content standards for building insulation products made with cellulose fiber in accordance with RCRA section 6002(i).

(3) EPA recommends that minimum content standards (i) be based on insulation material type, (ii) be based on the weight of component parts, (iii) refer only to the core insulation material and exclude from consideration any facing, binding or other materials surrounding or attached to the core, and (iv) include any insulation material that is used in composite products.

(4) EPA recommends that the following minimum content standards be used:

Material type	Percent by weight
Cellulose loose-fill and spray-on.	75% postconsumer recovered paper material.
Cellulose fiberboard	50% postconsumer recovered paper material.
Perlite composite board	23% postconsumer recovered paper material.
Polyisocyanurate: polyurethane:	
Rigid foam board	9% recovered material.
Foam-in-place	5% recovered material.
Phenolic rigid foam	4% recovered material.
Rock wool	50% recovered material.

(b)(1) In those cases where recovered material content is not yet, or may not be consistently, available, EPA recommends that a case-by-case approach be used.

(2) The case-by-case approach as described in RCRA section 6002(i)(3)(A) of RCRA allows procuring agencies to make an award to a vendor offering items with less than the minimum content standard. All other things being equal, the vendor offering the highest percentage of recovered material content must be awarded the bid. EPA recommends that procuring agencies use the case-by-case approach to purchase building insulation products in three instances:

(i) When an item can technically contain recovered materials content but is not commercially available, or is not consistently available,

(ii) When the item cannot be obtained with the standard minimum content for recovered material and no other method can be used to establish a new minimum content standard, or

(iii) When an item becomes unavailable with recovered material content. Use of the case-by-case approach should continue in this instance until it is proven that the recovered material will no longer be available for the item or until a new minimum content standard can be set.

(c) The recommendations in paragraphs (a) and (b) of this section, as well as any other substantially equivalent affirmative procurement program that an agency may adopt, are subject to the following limitations listed in section 6002(c)(1) of RCRA:

(1) Maintenance of a satisfactory level of competition;

(2) Availability within a reasonable period of time;

(3) Ability to meet the specifications in the invitation for bids;

(4) Availability at a reasonable price.

(d) EPA recommends that if procuring agencies have difficulty obtaining a building insulation product for the reasons listed in paragraph (c) of this

section, the procuring agencies should re-evaluate the minimum content standard.

(e) Procuring agencies should examine their purchasing practices and eliminate those which would inhibit the purchase of building insulation products containing recovered materials (e.g., bids for "all or none" when a broad range of insulation products are required).

(f) Procuring agencies should make determinations regarding competition and availability in accordance with the Federal Acquisition Regulation (FAR), 48 CFR Ch. 1 *et seq.*

§ 248.22 Promotion program.

EPA recommends that procuring agencies use the following methods, at a minimum, to promote their preference programs:

(a) Place a statement in procurement invitations in the *Commerce Business Daily* or similar publications describing the preference program.

(b) Describe the preference program in solicitations or invitations for bids for or which include building insulation.

(c) Discuss the preference program at bidders' conferences.

(d) Inform industry trade associations about the preference program.

(e) Publicize preferences for building insulation products made with recovered materials in all product-related services and publications (e.g., Department of Housing and Urban development publications and product-related services developed in compliance with section 521 of the National Housing Act, such as: National Building Codes, Bulletins, Materials Releases, Engineering Bulletins, and Use of Materials Information).

(f) Issue press releases describing the affirmative procurement program to recycling industry publications.

§ 248.23 Estimates, certification, and verification.

Each procuring agency must develop estimation, certification and verification procedures:

(a) When a vendor supplies a building insulation product, the contracting officer must require the vendor to estimate the total percentage of recovered material content in that insulation product. EPA recommends that procuring agencies maintain records of these estimates for three years by type of product, quantity purchased, and price paid.

(b)(1) When a procurement solicitation or invitation for bid requires a minimum recovered materials content, procuring agencies must require offerors or bidders to certify that the percentage of recovered material to be used in the performance of the contract will be at least the amount required by the solicitation or invitation for bid.

(2) When using the case-by-case approach, a procuring agency must require offerors or bidders to certify that the percentage of recovered materials to be used in the performance of the contract will be at least the minimum percentage described in the offer in response to the invitation for bids.

(c)(1) EPA recommends that procuring agencies develop verification procedures for certifications and estimates of recovered materials content in building insulation products that require access only to manufacturers' records of recovered materials and comparable virgin materials used in each batch. Verification need not include review of records of other ingredients used in small percentages, which could include confidential business information.

(2) EPA recommends that the average of recovered materials used in a specific insulation product over a one-month period be used, if necessary, for verification of estimates of recovered materials content actually utilized in insulation products supplied to a procuring agency.

§ 248.24 Annual review and monitoring.

(a) Each procuring agency must conduct an annual review and monitoring of the effectiveness of its affirmative procurement program.

(b) EPA recommends that the annual review include the following items:

(1) An estimate of the quantity of building insulation with recovered material content purchased and the total quantity of building insulation products purchased.

(2) An assessment of the effectiveness of the promotion program.

(3) An assessment of any remaining barriers to purchase of insulation with recovered content to determine whether they are internal (e.g., resistance to use) or external (e.g., unavailability).

(4) A review of the range of estimates and certifications of recovered materials content in building insulation products provided by vendors during the year to determine whether minimum content standards should be raised or lowered, or whether a change from the case-by-case approach to the minimum content standard approach is necessary.

(5) A program to gather statistics. Procuring agencies should monitor their procurements to provide data on the following:

(i) The percentages of recovered materials content in the products procured or offered;

(ii) Comparative price information on competitive procurements;

(iii) The quantity of each item procured over a fiscal year;

(iv) The availability of the insulation products to procuring agencies;

(v) Type of performance tests conducted, together with the type of building insulation product containing recovered materials content that failed the tests, the percentages of total virgin products and products containing recovered materials content supplied that failed each test, and the nature of the failure;

(vi) Agency experience with the performance of the procured products.

(c) Procuring agencies should prepare a report on their annual review and monitoring of the effectiveness of their procurement programs and make these reports available to the public. The reports should contain the following information:

(1) If the case-by-case approach or a substantially equivalent alternative is being used, a discussion of how the procuring agency's approach procures building insulation products containing recovered materials to the maximum extent practicable. The basis for this discussion should be a review of the data compiled on recovered materials content, price, availability, and performance, as well as a comparison of estimates and certifications provided by the vendors.

(2) If the minimum content standards approach is being used, a discussion of whether the minimum content standards in use should be raised, lowered, or remain constant for each item. The basis for this discussion should be a review of the data compiled on recovered materials content, price, availability, and performance, as well as a comparison of estimates and certifications provided by the vendors.

(3) Documentation of specification revisions made during the year.

§ 248.25 Implementation.

Procuring agencies must begin procurement of building insulation products, in compliance with this guideline, one year from [the date of publication of the final guideline].

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Tuesday
August 2, 1988

Part V

Environmental Protection Agency

40 CFR Parts 35 and 142

National Primary Drinking Water Regulations Implementation; Primary Enforcement Responsibility; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 35 and 142

[WH-FRL-3328-8]

National Primary Drinking Water Regulations Implementation; Primary Enforcement Responsibility

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to revise the requirements for States to obtain primary enforcement authority ("primacy") for the public water system supervision (PWSS) program, authorized under the Safe Drinking Water Act (SDWA) (42 U.S.C. 300f *et seq.*). The proposal would also add certain requirements for maintaining primacy. Specifically, the proposal would establish the procedures and deadlines for State submission and EPA review and approval or disapproval of program changes, and the actions to be taken if States with primacy do not adopt the new requirements on schedule. The proposed rule would also change the frequency of State reports to EPA from annually to quarterly, and add a requirement for States to adopt EPA's determination of best available technology (BAT) for use in granting variances from national primary drinking water regulations. Finally, the proposal would clarify the requirement to demonstrate program capability before an initial program grant is given and to obtain or retain primacy.

DATES: Written comments should be submitted by October 3, 1988. A public hearing will be held in Washington, DC, on Tuesday, August 30, 1988, beginning at 9:00 a.m. in the Auditorium of the Education Center, EPA, 401 M Street SW., Washington, DC 20460.

ADDRESSES: Send written comments to Murlene Lash, Comment Clerk, State Programs Division, Office of Drinking Water (WH-550E), Environmental Protection Agency, 401 "M" Street SW., Washington, DC 20460. A copy of the comments and supporting documents will be available for review during normal business hours at EPA, Room 1101 East Tower, 401 "M" Street SW., Washington, DC 20460. EPA requests that anyone planning to attend the public hearing (especially those who plan to make statements) register in advance by calling Murlene Lash at (202) 382-5522, or writing her at EPA, WH-550E, 401 "M" Street SW., Washington, DC 20460. Persons planning to make statements at the hearing are encouraged to submit written copies of their remarks at the time of the hearing.

FOR FURTHER INFORMATION CONTACT: The Safe Drinking Water Hotline, toll-free (800) 426-4791, or in Washington, DC at (202) 382-5533, or Carl Reeverts, Deputy Director, State Programs Division, Office of Drinking Water, 401 "M" Street SW., Washington, DC 20460, telephone (202) 382-5522.

SUPPLEMENTARY INFORMATION:

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I. Authority

Section 1413 of the Safe Drinking Water Act ("SDWA" or "the Act") establishes requirements a State must meet to obtain primary enforcement responsibility ("primacy") for the public water system supervision (PWSS) program. These include: (1) Adopting drinking water regulations no less stringent than the national primary drinking water regulations (NPDWRs) in effect under sections 1412(a) and 1412(b); (2) adopting and implementing adequate procedures for enforcement; (3) keeping records and making such reports with respect to its activities as EPA may require by regulation; (4) issuing variances and exemptions (if allowed at all by the State) under conditions no less stringent than allowed by sections 1415 and 1416; and (5) adopting and being able to implement an adequate plan for the provision of safe drinking water under emergency situations.

II. Background

40 CFR Part 142, Subpart B sets out requirements for States to obtain primacy for the PWSS program, as authorized by section 1413 of the SDWA. EPA first promulgated these regulations on January 20, 1976; since then, the basic requirements have remained relatively unchanged. Since 1976, however, much has happened in the PWSS program. With the exception of Wyoming, Indiana, and the District of Columbia, all eligible States and territories have received PWSS primacy. In addition, the SDWA amendments of 1986 made sweeping changes in the scope and content of the drinking water program. For example, the amendments mandate that EPA promulgate NPDWRs for 83 drinking water contaminants by 1989 and for 25 additional contaminants every three years thereafter. In addition, EPA must promulgate NPDWRs to specify criteria under which filtration is required as a treatment technique for public water systems supplied by surface water sources and which require disinfection as a treatment technique for all public water systems. EPA also was required to revise its existing public notification procedures, which was completed on October 28, 1987. (See 52 FR 41534.) The 1986 SDWA amendments also increase the Agency's authority to enforce the requirements of the national primary drinking water regulations.

With these extensive changes in the program and the law, portions of the primacy regulations at 40 CFR Part 142, Subpart B have become outdated. The major deficiency in the existing primacy regulations is that they neither require States with primacy to modify their programs to adopt new or revised EPA national primary drinking water regulations, nor do they provide a procedure for obtaining EPA approval for these changes.

The rule EPA is proposing in this notice would specify which new requirements must be adopted by a State to maintain primacy, when these new requirements must be adopted, and the procedures for State submittal and EPA review and approval of State program revisions. In developing this proposal, EPA considered the impact of the federal program changes on current State programs and evaluated which new provisions might require State statutory or other major institutional changes within the State.

III. Summary of Proposed Changes to Subpart B

The following table shows the relationship between the proposed

amendments to the PWSS primacy regulations in 40 CFR Part 142, Subpart B and the current regulations in that subpart.

Proposed subpart B revision	Content of revised section	Current subpart B	Change to current subpart B
142.10	Requirements for a determination of primary enforcement responsibility.	142.10	Made conforming changes; clarified capability requirement and BAT for variance requirement.
142.11	Initial determination of primary enforcement authority	142.11; 142.12(a)	Made conforming changes and redesignated; added Attorney General statement requirement.
142.12	Revision of State programs		New section.
142.13	Public hearing	142.13	Made conforming changes.
142.14	Records kept by States	142.14	Unchanged.
142.15	Reports by States	142.15	Amended.
142.16	Special primacy requirements	142.16	Unchanged. [1]
142.17	Procedures for withdrawal of State programs	142.12(b)	Redesignated and retitled.

[1] This section was modified as part of the public notification regulation, promulgated on October 28, 1987 (52 FR 41534). The modified § 142.16 replaces the old section on State public notification requirements.

As indicated in the table, the proposal would restructure the current Subpart B to add a new section on revision of State programs (new § 142.12), retitle and place in a separate section the existing procedures for withdrawal of State programs (new § 142.17), incorporate revised State reporting requirements (revised § 142.15), and make other conforming changes in the remaining sections to be consistent with the new State program revision section. Under this proposal, the revised primacy regulations would not be applicable to State program revisions to adopt new and revised EPA regulations promulgated before the effective date of this rule. State requests for program revisions to adopt EPA regulations promulgated before the effective date of this rule (e.g., the public notification requirements) are to comply with the current regulations under Part 142, Subpart B, and any special primacy requirements in the program regulation to be adopted.

IV. Discussion of Today's Proposed Rule

A. New Program Requirements Under 1986 SDWA Amendments

As noted above, the SDWA amendments of 1986 greatly increased the scope and content of the PWSS programs. The current program is operated principally by the States; 54 States and Territories operate approved primacy programs under the authority of section 1413 of the Safe Drinking Water Act. Of the States and Territories eligible for primacy, only Indiana and Wyoming do not have primacy. The programs in these two States, in Washington, DC, and on Indian lands are directly implemented by EPA.

In this notice, EPA is proposing that, to retain primacy, each State with a currently approved primacy program must revise that program to incorporate new EPA regulations promulgated under section 1412 (a) and (b), sections 1415 and 1416, and the revised public notification requirements under section 1414. Under the SDWA, EPA has had a policy of approving only State programs that have adopted the full EPA program. This policy was established from the start to avoid split accountability between EPA and the States for direct operations and to ensure that, to the extent possible, public water systems were regulated under a single regulatory scheme. This policy avoids confusion among the regulated community and the public regarding which regulations must be followed to comply with the SDWA requirements. For the same reasons, EPA intends to continue this "full primacy" policy as it implements the 1986 SDWA amendments.

The proposal maintains the "full primacy" policy by setting a deadline for States to revise their approved primacy programs to adopt new and revised EPA regulation. This is discussed in Part IV.C. below. Although the proposal allows extensions to these deadlines for a limited period, some States may be unable to adopt the new requirements by the end of the extension period and, thus, would be in violation of the primacy requirements. In some rare situations, a primacy State may never agree to or be able to adopt all the new and revised requirements promulgated by EPA. EPA solicits comments on the impact the "full primacy" policy will have on current State primacy programs, what responsibility EPA should assume to implement and enforce new federal requirements where the State has not adopted them, and the practical implication of a program that is partially implemented by both EPA and the State.

Table 1 below summarizes the recent and upcoming EPA regulations currently identified that the States would be required to adopt to retain primacy. The list of regulations in Table 1 is not meant to be complete and is subject to change as EPA proceeds to implement the 1986 SDWA amendments.

TABLE 1.—SUMMARY OF NEW EPA REQUIREMENTS UNDER THE SDWA AMENDMENTS ENACTED JUNE 19, 1986

Regulatory Packages
New NPDWRs:
VOCs
Coliforms
Lead/Copper
Inorganics/Synthetic Organics
Radionuclides
Other Mandated NPDWRs
1st Additional 25 NPDWRs
Public Notification
Filtration & Disinfection of Surface Water (NPDWR)
Disinfection for Groundwater/Disinfectant By-products (NPDWR)

For NPDWRs promulgated under sections 1412(a) and (b) and for the variance and exemption provisions (under sections 1415 and 1416), States must adopt new provisions that are "no less stringent" than the EPA regulations. EPA is also requiring that States adopt public notification requirements that are no less stringent than the revised Federal regulations (see 52 FR 41534, October 28, 1987).

B. Basic Requirements for State Program Revisions (Section 142.12(a))

EPA is proposing a new section (§ 142.12) to establish the requirements, application procedures, and the EPA review and decision process for State program revisions. EPA is proposing to define "State program revision" as a statutory, regulatory, or administrative change to the "approved State primacy program." The proposed rule defines the

"approved State primacy program" as the program elements submitted with the initial State application for primacy pursuant to § 142.11(a) and subsequently approved by EPA and any EPA-approved revisions to these elements. The elements required under § 142.11(a) include: The text of the State's drinking water statute and regulations; a description of the State's procedures for the enforcement of the State regulations (including six sub-elements); a statement that the State will make such reports as required; the statutory and regulatory provisions related to variances and exemptions (if the State grants them); a description of the State's plan for providing safe drinking water under emergency conditions; and an Attorney General's statement demonstrating adequate State authority. The Attorney General's Statement is a new requirement proposed in this notice and is discussed in further detail below. These elements, which would be updated with each State program revision and would be maintained by both EPA and the State, would describe the current approved State primacy program at any point in time. Not all portions of the State drinking water program are necessarily part of the approved State primacy program; e.g., many States have an operator certification program, a permit program for water treatment plants, or regulations governing other contaminants beyond the EPA NPDWRs. These would not be considered part of the approved program because they go beyond the primacy requirements established by EPA pursuant to the SDWA.

Section 142.12(a) of the proposed rule would require a State to notify EPA in writing of any modifications to its statutory or regulatory authority or program procedures that may affect the approved primacy program. This notification requirement is to ensure that EPA is kept informed of actions that may affect the authority or capability of the State to fully implement the approved primacy program. The material submitted with the notification must be sufficient to allow EPA to determine whether the change constitutes a revision to the approved primacy program, thus requiring EPA review and approval.

Based on the State's notification, EPA would determine, on a case-by-case basis, whether the changes constitute revisions to the State primacy program and thus must be submitted for approval. Under this proposal, State actions to adopt any new or revised EPA regulation (except for very minor changes, which are discussed below) would be considered a revision to the approved primacy program and the State would be required to submit it to EPA for approval. Therefore, for revisions to adopt new or revised EPA regulations, the State could bypass the notification step and simply submit a request for approval of the revision directly. For minor program revisions the information submitted with the notification may be sufficient to review and approve the revision; in such cases, the Agency does not intend to ask the State to submit a separate, formal request for approval. Likewise, in the rare circumstances in which a new or revised EPA regulation does not require any changes to the approved primacy program, the State would simply notify EPA of this fact; in such a case, the Agency does not intend to require the State to submit a formal rquest for approval.

The proposal would also allow the Administrator to require State submission of materials whenever he or she has reason to believe that the State program may have changed, in the event the State fails to notify the Agency of such a change. If the Administrator determines that the State changes affect the approved primacy programs, the Administrator would ask the State to submit a request for EPA approval of the State program revision.

EPA invites comment on whether it is appropriate for the Administrator (or his or her designee) to require States to notify EPA of all changes to their authorities and procedures that may affect the approved primacy program and to approve or disapprove each State program change that revised the approved primacy program. Comments are also requested on what categories of State changes do not require notification and what program revisions are minor and do not require the State to submit a separate, formal request for EPA approval.

C. Timing of State Program Revisions (Section 142.12(b))

Proposed § 142.12(b) would require the State to submit to EPA final requests for approval of program revisions to adopt new or revised EPA regulations within 15 months of the promulgation of EPA's regulations. The Administrator would be required to act on such requests within 90 days after receipt of the final and complete State request. EPA would not begin its final review until it has determined that the State submission is complete and final. The proposal would allow the Administrator to initiate an extension of these deadlines or approve a State request for an extension of the 15-month deadline under certain circumstances.

EPA is proposing the 1-month period for review of State requests for approval of program revisions to coincide with the effective date of most of the new EPA regulations. (Section 1412(b)(10) of the SDWA provides that NPDWRs become effective 18 months after promulgation by EPA.) The Agency did consider options for "clustering" the deadlines to minimize the disruption in State programs that may occur with the large number of sequential changes expected over the next several years. EPA recognizes the advantages of "clustering" program revisions and has proposed that "clustering" be an explicit factor in deciding whether to grant State requests for an extension of the 18-month period. (See discussion below.)

By using the effective date of the NPDWR as the deadline for the adoption and review process, EPA would minimize situations of split program responsibility or "partial primacy" because a State that adopts the change and has it approved on time would implement and enforce the new requirement from the time it is effective. This would avoid the need for EPA to implement and enforce the new requirement in a situation where all other requirements are administered by the State. Splitting oversight responsibilities between EPA and the primacy State, however briefly, may confuse administration of the program and make it difficult for public water system owners and operators and the public to determine which State and Federal regulations are being enforced by whom at any given time.

Nevertheless, EPA recognizes that for valid reasons a State request for approval and EPA's review of State program revisions may take more than 18 months. EPA wishes to avoid initiating primacy withdrawal in cases where a State is making a good-faith effort to adopt the new requirements. Therefore, EPA is proposing that a State may request an extension for up to two years, if the State either has statutory or regulatory barriers to meeting the deadline or temporarily lacks program capability to implement adequately the new requirements. Under the proposal, if a State anticipates submission of a final request for approval of a program revision to EPA more than 15 months after promulgation of the EPA regulation, the State would be required to request an extension of the deadline before the expiration of the 15-month period.

To obtain an extension, the State must demonstrate that it: (1) Is requesting the

extension to group two or more program revisions in a single legislative or regulatory action or otherwise cannot meet the original deadline in spite of a good faith effort to do so; (2) is taking steps to adopt and implement the new provisions within its existing authority; and (3) will develop the capability necessary to implement adequately the new provisions. The extension request must include a schedule setting forth when and how the States will be able to adopt and effectively implement the new provisions.

In granting the State an extension to the 18-month deadline, EPA would put itself in the position of directly implementing the new requirement until it finally approves the State's program revision. To minimize the disruption in State program administration in these cases, EPA is proposing that the State, as a condition of obtaining the extension, implement the following interim measures, as they apply to the new regulations, during the extension period: Inform public water systems of the new requirements and the fact that EPA will be overseeing implementation of the requirement until EPA approves the primacy program revision; collect and store laboratory results and other compliance data; conduct informal follow-up on violations and assist EPA in development of enforcement actions; provide technical assistance to public water systems; and provide EPA with all information prescribed by § 142.15 on State reporting.

If a State's request for an extension is based on a temporary lack of program capability to implement the new requirement, the rule would require the State to take steps to remedy the capability deficiency during the extension period. Actions necessary to accomplish this would be determined case by case considering the administrative, technical, and management areas to be addressed. Such actions might include: (1) An increase in resources to the program; (2) training of existing staff; (3) development of State procedures, guidelines, and policies to implement the new provisions; etc. The proposal would require the State to submit with its extension request a plan to build State capability during the extension period.

The extension request could be approved by EPA for a period not to exceed two years. The full extension period should be used only where there is a clear need for that long a period (e.g., when State legislative changes are required in States where the legislature meets infrequently). The procedures for EPA review and oversight of the State program during the extension period would be developed State by State, within the general criteria outlined in this section.

The extension period would be limited to two years because of the need to limit the period during which States may continue to operate with partial primacy. Even though a State would be implementing the new requirements within the limits of its authority and capabilities as a condition of the extension, EPA believes its policy of full primacy requires a fixed deadline for State adoption of the new requirements. Therefore, under the proposal, where a State has not obtained EPA approval of a program revision by the deadline, EPA may initiate procedures leading to withdrawal of the primacy program. EPA intends to begin procedures leading to withdrawal of the primacy program if the State has not submitted an approval request for program revisions in a timely manner. This is necessary to maintain EPA's "full primacy" policy.

EPA invites comment on the proposed deadline, the criteria for EPA approval of extension of the deadline, the length of the extension, and the conditions a State must meet during the extension period.

D. Content of a Request for EPA Approval of State Program Revisions (Section 142.12(c))

Proposed § 142.12(c) lists the contents of a State's request for EPA approval of a revision. The State request must include:

(1) The same information required in an application for initial primacy, listed in § 142.11(a), to the extent the items listed apply to the request for approval of the program revision;

(2) Any additional regulation-specific materials required for program changes where the State is given broad discretion to choose how to achieve the objective of the regulation (these will be specified in § 142.16); and (3) an Attorney General's statement that demonstrates that the State has adequate legal authority under its statute and regulations to carry out the program revision. (NOTE: As explained later, this proposal would amend the application requirements for initial primacy to require an Attorney General's statement. Thus, the third requirement above would be encompassed by the first.) These three requirements are explained in more detail below.

1. Documentation Required Under Section 142.11(a)

Under § 142.11(a), a State request for initial primacy must include the text of the State's statute and regulations (and a demonstration that they are no less stringent than the comparable EPA regulations); a description of the State procedures for administration and enforcement of the regulations; a statement that the State will keep records as required by EPA; a copy of the State variance and exemption regulations (if any); and a description of the State's plan for the provision of safe drinking water under emergency conditions. EPA is proposing that an update of the same materials, as applicable, be included in State requests for approval of program revisions as well. The State would not be required to include materials listed in § 142.11(a) that are not directly related to the program revision under consideration. EPA may, however, request additional materials if needed in order to perform a complete review of a specific program revision.

2. Additional Regulation-Specific Materials

Section 142.16 (as amended by the revised public notification rule, see 52 FR 41534, October 28, 1987) lists additional materials specific to an individual EPA regulation that must be included in a State's request for approval of that regulations. EPA anticipates that these regulations-specific requirements will be necessary only where a new or revised EPA regulation gives the State discretion on how to implement certain requirements of the regulations. Since these primacy requirements will be specific to a regulation, they will be promulgated when the new or revised EPA regulation is promulgated. Currently, this section (§ 142.16) contains only special primacy requirements for State adoption of the revised public notification rule promulgated on October 28, 1987 (52 FR 41524). Special primacy requirements have also been proposed for the surface water treatment and coliform rules (52 FR 42178 and 42224, November 3, 1987).

3. Attorney General's Statement

Under the proposed rule, a request for approval of a program revision would be required to include an Attorney General's statement (or a statement from the attorney for the State primacy agency if it has independent legal counsel). This statement would demonstrate that the State has adequate legal authority under its statutes and regulations to implement the program revision submitted to EPA for approval. The Attorney General's statement would be required in all State requests for approval of program revisions, unless

EPA has specifically waived the requirement as described below.

The proposed rule would enable EPA to use its discretion to waive the requirement for the Attorney General's statement in certain circumstances. EPA is proposing that no waiver of the Attorney General's statement be available for State requests for approval of program revisions which adopt new or revised NPDWRs for specific contaminants required under the 1986 SDWA amendments, for the surface water treatment and disinfection requirements, and for the public notification rule. If EPA elects to waive the requirement for an Attorney General's statement in other cases not covered above, EPA would announce this decision in the preamble to the federal regulation the State is to adopt. In the case of State-initiated changes, as discussed above, the State would be required to notify EPA of such changes. EPA would then inform the State whether or not a request for approval of the program revision is required. In EPA's response, if an Attorney General's statement is not required, EPA would so state. If EPA required the State to submit a request for approval of the program revision, and was silent on the requirement for an Attorney General statement, then an Attorney General's statement would be required.

The proposal would also amend § 142.11 to require a jurisdiction which applies for initial State primacy after promulgation of this regulation to submit an Attorney General's statement as part of its application.

EPA has carefully considered the requirement for an Attorney General's statement. Although the Agency did not require an Attorney General's statement for the primacy determinations made to date, it believes that there are clear and valid reasons for this new requirement.

First, the program is now more complex because of the 1986 SDWA amendments. For the first ten years of its existence, the PWSS program was relatively stable. The basic regulatory requirements remained virtually unchanged from year to year, and almost all eligible States and territories applied for and received primacy soon after the Safe Drinking Water Act was passed in 1974. The program requirements were relatively clear and straightforward to implement and to oversee. However, the 1986 amendments to the Act made sweeping changes in the scope and content of the PWSS program, transforming it into a more extensive and complex regulatory program. For example, as noted above, the amendments mandate that EPA promulgate new drinking water standards for 83 contaminants by 1989 and standards for 25 additional contaminants every three years thereafter. Moreover, the amendments require EPA to promulgate a NPDWR establishing criteria where filtration is required as a treatment technique for public water systems supplied by surface water sources and a NPDWR requiring disinfection for all systems. States will have to revise significantly their existing statutory and regulatory authorities to adopt the new federal requirements. Many of the issues which will arise in the State preparation of program revisions and in EPA review of these revisions will be legal ones; therefore, individuals in the State knowledgeable about State law and able to render a definitive legal opinion on the meaning of the State statutes and regulations should be involved in the revision process.

Second, the SDWA amendments strengthened EPA's enforcement authorities and mandated that the Agency strengthen its enforcement efforts for all instances of noncompliance. Since in almost all cases primary enforcement responsibility has been delegated to the States, the Agency has been actively urging the States to take additional enforcement actions. EPA has also initiated more federal enforcement actions to respond to noncompliance and is following up in cases where the State is not taking action. EPA expects this trend toward stronger enforcement to continue into the future. Further, as standards for additional contaminants are promulgated, enforcement efforts will become more complex. To ensure the success of this enhanced enforcement program, EPA must be certain that the States have adequate authority under their laws and regulations to enforce the new standards. The Attorney General's statement in the State request for approval of a program revision would document this authority.

Third, the Attorney General's statement would act as a guide or "road map" for EPA review of State program revisions, which would simplify and expedite EPA's review. EPA envisions the "road map" to be primarily a directory or side-by-side comparison of the federal regulations and the corresponding State statutes and regulations. EPA would not require the Attorney General's statement to be submitted in any specific format; however, EPA would provide the States with samples and assist them in formatting the statement if needed.

Finally, and most importantly, the statement would demonstrate why the State laws and regulations give the State adequate authority to implement the federal laws and regulations, and allow the State to explain any ambitious provisons in those statutes or regulations. By submitting the "road map" and explanation of State law in the Attorney General's statement, the State would reduce the possibility that EPA will misinterpret State laws and regulations and determine that they are not adequate to implement the federal requirements. Such a determination could result in failure to approve the program revision, or, at best, a long process whereby EPA would need to request additional information and clarification from the State. This could greatly delay a final determination on a State application.

The requirement for an Attorney General's statement would generally require the primacy agency to better coordinate its program revisions with the Attorney General. The Agency recognizes that this new requirement may increase the administrative burden both to prepare requests for appoval of revisions to current primacy programs and to apply for initial primacy for those entities which currently lack primary enforcement responsibility. However, EPA believes that the benefits of the statement, as described above, outweigh any additional administrative burden.

EPA considered whether there are alternatives to the requirement for an Attorney General's statement which might be less burdensome to the State, but which would still meet the basic needs as outlined above. Accordingly, EPA is requesting comments on the following alternative to the current proposal.

Under the alternative, a State's request for approval of a program revision would include a side-by-side comparison of the Federal requirements and the corresponding State provisions (as described above) that is prepared by the State primacy agency; in the case, no Attorney General's statement would be required with the request. EPA would review the documentation submitted by the State primacy agency and would then determine, case by case, if the Attorney General's involvement was necessary. For example, the Attorney General's involvement would be necessary if there was ambiguous statutory or regulatory provision that could be interpreted as inconsistent with the Federal program. In such cases, EPA would request an Attorney General's statement to clarify the ambiguity. This option could lessen the administrative burden of involving the Attorney General's office in the process, at least

initially. However, having to go back to the State and ask that the Attorney General prepare a statement could result in substantial delays in approving State program revisions. If most requests for EPA approval of program revisions involve legal issues that eventually require the Attorney General's participation, the benefits of this option would be small.

EPA requests comment on the proposed requirement for an Attorney General's statement. Comments should address the proposed requirement as well as the alternative presented here and should focus particularly on the usefulness of the requirement for the Attorney General's statement in EPA's review and approval of State requests for program revisions and the impact on State programs.

E. Procedures for Reviewing a State Request for EPA Approval of a State Program Revision (Section 142.12(d))

Proposed § 142.12(d) would establish procedures for State submission of requests for approval of program revisions and for EPA review and decision on these program revisions. It also would establish the public notice and public hearing requirements for EPA approval or disapproval of State program revisions.

The proposed procedures for State submission and EPA review of a State request for approval of a program revision would be a two-step process, requiring that the State first submit a preliminary request (containing a draft of the materials listed in § 142.12(c)) for EPA review and tentative determination. EPA's tentative determination would be subject to public notice (and a public hearing if requested) for revisions deemed "substantial" by the Administrator. Then, the State would submit a final request (containing final and complete State materials) for formal EPA approval or disapproval. The final State request would include, for example, State statutory and regulation changes already promulgated, a signed Attorney General's statement, and descriptions of any procedures and other administrative processes already adopted and in place within the State.

A summary of the procedures for review and approval of State requests is illustrated in the following chart.

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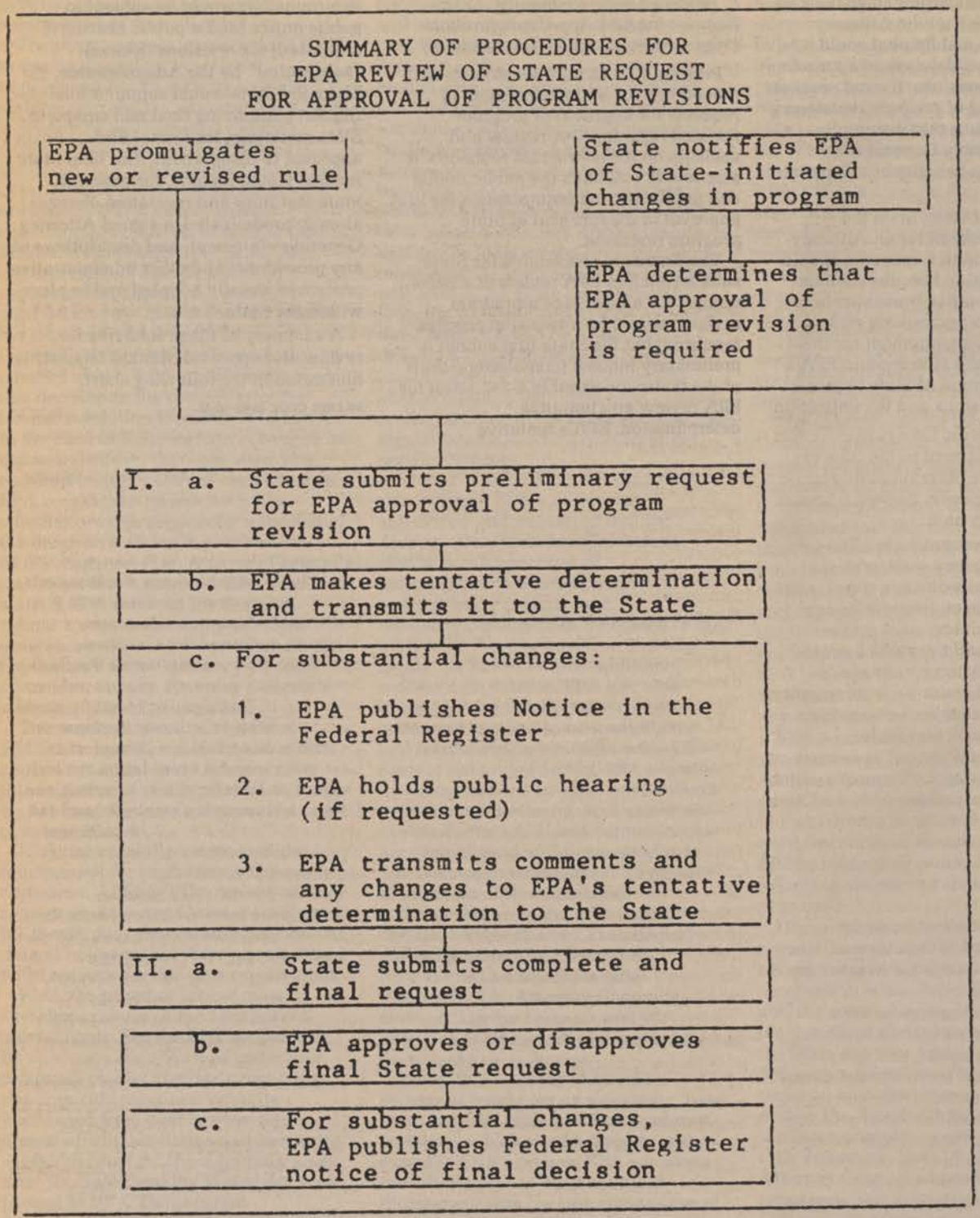

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Proposed § 142.12(d)(1) would require the State to submit a preliminary request for approval of a State program revision as soon as practicable after EPA's promulgation of a new or revised regulation or EPA's determination that a primacy program revision is required for a State-initiated change. This preliminary request would, at a minimum, contain the information required in § 142.12(c), *in draft form*, including any draft statutes and regulations and a draft Attorney General's statement, i.e., one not yet signed by the Attorney General (see Section D above). The information must be complete enough to allow the Administrator to do a full review and make a tentative determination on the adequacy of the proposed State program revision. No specific time period for this first phase is proposed in the rule, to give EPA and the State flexibility to respond to the specific circumstances of each program revision.

It is strongly recommended that the State primacy agency work with the Attorney General's office in developing the program revision (especially any statutory or regulatory changes) to ensure that no major problems occur later. The draft Attorney General's statement would contain the information described in Section D: A comparison between the federal and State regulations to show that all necessary elements are present and an explanation of any ambiguous provisions in the State law. EPA would review this draft statement along with the rest of the preliminary application materials and discuss any needed changes or additions with State personnel. The statement submitted with the final program revision application would be signed by the Attorney General (or his or her designee).

The proposed requirement for a preliminary State submission and tentative EPA determination is new. This change would formalize what has been standard practice in the primacy review process both for initial primacy decisions and for the program revision process for adoption of the national interim primary drinking water regulations for trihalomethanes in 1979 and 1980, as well as in other Agency programs. EPA is proposing to make this preliminary review step a regulatory requirement for review of all future program revisions to ensure that issues are identified early in the program revision process and that there is an opportunity to respond to EPA comments before EPA takes any final action on State requests.

Proposed § 142.12(d)(1)(iii) would require EPA to publish notice in the **Federal Register** that it has made a tentative determination to approve or disapprove a State program revision and to provide an opportunity to request a public hearing and submit comments. Public notice would only be required for program revisions that the Administrator determines are "substantial." EPA would transmit to the State for its consideration all the public comments and any changes to EPA's tentative determination. Public notice of the Administrator's preliminary determination on the State request is also a new requirement; the current regulations for obtaining initial primacy do not require public notice until after the Administrator makes his or her final decision. However, EPA believes that soliciting early public comment, in conjunction with an early review by EPA of draft State program revisions, would help to prevent new issues from emerging later in the process, e.g., after a State promulgates its regulations. The procedures for public notice and hearing would follow the existing procedures in § 142.13.

The proposed rule does not define the specific criteria EPA will use to determine which program revisions are "substantial." However, EPA believes that most of the State program revisions to adopt the new or revised NPDWRs required by the 1986 SDWA amendments would be deemed "substantial." EPA would determine which new or revised EPA regulations require a "substantial" change to the existing primacy program at the time the EPA regulations are promulgated. State-initiated revisions would be determined to be "substantial" on a case-by-case basis by EPA, based on an evaluation of the impact the change has on the existing primacy program.

After EPA has transmitted the tentative determination and, for substantial changes, all comments and changes resulting from the public notice process, proposed § 142.12(d)(2) would require the State to submit a final request for formal EPA approval of the State program revision. The final request would contain complete information *in final form* for all the elements listed in § 142.12(c), in accordance with EPA's tentative determination. For substantial changes, the final request would include the State response to all comments and changes resulting from the public notice process. The information in the final request would include the relevant statutory authorities and regulations and the signed Attorney General's statement, as well as the final materials to meet the other requirements in § 141.12(c).

For program revisions deemed "substantial" by the Administrator, the proposed rule would require EPA to give public notice in the **Federal Register** that a final determination has been made on the State request. This notice may take place after the 18-month deadline (or extended period) has elasped. If the final program revision is substantially changed from the preliminary State request and EPA's tentative determination, EPA may publish a public notice prior to its final decision requesting comment and giving opportunity for another public hearing.

EPA's disapproval of a State's final request for approval of a program revision would likely require the State to re-promulgate its regulatory changes or to modify other State procedures already in place to meet the conditions for approval. To avoid this, EPA strongly encourages early and active EPA/State identification of issues and their resolution even in advance of the preliminary State request. EPA expects that its tentative determination on the preliminary State request would establish the conditions for final approval. If EPA disapproves the final State request, however, the procedures proposed in § 142.12(d)(1) and (2) would allow the State to submit supplemental materials. For revisions to implement new or revised EPA regulations (which have a deadline for final approval), the State could request an extention of the 18-month deadline to allow sufficient time for submission and review of the supplemental materials.

If the State does not have an approved program revision within the 18-month deadline (or by the end of the approved extension period), the proposal would require EPA to notify the State that it no longer meets the requirements set forth in the rule for maintenance of primary enforcement authority. If the State did not take immediate steps to remedy the situation, EPA could initiate procedures leading to program withdrawal as specified in proposed § 142.17.

EPA invites comment on all aspects of the procedures proposed for EPA's review and decision on State requests for approval of program revisions.

F. Options for Addressing Minimum State Enforcement Authorities

Both the Safe Drinking Water Act and the implementing regulations at § 142.10 require a State to have adequate procedures for the enforcement of its drinking water regulations in order to obtain and maintain primary

enforcement responsibility for the PWSS program. Under § 142.10(b)(6)(vi), adequate procedures for the enforcement of drinking water regulations include authority to assess civil or criminal penalties for violation of the State's primary drinking water regulations.

The current regulations in Part 142, however, do not specify any minimum penalty authority. This was a major issue in the development of the initial primacy regulations in 1976. At that time, EPA decided to require the State to have the legal authority to assess civil or criminal penalties for violations, but not to require the State to have any specific minimum penalty authority. While EPA, in the preamble to the original regulations (52 FR 2917, January 20, 1976), strongly urged the States to adopt the same level of penalties as was available to EPA under the SDWA (up to $5,000 per day civil penalty for a willful violator), a lower penalty authority was not a bar to approval of the State's program. The preamble did specify, however, that where lower penalty authority levels had a significant adverse effect on the adequacy of the State's enforcement program, EPA could require a State to raise its penalty authority to retain primacy.

EPA has been investigating current State enforcement authorities under the PWSS program to determine whether it should propose amending the current primary requirements to require States to have enforcement authorities close to or the same as EPA's enforcement authorities under the amended SDWA. The 1986 SDWA amendments increased EPA's maximum civil penalty authority from $5,000 to $25,000 per day and eliminated the requirement that a violation be "willful." See section 1414(b) of the SDWA. In addition, section 1414(a) was amended to give EPA authority to issue administrative orders and the authority to assess administrative penalties up to $5,000, if the initial administrative order is violated. The SDWA was also amended to require EPA to take enforcement action where the State has not taken an appropriate enforcement action under its authorities in a timely manner.

EPA has reviewed current State penalty authorities and their use. This survey indicates that current civil penalty monetary amounts specified in State law range from zero in a few States to $25,000 per violation per day in several States. Specifically, of the 54 States and Territories with primacy, four States have authority to assess fines for up to $25,000 per violation per day, five States up to $10,000 per day, 17 States up to $5,000 per day, seven States up to $1,000 per day, five States up to $500 per day, and the remaining 16 States either have no penalty amount specified or the penalty amounts in their State laws are not known.

EPA believes that the availability and proper use of penalties does serve as a deterrent to violations in general and can be particularly effective in ensuring compliance by recalcitrant systems. Although EPA is not explicitly proposing any specific regulatory language to revise the primacy requirements regarding penalty amounts in this rule, EPA is actively considering several options:

(1) Not specifying a penalty amount (i.e., leave the current requirement unchanged); (2) requiring States to have authority to assess penalties up to $5,000 per day (which would match the authority 26 States now have); (3) requiring States to have authority to assess penalties up to $25,000 per day (which would match EPA's new authority); or (4) requiring States to have authority to assess penalties of some other specified amount within this range, based on comments received and further investigation. EPA requests comment on the concept of requiring a specific minimum level of penalty authority for primacy and, if so, what that level should be. EPA also invites comments on the factors it should consider in evaluating these options, including: (1) The potential benefits to the current State enforcement program; (2) the minimum penalty amount that would effectively encourage compliance by public water systems; and (3) the difficulty for the States of adopting such a requirement.

The 1986 SDWA amendments also added administrative order authority to EPA's mix of enforcement tools. All EPA environmental programs (except those under the Clean Air Act) currently have some type of administrative enforcement authority. In the PWSS program, EPA may assess an administrative penalty only for violation of a compliance order. The States in the PWSS program, in general, do not currently have administrative enforcement authority. The major advantage of administrative order authority, particularly when it includes penalty authority, is that State Agency Directors may order compliance and assess penalties without resort to courts, thus expediting what in many cases would be a longer, more resource-intensive process. EPA is concerned about requiring agencies to adopt administrative enforcement authority, however, because generally State agencies do not have authorities and could not get them without State legislative changes. The State legislative change may be difficult to obtain in many State legislatures without clear and convincing proof of its benefits.

EPA requests comment on whether it should require States as a condition of primacy to have, first, administrative order authority and, second, administrative penalty authority equivalent to EPA's authority. Comments should address the need when such authority in the Public Water System Supervision program, when such authority should be required, advantages and uses of such authority, and the potential difficulties States may face in trying to meet such a requirement to obtain or retain primacy. EPA may issue final regulations on State primacy requirements for civil penalty amounts and State administrative order authority when it issues the final primacy regulations.

G. Other Changes to Subpart B

The proposed rule would make other changes to various sections of Part 142, Subpart B in addition to those necessary to restructure and conform the rule language to accomodate the new section on State program revisions. Three of these changes are significant.

State Adoption of BAT. The proposal would revise the primacy requirements in § 142.10 to amend paragraph (d), which relates to the variance and exemption procedures. Under the 1986 SDWA amendments, EPA must promulgate its findings of best available technology (BAT) for the purpose of obtaining variances at the time the new or revised NPDWR is promulgated. This notice proposes to add a sentence that requires those States that currently allow variances to adopt requirements no less stringent than EPA's findings of BAT for use in the State's variance process. EPA is proposing this change because the BAT determination is an integral part of each primacy drinking water regulation to be adopted by the States, which, under Section 1413, must be "no less stringent" then EPA's new or revised NPDWR.

Revision to State Reporting Requirements. The proposal includes a revision of the current regulations at § 142.15 related to State reporting. The proposal would require States to submit reports to EPA every quarter. The reports would, at a minimum, contain updates of the State's inventory of public water systems, information on violations and enforcement actions, and a summary of newly-granted variances

and exemptions. This would revise the current rule, which only requires information to be submitted annually and does not require information on enforcement actions. The proposal also would require the State to notify EPA of any new variances and exemptions granted during the quarter. (The current rule simply requires "prompt" notification.) This will put this requirement on the same schedule as the other State reports. Finally, the proposal would add a new paragraph to reserve space for special reports beyond the basic reporting requirements. These special reports may be required in new NPDWRS promulgated subsequent to this rule. For example, the proposed surface water treatment requirements (52 FR 42178, November 3, 1987) would amend § 142.15 to require information on which systems must install filtration. EPA is proposing to require a fixed interval (i.e., quarterly) for information on new variances and exemptions, as well as reporting for all other information, to more effectively carry out the new Congressional directive for enhanced Federal enforcement of violations. EPA needs timely information on violations and State enforcement actions on an ongoing basis to meet this Congressional mandate.

Program Capability Considerations. The proposal would revise the current program grant regulations (§ 35.410 and 35.415) and existing primacy requirements (§ 142.10(b) and § 142.15(a)) to explicitly consider program capability in the grant and primacy decision process. The revised grant regulations would require a State or Indian Tribe applying for an initial award under section 1443(a) of the Act to demonstrate that it will be capable of establishing a public water system supervision program after the initial grant period. For States, EPA would not approve an award until the State demonstrates that it will be capable of implementing the primacy requirements within one year of the initial award and agrees to use such funding to demonstrate such capability. For Indian Tribes, EPA would not approve an award until the Indian Tribe demonstrates that it will be capable of implementing the primacy requirements within three years of initial award and agrees to use at least one year's funding to demonstrate such capability.

The revised primacy regulations (§ 142.10(b)) would require a State wanting to obtain or retain primacy to demonstrate that it is capable of implementing adequate procedures for the enforcement of the primacy program. Specifically, this change would apply to any State applying for initial primacy. This change would also apply to requests for EPA approval of revisions to existing primacy programs, to the extent a demonstration of program capability is relevant to the program revision under consideration. No explicit criteria or "thresholds" are proposed in this rule for demonstration of capability. For program revisions, in particular, the determination of whether the State is capable of implementing adequate procedures to enforce the program revision will be case by case, depending on the management, technical, and administrative demands of the program revision at issue and the specific situation.

V. Request for Public Comment

EPA requests public comments and information on all aspects of this proposal, including the specific issues identified in the preamble.

VI. Compliance with Executive Order 12291

Executive Order 12291 requires that a regulatory agency determine whether a new regulation will be "major" and, if so, that the Agency conduct a Regulatory Impact Analysis. A major rule is defined as a regulation which is likely to result in:

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

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

(3) A significant adverse effect on competition, employment, investment, production, innovation, or on the ability of the United States-based enterprises to compete in domestic or export markets.

Since the proposed rule does not meet the definition of a major regulation, the Agency has not conducted a Regulatory Impact Analysis.

This proposed rule was submitted to the Office of Management and Budget (OMB) for review as required by Executive Order 12291. Any written comments from OMB to EPA and any response to these comments will be available for viewing in the public docket for this rule at EPA, Room 1101ET, Washington, DC 20460.

VII. Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to the OMB under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* An Information Collection Request document, ICR No. 0270.11, has been prepared by EPA and a copy may be obtained from Carla Levesque, Information Policy Branch; EPA; 401 M Street SW (PM-223); Washington, DC 20460 or by calling (202) 382-2740. Submit comments on these requirements to EPA at the address at the beginning of this notice and to the Office of Information and Regulatory Affairs; OMB; 726 Jackson Place NW., Washington, DC 20530; Attention: Tim Hunt. The final rule will respond to any OMB and public comments on the information collection requirements.

VIII. Regulatory Flexibility Act

The Regulatory Flexibility Act requires that federal agencies prepare regulatory flexibility analyses assessing the impacts of proposed rules on entities such as small businesses, small organizations, and small governmental jurisdictions. Such analysis is not required, however, when the head of an agency certifies that a proposed rule would not have a significant effect on a substantial number of small entities.

EPA considers the information that would be required by this proposed rule to be the minimum necessary to effectively administer oversight of States which plan to apply for or have been granted primacy for the PWSS program under section 1413 of the SDWA. The proposal would establish new procedures for State submission of requests for EPA approval of program revisions to current primacy programs. The proposal would also modify existing procedures to require submission of an Attorney General's statement with the material to be submitted by States applying for initial primacy.

The impact of the administrative requirements under the proposed rule beyond that already required of States to meet the statutory requirements for obtaining or retaining primacy would not be significant in any State. Section 1413 of the statute requires States to adopt drinking water regulations no less stringent than EPA regulations, to adopt adequate procedures for the enforcement of there regulations, and to meet other requirements for the administration of a State program. This proposed rule would not require States to collect information beyond that already required to comply with the statutory requirements.

The proposed rule would apply to all States applying for initial primacy or requesting EPA to approve revisions for existing primacy programs. The additional workload in any State because of these administrative requirements would not be significant relative to the total State workload required to obtain or retain primacy. Accordingly, I certify that these

proposed rules, if promulgated, would not have a significant impact on a substantial number of small entities. The Agency seeks comments and any additional information related to the potential impact of these proposed rules on small entitities.

List of Subjects in 40 CFR Parts 35 and 142

Administrative practice and procedure, Reporting and recordkeeping requirements, Water supply.

Lee M. Thomas,

Administrator.

Date: July 18, 1988.

For the reasons set forth in the preamble, Title 40, Chapter I of the Code of Federal Regulations (CFR) is proposed to be amended as follows:

PART 35—STATE AND LOCAL ASSISTANCE

1. The authority citation for Part 35 continues to read as follows:

Authority: Secs. 105 and 301(a) of the Clean Air Act, as amended (42 U.S.C. 7405 and 7601(a)); secs. 106, 205(g), 205(j), 208, and 501(a) of the Clean Water Act, as amended (33 U.S.C. 1256, 1285(g), 1285(j), 1288, and 1361(a)); secs. 1443 and 1450 of the Safe Drinking Water Act (42 U.S.C. 300j–2 and 300j–9); secs. 2002(a) and 3011 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 (42 U.S.C. 6912(a), 6931, 6947, 6949); and secs. 4, 23, and 25(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. 136b, 136u, and 136w(a)).

2. Section 35.410 is revised to read as follows:

§ 35.410 Limitations applicable to States.

(a) The Regional Administrator will not make an initial award of section 1443(a) funds unless the applicant demonstrates that it will be capable of establishing a public water system supervision program within one year of the initial award. Upon agreement by the applicant to establish a public water system supervision program within one year, the initial award shall be used by the State to demonstrate program capability to implement the requirements found in § 142.10 of this part.

(b) The Regional Administrator will not make a subsequent award of section 1443(a) funds unless the applicant has primary enforcement responsibility for the public water system supervision program.

3. Section 35.415, which was proposed to be added on July 27, 1987 (52 FR 28117), would be further amended by revising paragraph (a)(2) to read as follows:

§ 35.415 Indian Tribes treated as States

* * * * *

(a) * * *

(2) The applicant has a public water system supervision program or agrees to establish one within three years of the initial award and agrees to assume primacy enforcement responsibility within this period. Upon agreement by the applicant, at least one year of the grant funding will be used to demonstrate program capability to implement the requirements found in § 142.10 of this part.

PART 142—NATIONAL PRIMARY DRINKING WATER REGULATIONS IMPLEMENTATION

1. The authority citation for Part 142 is revised to read as follows:

Authority: 42 U.S.C. 300g, 300g–1, 300g–2, 300g–3, 300g–4, 300g–5, 300g–6, 300j–4, and 300j–9.

2. Section 142.2, which was proposed to be amended on July 27, 1987 (52 FR 28118), would be further amended by redesignating paragraph (q) as (u), and to insert new paragraphs (r) and (s) to read as follows:

§ 142.2 Definitions.

* * * * *

(r) "Approved State primacy program" consists of those program elements listed in § 142.11(a) of this part that were submitted with the initial State application for primary enforcement authority and approved by the EPA Administrator and all State program revisions approved thereafter.

(s) "State program revision" means a statutory, regulatory, or administrative change that changes an approved State primacy program.

3. Section 142.10 is amended to revise the introductory paragraph and paragraphs (a), (b) introductory text, and (d), to read as follows:

§ 142.10 Requirements for a determination of primary enforcement responsibility.

A State has primary enforcement responsibility for public water systems in the State during any period for which the Administrator determines, based upon a submission made pursuant to § 142.11, and submission under § 142.12 of this part, that such State, pursuant to appropriate State legal authority:

(a) Has adopted drinking water regulations which are no less stringent than the national primary drinking water regulations (NPDWRs) in effect under Part 141 of this chapter;

(b) Has adopted and has demonstrated that it has the program capability to implement adequate procedures for the enforcement of such State regulations, such procedures to include:

* * * * *

(d) If it permits variances or exemptions, or both, from the requirements of the State primary drinking water regulations, it shall do so under conditions and in a manner which is no less stringent than the requirements under sections 1415 and 1416 of the Act. In granting variances, the State must adopt provisions which are no less stringent than the Administrator's findings of best available technology, treatment techniques, or other means available as specified in Subpart G of this part. (States with primary enforcement responsibility may adopt procedures different from those set forth in Subparts E and F of this part, which apply to the issuance of variances and exemptions by the Administrator in States that do not have primary enforcement responsibility, provided, that the State procedures meet the requirements of this paragraph); and

* * * * *

4. Section 142.11 is amended by redesignating the introductory text as the introductory text of paragraph (a), redesignating paragraphs (b)(1) through redesignating paragraph (b)(1) through (b)(6) as paragraphs (a)(2)(i) through (a)(2)(vi), and redesignating paragraphs (c) through (e) as (a)(3) through (a)(5).

5. Section 142.11 is further amended by revising the title and adding a new paragraph (a)(6), to read as follows:

§ 142.11 Initial determination of primary enforcement responsibility.

(a) * * *

(6) In applications for a determination that a State has primary enforcement responsibility submitted after [insert date of publication of the final rule], a statement by the State Attorney General (or the attorney for the State primacy agency if it has independent legal counsel) or the attorney representing the Indian tribe that demonstrates that the laws and regulations of the State or tribal ordinances provide adequate legal authority to carry out the program described in § 142.10 of this part. The statement shall include citations to the specific statutes, administrative regulations or ordinances, and, where appropriate, judicial decisions which demonstrate adequate authority. State statutes and regulations cited by the State Attorney General and tribal ordinances cited by the attorney representing the Indian tribe shall be in the form of lawfully adopted State statutes and regulations or tribal ordinances at the time the statement is

signed and shall be fully effective by the time the program is approved. To qualify as "independent legal counsel," the attorney signing the statement required by this section shall have full authority to independently represent the State primacy agency or Indian tribe in court on all matters pertaining to the State or tribal program.

6. Section 142.12(a) is redesignated as § 142.11(b) and paragraph (b)(3), as redesignated, is revised to read as follows:

§ 142.11 Initial determination of primary enforcement responsibility.

* * * * *

(b) * * *

(3) When the Administrator's determination becomes effective pursuant to § 142.13, it shall continue in effect unless terminated pursuant to § 142.17.

7. Section 142.12(b) and (c) is redesignated as § 142.17(a) and (b), and the section heading is revised to read as follows:

§ 142.17 Procedures for withdrawal of State programs.

8. A new § 142.12 is added to read as follows:

§ 142.12 Revision of State programs.

(a) *General requirements.* Either EPA or the primacy State may initiate actions that require the State to revise its approved State primacy program. To retain primary enforcement responsibility, States must adopt all new and revised national primary drinking water regulations promulgated in Part 141 of this Chapter and any other requirements specified in this part.

(1) Whenever a State revises its program to adopt new or revised Federal regulations, the State must submit a request to the Administrator for approval of the program revision, using the procedures described in paragraphs (b), (c), and (d) of this section. The Administrator shall approve or disapprove each State request for approval of a program revision based on the requirements of the Safe Drinking Water Act and of this part.

(2) For a State program revision that does not adopt a new or revised EPA regulation (i.e., a State-initiated change), the State shall notify the Administrator in writing of the change, including any proposed or final revisions to its statutory or regulatory authority or program procedures that may affect its approved State primacy program. After reviewing the notice, the Administrator may require the State to submit a request for approval of the program revision as described in paragraphs (c) and (d) of this section. The Administrator will make this determination on a case-by-case basis.

(3) Whenever the Administrator has reason to believe that a State's statutes, regulations, or procedures have changed, the Administrator may request, and then the State must provide, documents or other information as necessary to demonstrate that the requirements or primacy continue to be met. If the Administrator determines, based on these documents and other information, that a request for approval of a State program revision is required, the Administrator will notify the State and the State must follow the procedures in paragraphs (c) and (d) of this section.

(4) A State must notify the Administrator whenever it proposes to transfer all or part of the program from the approved State agency to any other State agency, and shall identify any new division of responsibilities among the agencies involved.

(b) *Timing of State requests for approval of program revisions to adopt new or revised Federal regulations.* (1) Complete and final State requests for approval of program revisions to adopt new or revised EPA regulations must be submitted to the Administrator within 15 months after promulgation of the new or revised EPA regulations and be approved or disapproved by EPA within 90 days after EPA determines that the State has submitted a complete and final request, unless the State requests an extension and the Administrator has approved the request pursuant to paragraphs (b) (2) and (3) of this section. If the State expects to submit a final State request for approval of a program revision to EPA more than 15 months after promulgation of the new or revised EPA regulations, the State shall request an extension of the deadline before the expiration of the 15-month period.

(2) The final date for approval by the Administrator of a State program revision may be extended by EPA for up to a two-year period upon a written application by the State to the Administrator. The application must include a schedule for the submission of a final request by a certain time and provide sufficient information to demonstrate that the State:

(i) (A) Currently lacks the legislative or regulatory authority to enforce the new or revised requirements, or

(B) Currently lacks the program capability adequate to implement the new or revised requirements; and

(C) Is requesting the extension to group two or more program revisions in a single legislative or regulatory action, or cannot meet the original deadline for reasons beyond its control in spite of a good faith effort to do so; and

(ii) Is implementing the EPA requirements to be adopted by the State in its program revision within the scope of its current authority and capabilities.

(3) To be granted an extension, the State must agree to meet certain requirements during the extension period, which include, but are not limited to:

(i) Informing public water systems of the new EPA (and upcoming State) requirements and that EPA will be overseeing implementation of the requirements until EPA approves the State program revision;

(ii) Collecting, storing, and managing laboratory results, public notices, and other compliance and operation data required by the EPA regulation;

(iii) Assisting EPA in development of the technical aspects of enforcement actions and conducting informal follow-up on violations (telephone calls, letters, etc.);

(iv) Providing technical assistance to public water systems;

(v) Providing EPA with all information prescribed by § 142.15 of this part on State reporting; and

(vi) For States whose request for an extension is based on current lack of program capability adequate to implement the new requirements, taking steps agreed to by EPA and the State during the extension period to remedy the deficiency.

(c) *Contents of a State request for approval of a program revision.* (1) The State request for EPA approval of a program revision shall be concise and must include:

(i) The documentation required in § 142.11(a) of this part as it applies to the particular program revision the State is requesting EPA to approve;

(ii) Any additional materials that are listed in § 142.16 of this part for a specific EPA regulation, as appropriate; and

(iii) Unless one of the conditions listed in paragraph (c)(2) of this section are met, a statement by the State Attorney General (or the attorney for the State primacy agency if it has independent legal counsel) or the attorney representing the Indian tribe that the laws and regulations of the State or tribal ordinances provide adequate authority to carry out the program revision the State or tribe is requesting EPA to approve. The statement shall include citations to the specific statutes and administrative regulations or ordinances and, wherever appropriate, judicial decisions which demonstrate

adequate authority to meet the requirements of § 142.10 of this part as they apply to the program revision. State statutes and regulations cited by the State Attorney General and tribal ordinances cited by the attorney for the Indian tribe shall be in the form of lawfully adopted State statutes and regulations or tribal ordinances at the time the statement is signed and shall be fully effective by the time the request for program revision is approved by EPA. To qualify as "independent legal counsel," the attorney signing the statement required by the section shall have full authority to independently represent the State primacy agency or tribe in court on all matters pertaining to the State or tribal program.

(2) An Attorney General's statement will be required as part of an application for EPA approval of a program revision unless:

(i) EPA has specifically waived this requirement for a specific regulation at the time EPA promulgated it, or by later written notice to the State; or

(ii) EPA has, in its response to a State's notification of a State-initiated program revision, as described in paragraph (a)(2) of this section, specifically informed the State that an Attorney General's statement is not required.

(d) *Procedures for review of a State request for approval of a program revision.*—(1) *Preliminary request.* (i) The State must submit to the Administrator for his or her review a preliminary request for approval of each program revision, containing the information listed in paragraph (c)(1) of this section, *in draft form.* For revisions that adopt new or revised EPA regulations, the preliminary request must be submitted to the Administrator as soon as practicable after the promulgation of the EPA regulations.

For revisions that do not adopt new or revised EPA regulations, the preliminary request must be submitted as soon as practicable after EPA informs the State that it must request approval for the revision pursuant to § 141.12(a)(2) of this part.

(ii) The Administrator will review the preliminary request and supporting materials and make a tentative determination on the request. The Administrator will send the tentative determination and other comments or suggestions to the State for its use in developing the State's final request under paragraph (d)(2) of this section.

(iii) Whenever the Administrator determines, based on the State's preliminary request for approval of the program revision, that the proposed revision is substantial, the Administrator will publish a public notice of the proposed revision and provide an opportunity for comment for a period of at least 30 days. The public notice must be published in the **Federal Register** and in enough of the largest newspapers in the State to provide Statewide coverage. The public notice must summarize the proposed revision and the Administrator's tentative determination on the State's request for approval. The public notice must provide for the opportunity to request a public hearing. The Administrator will hold a public hearing, if he or she determines, there is significant public interest based on the requests and comments received. If EPA holds a public hearing, it will be conducted in accordance with the procedures in § 142.13 of this part. EPA will transmit to the State for its consideration all the public comments and any changes to the tentative determination resulting from the public notice process.

(2) *Final request.* (i) The State must submit a complete and final request for approval of a program revision to the Administrator for his or her review and approval. The request must contain the information listed in paragraph (c)(1) of this section *in complete and final form,* in accordance with EPA's tentative determination. For substantial changes, the final request must include the State response to any comments and changes resulting from the public notice process. Complete and final State requests for program revisions to adopt new or revised EPA regulations shall be submitted within 15 months of the promulgation of the new or revised EPA regulations, as specified in paragraph (b) of this section. Complete and final State requests for EPA approval of program revisions that do not adopt new or revised EPA regulations shall be submitted as soon as practicable after comments are received on the preliminary request.

(ii) If the State program revision is substantial, the Administrator may, if he or she determines that changes in the final State request are significantly different from the preliminary State request and EPA's tentative determination, publish a public notice of the revision and provide opportunities for public comment in accordance with the procedures in paragraph (d)(1)(iii) of this section.

(iii) The Administrator shall approve or disapprove the State request for approval of the program revision within 90 days after determining that the final State request is complete and final and shall promptly notify the State of his or her decision.

(iv) If the Administrator disapproves a final request for approval of a program revision, the Administrator will notify the State in writing. Such notification will include a statement of the reasons for disapproval. The State may submit additional materials to remedy the deficiencies in its final request for approval of the program revision. For program revisions to adopt new or revised EPA regulations, the State may request an extension under paragraph (b) of this section to submit additional materials. Regardless of when the State requests the extension, the final date for approval may be no longer than two years after the original deadline. If the Administrator disapproves the revision after the 18-month period (or the extended period approved by EPA under paragraph (b) of this section), the Administrator will notify the State that it no longer meets the requirements set forth in § 142.10 of this part for the maintenance of primary enforcement authority and may initiate the procedures established in § 142.17 of this part for withdrawal of primacy.

(v) A State program revision becomes part of the approved State's primacy program, upon approval by the Administrator. If the State program revision is substantial, the Administrator will publish in the **Federal Register** a public notice of the Administrator's final determination to approve or disapprove the State program revision. The Administrator may provide notice of approval of non-substantial revisions in writing to the State.

9. Section 142.13 is amended by revising paragraph (a) to read as follows:

§ 142.13 Public hearing.

(a) Before any determination pursuant to § 142.11 of this part that a State meets the requirements of § 142.10 of this part for obtaining primary enforcement responsibility, or any determination pursuant to § 142.17 of this part that a State no longer meets the requirements of § 142.10 of this part, the Administrator will provide an opportunity for public hearing on the determination.

* * * * *

10. Section 142.15 is revised to read as follows:

§ 142.15 Reports by States.

(a) Each State which has primary enforcement responsibility shall submit quarterly reports to the Administrator on a schedule and in a format prescribed by the Administrator, consisting of the following information:

(1) All additions or corrections to the State's inventory of public water systems;

(2) All violations by public water systems in the State, of the State or Federal drinking water regulations;

(3) All enforcement actions taken by the State, against public water systems in the State; and

(4) A summary of the status of each variance and exemption currently in effect.

(5) Notification of any new variance or exemption granted during the last quarter. The notice shall include a statement of reasons for the granting of the variance or exemption, including documentation of the need for the variance or exemption and the finding that the granting of the variance or exemption will not result in an unreasonable risk to health. The State may use a single notification statement to report two or more similar variances or exemptions.

(b) *Special reports.* [Reserved]

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Tuesday
August 2, 1988

Part VI

Environmental Protection Agency

Asbestos-Containing Materials in Schools; Deferral of Deadline for Submission of Asbestos Management Plans; Notice

ENVIRONMENTAL PROTECTION AGENCY

[OPTS-62066; FRL-3424-2]

Asbestos-Containing Materials in Schools; Deferral of Deadline for Submission of Asbestos Management Plans

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA is issuing a notice under amendments to the Asbestos Hazard Emergency Response Act (AHERA) to inform Local Education Agencies (LEAs) of the opportunity to request a deferral until May 9, 1989, for the submission of asbestos management plans to their States if they are unable to provide the plan by the original due date of October 12, 1988.

DATE: An LEA must submit its deferral request to the respective State Agency by October 12, 1988.

ADDRESSES: For obtaining copies of this notice and the Act, contact the office listed under **FOR FURTHER INFORMATION CONTACT** or the State Offices listed under Unit VIII of this notice.

FOR FURTHER INFORMATION CONTACT: Michael M. Stahl, Acting Director, TSCA Assistance Office (TS-799), Office of Toxic Substances, Environmental Protection Agency, Rm. EB-44, 401 M St., SW., Washington, DC 20460, Telephone: (202) 554-1404, TDD: (202) 554-1404.

I. Overview

On July 18, 1988, President Reagan signed Pub. L. 100-368 (formerly H.R. 3893), an amendment to AHERA. The primary provision of the amendment provides an LEA with the opportunity to request a deferral to May 9, 1989 for the submission of its asbestos management plan to the State Governor if it is unable to provide the plan by the original due date of October 12, 1988.

The requirement for submission of management plans for asbestos in schools comes from the original AHERA, signed into law October 22, 1986. Under AHERA, EPA issued the AHERA schools rule, which requires LEAs to inspect for and to manage asbestos-containing materials in their schools. The AHERA schools rule was published at pages 41826-41898 of volume 52 of the **Federal Register**, and is codified at 40 CFR Part 763.

Under the amendment, EPA is required to notify LEAs of the opportunity to request deferrals and to provide a list of offices in each State to which deferral requests should be sent. (The State offices are listed in Unit VIII. below.) EPA is providing notification though this **Federal Register** notice and a subsequent direct mailing to individual LEAs.

II. How the Deferral Process Works

A. School Submission

An LEA may request, from its Governor, a deferral to May 9, 1989, for submission of a management plan to the State. The request may cover one or more schools and must include a list of all schools covered by the request.

The LEA must make certain assurances in its deferral request that requirements specified by the amendment have been met. (The required assurances are listed in Unit III. below.)

Before filing a deferral request, the LEA shall notify affected parent, teacher, and employee organizations of its intent to file, and in the case of a public school, the LEA shall discuss the request at a public meeting of the school board. The deferral request must be filed with the State by October 12, 1988—the original due date for plan submission under AHERA.

B. State Review

Within 30 days after receipt of a deferral request, the Governor shall respond to the LEA in writing to acknowledge whether the deferral request is complete or incomplete. If incomplete, the Governor must identify in the response the items which are missing from the request. The LEA may correct and refile its request with the Governor not later than 15 days after it has received a response from the Governor.

Only when a deferral request is accepted as complete and acknowledged in writing by the State, has the deferral been granted.

An LEA whose deferral request has been approved must submit a management plan to the Governor not later than May 9, 1989. (The submission must include a copy of the deferral request and the appropriate assurances accompanying the request, as discussed in Unit III. below.) The Governor must review the deferred management plan in accordance with the applicable standards for review of management plans under the original AHERA. There is one exception, however. Under the original law, the Governor could extend the 30-day period under which an LEA may revise a disapproved plan for an additional 90 days. Under the new law, the Governor may extend the 30-day revision period only for an additional 30 days.

LEAs are still required to begin implementation of their management plans by July 9, 1989, as originally specified in AHERA and the AHERA schools rule.

III. LEA Assurances Required for Deferrals

The amendment creates two categories of LEA deferrals, with assurances specified for each category. The first category (Category A) applies to LEAs in States which have, before June 1, 1988, requested waivers from AHERA under 40 CFR 763.98. These States are Connecticut, Illinois, New Jersey, and Rhode Island. The second Category (Category B) applies to LEAs in all other States. Many of the activities associated with these deferral assurances must be completed before October 12, 1988.

A. Category A Deferrals

Only LEAs in Connecticut, Illinois, New Jersey, and Rhode Island may seek a deferral under Category A. (These States have requested waivers under the AHERA schools rule for their own State programs by June 1, 1988.)

The amendment requires two assurances for Category A deferrals, which may be made in a single statement:

1. *Assurance 1:* That the State in which the LEA is located has requested a waiver from EPA before June 1, 1988.

2. *Assurance 2:* That the LEA has carried out the notification of affected groups and in the case of a public school, that the LEA has conducted the public meeting required by the amendment. The amendment requires that before filing a deferral request, an LEA must notify affected school (parent, teacher, and employee) organizations of its intent. Further, in the case of a public school, the LEA must discuss the request at a public meeting of the school board. Affected school organizations must be notified in advance of the meeting's time and place.

B. Category B Deferrals

The amendment requires four assurances for Category B deferrals.

1. *Assurance 1:* A statement and brief explanation why the LEA, despite good faith efforts, will not be able to meet the original October 12, 1988, deadline for submittal of its management plan.

2. *Assurance 2:* A statement that the LEA has made at least one of the following documents available for inspection at each school for which a deferral is sought:

a. A solicitation by the LEA to contract with an accredited asbestos

contractor for inspection or management plan development.

b. A letter certifying that school district personnel are enrolled in an EPA-approved training course for inspection and management plan development.

c. Documentation showing that suspected asbestos-containing material from the school is being analyzed at an accredited laboratory.

d. Documentation showing that an inspection or management plan has been completed in at least one other school under the LEA's authority.

3. *Assurance 3:* A statement giving assurance that the LEA has carried out notification of affected groups and, in the case of a public school, a public meeting. (Again, the new law requires that before filing a deferral request, an LEA shall notify affected parent, teacher, and employee organizations of its intent to file its request. In the case of a public school, the LEA shall discuss the request at a public meeting of the school board, and affected organizations shall be notified in advance of the time and place of the meeting.)

4. *Assurance 4:* A proposed schedule outlining all significant activities leading up to submission of a management plan by May 9, 1989, including the inspection of the school. This schedule must contain a deadline of no later than December 22, 1988, for entering into a contract with an accredited inspector (unless inspections are to be performed by accredited school personnel). Laboratory analysis and management plan development must also be included in the activity schedule.

IV. Worker Protection Requirements

As of October 12, 1988, renovations or removals, with the exception of "emergency repairs," are prohibited in schools whose management plans have not completed the AHERA State review process unless:

(1) The school is carrying out work with a grant under the EPA's Asbestos School Hazard Abatement Act (ASHAA) award program.

(2) An inspection that complies with the requirements of the AHERA schools rule has been carried out in the school and the LEA complies with key sections of the AHERA schools rule: Section 763.90 (g), (h), and (i) on response actions and Appendix D to Subpart E of Part 763 on transport and disposal of asbestos waste.

An "emergency repair" is a repair in a school building that was not planned and was in response to a sudden, unexpected event that threatens either the health or safety of building occupants or the structural integrity of the building.

In addition (again, as of October 12, 1988), no operations and maintenance (O&M) work can occur in schools whose management plans have not received a completed State review unless the LEA complies with key sections of the AHERA schools rule: Section 763.91 on O&M activities, including Appendix B to Subpart E of Part 763, and § 763.92(a)(2) regarding training.

Finally, any school employee who conducts emergency repairs involving any material containing asbestos or suspected of containing asbestos or who conducts O&M activities must have proper training and equipment to safely conduct the work in order to prevent potential exposure to asbestos.

V. Responsibilities of the State

The States have two primary responsibilities under the amendment. The first responsibility deals with the deferral process, as outlined in Unit II. of this notice. LEAs must understand that only when a deferral request is accepted as complete and acknowledged in writing by the State, has the deferral been granted.

The second responsibility involves submitting status reports to EPA. No later than December 31, 1988, the Governor of each State must submit to EPA a written statement on the status of management plan submissions and deferral requests received by the State. The list must contain the information specified in section 205(e) of the amendment and must be made available to LEAs in the State. An updated version of the report must be submitted to EPA no later than December 31, 1989.

VI. Publication of EPA-Approved Courses

EPA must issue each quarter in the **Federal Register**, beginning August 31, 1988, a list of training courses approved by EPA for AHERA purposes and laboratories accredited under AHERA. The list of training courses, which has been published approximately every 4 months since October 1987, was last published in the **Federal Register** of June 1, 1988 (53 FR 20066).

VII. Penalties for LEAs

LEAs are subject to the civil penalties under the original AHERA for violating worker protection requirements of the amendment, described in Unit IV. above, or for submitting false information in the deferral request. Under AHERA, LEAs are liable for a civil penalty of not more than $5,000 per building for each day during which the violation continues.

Dated: July 28, 1988.

John A. Moore,

Assistant Administrator for Pesticides and Toxic Substances.

VIII. List of State Offices

LEAs should submit their deferral requests to their State office as indicated below:

Alabama:
Alabama Safe State Program, College of Continuing Studies, P.O. Box 2967, University of Alabama, Tuscaloosa, AL 35486–2967, (205) 348–3033, Attn: William Weems.

Alaska:
Alaska Department of Education (Facilities), P.O. Box F, Juneau, AK 99811, (907) 465–2865, Attn: Susan Miller.

American Samoa:
Office of the Governor, American Samoa Government, Pago Pago, AS 96799, (809) 774–8315, Attn: Pati Faiai.

Arizona:
Dept. of Environmental Quality, Office of Air Quality, 2005 North Central Avenue, Phoenix, AZ 85004, (602) 257–2285, Attn: David O. Chelgren.

Arkansas:
School Plant Services, AR Dept. of Education, Arch Ford Education Building, #4 Capitol Mall, Rm. 110B, Little Rock, AR 72201–1021, (501) 682–4261, Attn: Jimmy Moore.

California:
Office of Local Assistance, 501 J Street, Suite 350, Sacramento, CA 95814, (916) 445–3377, Attn: Art S. Kevorkian.

Colorado:
Colorado Department of Health, 4210 E. 11th Avenue, Denver, CO 80220, (303) 331–8587, Attn: Dave Ouimette.

Connecticut:
Dept. of Education Bureau of Grants Processing, 165 Capitol Avenue, Hartford, CT 06106, (203) 566–8204, Attn: William D. Guzman.
Preventable Diseases Division, State of Connecticut, 150 Washington Street, Hartford, CT 06106, (203) 566–3186, Attn: Paul Schur.

Delaware:
Dept. of Administrative Services, Division of Facilities Management, P.O. Box 1401, O'Neill Building, Dover, DE 19901, (302) 736–3611, Attn: Robert Foster.

District of Columbia:
DC Public Schools, Presidential Bldg., 415 12th St., NW., Rm. 1209, Washington, DC 20001, (202) 724–4098, Attn: Andrew Weeks.

Florida:
Florida Dept. of Education, W.V.

Knott Bldg., 114 Collins, Tallahassee, FL 32399–0400, (904) 487–1130, Attn: Bobby L. Johnson.

Georgia:
Director, Transportation Facilities and Asbestos Division, Georgia Dept. of Education, 1670 Twin Towers East, Atlanta, GA 30334, (404) 656–2440, Attn: Don Thornhill.

Guam:
Guam Environmental Protection Agency, P.O. Box 2999, Agana, GU 96910, (671) 646–8863, Attn: Charles P. Crisostmo.

Hawaii:
Environmental Protection Health Services Division, State Health Department, P.O. Box 3378, Honolulu, HI 96801, (808) 548–6455, Attn: James Ikeda.

Idaho:
Department of Administration, 650 West State Street, Boise, ID 83720, (208) 334–3382, Attn: Loren Nelson.

Illinois:
Asbestos Abatement Program, Illinois Dept. of Public Health, 525 W. Jefferson St., 3rd Floor, Springfield, IL 62761, (217) 782–3517, Attn: R. Kent Cook.

Indiana:
Office of Air Management, Dept. of Environmental Management, 105 S. Meridian Street, P.O. Box 6015, Indianapolis, IN 46206–6015, (317) 232–8232, Attn: Andrew Knott.

Iowa:
School Plant & Facilities Unit, Dept. of Education, Grimes State Office Building, Des Moines, IA 50319–0146, (515) 281–4743, Attn: C. Milton Wilson.

Kansas:
Dept. of Health & Environment, Forbes Field, Topeka, KS 66620, (913) 296–1544, Attn: John Irwin.

Kentucky:
Division of Buildings and Grounds, Kentucky Dept. of Education, Capital Plaza Tower, 15th Floor, Frankfort, KY 40601, (502) 564–4326, Attn: Jim Judge.

Louisiana:
Enforcement Program Manager, Office of Air Quality, P.O. Box 44096, Baton Rouge, LA 70804, (504) 342–9053, Attn: Chris Roberie.

Maine:
Dept. of Administration, Division of Asbestos Management Activities, State House Station 77, Augusta, ME 04333, (207) 289–4511, Attn: Henry E. Warren.

Maryland:
Maryland Dept. of the Environment, 201 West Preston Street, Rm. 214, Baltimore, MD 21201, (301) 225–5753, Attn: Dr. Katherine Farrell.

Massachusetts:
Division of Occupational Hygiene, Massachusetts Dept. of Labor & Industry, 1001 Watertown Street, West Newton, MA 02165, (617) 969–7177, Attn: Richard Levine.

Michigan:
Dept. of Public Health, Division of Occupational Health, Attn: Asbestos Program, 3500 N. Logan St., P.O. Box 30035, Lansing, MI 48909, (517) 335–8250, Attn: Bill De Liefde.

Minnesota:
Minnesota Dept. of Education, 943 Capitol Square Building, 550 Cedar Street, St. Paul, MN 55101, (612) 296–1382, Attn: Len Nachman.

Mississippi:
Superintendent of School Buildings, Mississippi State Department of Education, P.O. Box 771, Jackson, MS 39205, (601) 359–3555, Attn: Gerald Pevey.

Missouri:
Bureau of Environmental Epidemiology, Health Dept., 1730 East Elm Street, P.O. Box 570, Jefferson City, MO 65102, (314) 751–6411, Attn: Daryl W. Roberts.

Montana:
Dept. of Health & Environmental Science, Cogswell Bldg., Rm A107, Helena, MT 59620, (406) 444–3948, Attn: Tom Ellerhoff.

Nebraska:
Asbestos Program Coordinator, Nebraska Dept. of Health—EHHS, 301 Centennial Mall South, P.O. Box 95007, Lincoln, NE 68509, (402) 471–2541, Attn: Jacqueline M. Fiedler.

Nevada:
Nevada Dept. of Education, 215 E. Bonanza St., State Mail Rm., Las Vegas, NV 89158, (702) 486–6455, Attn: Douglas Stoker.

New Hampshire:
Department of Education, State Office Park South, 101 Pleasant St., Concord, NH 03301, (603) 271–3620, Attn: Douglas Brown.

New Jersey:
New Jersey Department of Health, Asbestos Control Service, AHERA Implementation, CN 360, Trenton, NJ 08625, (609) 984–2193, Attn: James A. Brownlee.

New Mexico:
State Dept. of Education, Education Building, Santa Fe, NM 87501–2876, (505) 827–3848, Attn: Ed Tangman.

New York:
State Education Department, Rm. 3059, Cultural Education Ctr., Albany, NY 12230, (518) 474–3384, Attn: Mae Timer.

North Carolina:
North Carolina Division of Health Services, Cooper Memorial Building, Rm. 3011, P.O. Box 2091, 225 N. McDowell Street, Raleigh, NC 27602, (919) 733–0820, Attn: Howard Bridges.

North Dakota:
North Dakota Health Dept., Missouri Office Building, 1200 Missouri Ave., Box 5520, Bismarck, ND 58502, (701) 224–2348, Attn: Dana Mount,

or,

Dept. of Public Instruction, Missouri Office Building, 1200 Missouri Ave., Box 5520, Bismarck, ND 58502, (701) 224–2267, Attn: Alton Koppang.

Northern Marianas:
Dept. of Public Health & Environmental Services, P.O. Box 1304 (CK), Saipan, CM 96950, Attn: Russell F. Mechem.

Ohio:
Ohio Department of Health, 246 N. High St., P.O. Box 118, Columbus, OH 43266–0118, (614) 466–1450, Attn: Marty King.

Oklahoma:
Radiation and Special Hazards Service, Oklahoma State Dept. of Health, N.E. 10th and Stonewall, P.O. Box 53551, Oklahoma City, OK 73152, (405) 271–5221, Attn: Emily Allen or J. Dale McHard.

Oregon:
Oregon Dept. of Education, 700 Pringle Parkway, S.E., Salem, OR 97310, (503) 378–6964, Attn: Al Shannon.

Pennsylvania:
Dept. of Education, 333 Market Street, Harrisburg, PA 17126–0333, (717) 787–5480, Attn: Gerald Grove.

Puerto Rico:
Puerto Rico Environmental Quality Board, 204 Pumarada Street, 10th Floor, Box 11488, San Turce, PR 00910, (809) 722–0077, Attn: Juan Merced.

Rhode Island:
Dept. of Health, Division of Occupational Health, 206 Cannon Bldg., 75 Davis St., Providence, RI 02908, (401) 277–3601, Attn: J. Hickey/W. Dundulis.

South Carolina:
South Carolina Dept. of Education, Office of School Planning & Building, 100 Executive Center Drive, Santee Building, Suite A–22, Columbia, SC 29210, (803) 737–8700, Attn: G. Stuart Clarkson.

South Dakota:
Office of School Standards, Division of Education, 700 Governor's Drive, Pierre, SD 57501, (605) 773–3553, Attn: Leonard Powell.

Tennessee:
Tennessee Department of Education, 126 Cordell Hull Building, Nashville, TN 37219, (615) 741–3489, Attn: Dr. Nile McCrary.

Texas:
Occupational Health Program, 1100 West 49th Street, Austin, TX 78756, (512) 458–7254, Attn: Jerry F. Lauderdale.
Occupational Safety and Health Division, 1100 West 49th Street, Austin, TX 78756, (512) 458–7254, Attn: Joel Smith.
Utah:
Department of Health, P.O. Box 16690, 288 North 1460 West, Salt Lake City, UT 84116–0690, (801) 538–6121, Attn: Kenneth L. Alkema.
Vermont:
Vermont Dept. of Health, Asbestos Program, 60 Main Street, P.O. Box 70, Burlington, VT 05402, (802) 863–7231, Attn: James Meriwether.
Virgin Islands:
Dept. of Planning & Natural Resources, Division of Environmental Protection, 179 Altona and Welgunst, Charlotte Amelia, St. Thomas, VI 00802, (809) 774–3411, Attn: Vernon Richards.
Virginia:
Virginia Dept. of Education, James Monroe Building, 24th Floor, 101 N. 14th Street, P.O. Box 6–Q, Richmond, VA 23219, (804) 225–2035, Attn: David Boddy.
Washington:
Superintendent of Public Instruction, Old Capitol Building, FG–11, Olympia, WA 98504, (206) 753–6703, Attn: Harvey C. Childs.
West Virginia:
West Virginia Dept. of Education, Rm. B–264, Capitol Complex Bldg. #6, Charlestown, WV 25305, (304) 348–2969, Attn: Roy Blizzard.
Wisconsin:
Wisconsin Division of Health, P.O. Box 309, Madison, WI 53701, (608) 266–9337, Attn: Bill Otto.
Wyoming:
Wyoming Dept. of Education, 2300 Capitol, Hathaway Building, 2nd Floor, Cheyenne, WY 82002, (307) 777–6198, Attn: Dr. Roger Hammer.

[FR Doc. 88–17366 Filed 8–1–88; 8:45 am]
BILLING CODE 6560–50–M

federal register

Tuesday
August 2, 1988

Part VII

Interstate Commerce Commission

CSX Transportation, Inc.; Abandonment Exemption; Greenville County, SC and Loudon County, TN; Notice of Exemption

INTERSTATE COMMERCE COMMISSION

[Docket No. AB-55 (Sub-No. 261X)]

CSX Transportation, Inc.—Abandonment Exemption—Greenville County, SC

Editorial Note.—This document was inadvertantly published August 1, 1988. It is republished today at the request of the agency.

Applicant has filed a notice of exemption under 49 CFR 1152 Subpart F—*Exempt Abandonments* to abandon its approximately 2.36-mile line of railroad between Valuation Station 19+81 and Valuation Station 1793+00 at Greenville, SC, in Greenville County, SC.

Applicant has certified that (1) no local or overhead traffic has moved over the line for at least 2 years 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). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10505(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance has been received, this exemption will be effective September 1, 1988 (unless stayed pending reconsideration). Petitions to stay regarding matters that do not involve environmental issues [1] and formal expressions of intent to file an offer of financial assistance under 49 CFR 1152.27(c)(2) [2] must be filed by August 12, 1988, and petitions for reconsideration, including environmental, energy, and public use concerns, must be filed by August 22, 1988 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: Patricia Vail, 500 Water Street, Jacksonville, FL 32202.

If the notice of exemption contains false or misleading information, use of the exemption is void *ab initio.*

Applicant has filed an environmental report which addresses environmental or energy impacts, if any, from this abandonment.

The Section of Energy and Environment (SEE) will prepare an environmental assessment (EA). SEE will serve the EA on all parties by August 7, 1988. Other interested persons may obtain a copy of the EA from SEE by writing to it (Room 3115, Interstate Commerce Commission, Washington, DC 20423) or by calling Carl Bausch, Chief, SEE at (202) 275-7316.

A notice to the parties will be issued if use of the exemption is conditioned upon environmental or public use conditions.

Decided: July 22, 1988.

By the Commission, Jane F. Mackall, Director, Office of Proceedings.

Noreta R. McGee,

Secretary.

[FR Doc. 88-17109 Filed 8-1-88; 8:45 am]

BILLING CODE 1505-05-M

[Docket No. AB-55 (Sub-No. 251X)]

CSX Transportation, Inc.—Abandonment Exemption—Loudon County, TN

Editorial Note.—This document was inadvertantly published August 1, 1988. It is republished today at the request of the agency.

Applicant has filed a notice of exemption under 49 CFR 1152 Subpart F—*Exempt Abandonments* to abandon its approximately 3.2-mile line of railroad between milepost LKT-302.3 at Jena, TN, and milepost LKT-305.5 at Greenback, TN, in Loudon County, TN.

Applicant has certified that (1) no local or overhead traffic has moved over the line for at least 2 years 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). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10505(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance has been received, this exemption will be effective September 1, 1988 (unless stayed pending reconsideration). Petitions to stay regarding matters that do not involve environmental issues [1] and formal expressions of intent to file an offer of financial assistance under 49 CFR 1152.27(c)(2) [2] must be filed by August 12, 1988, and petitions for reconsideration, including environmental, energy, and public use concerns, must be filed by August 22, 1988 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: Patricia Vail, 500 Water Street, Jacksonville, FL 32202.

If the notice of exemption contains false or misleading information, use of the exemption is void *ab initio.*

Applicant has filed an environmental report which addresses environmental or energy impacts, if any, from this abandonment.

The Section of Energy and Environment (SEE) will prepare an environmental assessment (EA). SEE will serve the EA on all parties by August 7, 1988. Other interested persons may obtain a copy of the EA from SEE by writing to it (Room 3115, Interstate Commerce Commission, Washington, DC 20423) or by calling Carl Bausch, Chief, SEE at (202) 275-7316.

A notice to the parties will be issued if use of the exemption is conditioned

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[1] A stay will be routinely issued by the Commission in those proceedings where an informed decision on environmental issues (whether raised by a party or by the Section of Energy and Environment in its independent investigation) cannot be made prior to the effective date of the notice of exemption. *See* Ex Parte No. 274 (Sub-No. 8), *Exemption of Out-of-Service Rail Lines* (not printed), served March 8, 1988.

[2] *See Exemption of Rail Line Abandonments or Discontinuance—Offers of Financial Assistance,* 4 I.C.C. 2d 164 served December 21, 1987, and final rules published in the **Federal Register** on December 22, 1987 (52 FR 48440-48446).

[1] A stay will be routinely issued by the Commission in those proceedings where an informed decision on environmental issues (whether raised by a party or by the Section of Energy and Environment in its independent investigation) cannot be made prior to the effective date of the notice of exemption. *See* Ex Parte No. 274 (Sub-No. 8), *Exemption of Out-of-Service Rail Lines* (not printed), served March 8, 1988.

[2] *See Exemption of Rail Line Abandonments or Discontinuance—Offers of Financial Assistance,* 4 I.C.C. 2d 164 served December 21, 1987, and final rules published in the **Federal Register** on December 22, 1987 (52 FR 48440-48446).

upon environmental or public use conditions.

Decided: July 22, 1988.

By the Commission, Jane F. Mackall, Director, Office of Proceedings.

Noreta R. McGee,

Secretary.

[FR Doc. 88-17108 Filed 8-1-88; 8:45 am]

BILLING CODE 1505-05-M

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Federal Register

Vol. 53, No. 148

Tuesday, August 2, 1988

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Revised as of April 1, 1988

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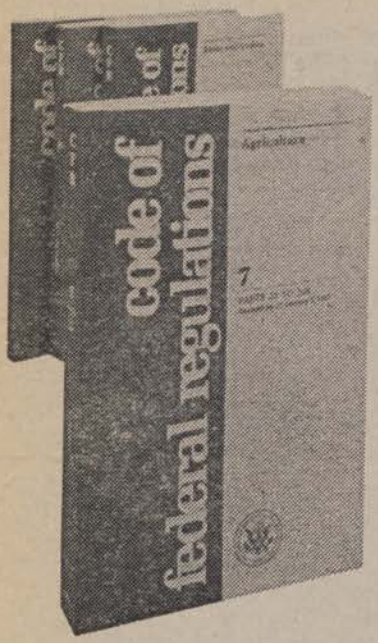

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