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October 21, 1988

Briefing on How To Use the Federal Register—
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THE FEDERAL REGISTER
WHAT IT IS AND HOW TO USE IT

FOR: Any person who uses the Federal Register and Code of Federal Regulations.

WHO: The Office of the Federal Register.

WHAT: Free public briefings (approximately 3 hours) to present:

1. The regulatory process, with a focus on the Federal Register system and the public's role in the development of regulations.
2. The relationship between the Federal Register and Code of Federal Regulations.
3. The important elements of typical Federal Register documents.
4. An introduction to the finding aids of the FR/CFR system.

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

WASHINGTON, DC

WHEN: November 4; at 9:00 a.m.
WHERE: Office of the Federal Register, First Floor Conference Room, 1100 L Street NW., Washington, DC
RESERVATIONS: 202–523–5240

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Presidential Documents

Title 3—

The President

Proclamation 5883 of October 19, 1988

Drug-Free America Week, 1988

By the President of the United States of America

A Proclamation

The very concept of Drug-Free America Week, 1988, reminds us of how far we have advanced in our thinking and actions in the fight to stop illegal drugs. Most people now understand that illegal drug use brings illness, disability, and death. The illegal drug user costs our Nation billions of dollars in lost productivity each year, while undermining our economy and threatening our national security. Drugs ruin lives and destroy families and prey on our young people. Americans everywhere recognize the real and present danger of illegal drug use.

Most people also understand that illegal drug use is preventable—if we have the will and the moral courage to stand and be counted. Drug-Free America Week is an opportunity to do just that.

During Drug-Free America Week, we will continue to spread the messages that there is no safe use of illegal drugs; that illegal drug use is simply unacceptable anywhere in America; and that we will pursue the fight against illegal drugs, in our homes and schools and in our communities and factories. We will seek and take every opportunity to oppose the presence and use of illegal drugs. We will hold drug dealers and users responsible and accountable for the plague of illegal drugs.

Each American has a right to live in a drug-free family, to dwell in a drug-free community, to learn in a drug-free school, to earn a living in a drug-free workplace, and to travel on drug-free roads, waterways, railways, and airways. Concerned parents, youth, community groups, businesses, churches, and educators are accepting the challenge to stop drugs and build a better future for our children and for our Nation.

We should be pleased with the progress we have made together as Americans—in strong law enforcement against drug criminals, in international cooperation to reduce drug production and smuggling, in research to learn more about drugs and what works in treatment, and in education and prevention. Each of these important gains is a battle won in the war against drugs. We have started a crusade for a Drug-Free America. We must maintain awareness of the drug threat and continue the fight until illegal drugs are only a bad memory.

Many individuals, civic groups, businesses, and government at all levels are demonstrating leadership, creativity, and determination in the fight for a drug-free America. For example, the National Federation of Parents for Drug-Free Youth is observing the week of October 24 through October 30, 1988, as National "Red Ribbon Week," asking all Americans to join in wearing a red ribbon to symbolize a personal commitment to a healthful, drug-free life.

To encourage all Americans to join together to stop illegal drugs, the Congress, by Senate Joint Resolution 329, has designated the week of October 24 through October 30, 1988, as "Drug Free America Week."

NOW, THEREFORE, I, RONALD REAGAN, President of the United States of America, by the authority vested in me by the Constitution and laws of the United States, do hereby proclaim the week of October 24 through October 30,

1988, as Drug-Free America Week, and I call upon the people of the United States to observe this week with appropriate programs, ceremonies, and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this nineteenth day of October, in the year of our Lord nineteen hundred and eighty-eight, and of the Independence of the United States of America the two hundred and thirteenth.

Ronald Reagan

[FR Doc. 88-24534
Filed 10-20-88; 10:34 am]
Billing code 3195-01-M

Presidential Documents

Proclamation 5884 of October 19, 1988

United Nations Day, 1988

By the President of the United States of America

A Proclamation

In 1945, the United Nations was founded to provide a framework for international cooperation. The U.N. Charter expressed the ideal that all member states would work together to maintain international peace and security, foster respect for human rights, and promote economic and social progress. Three years later, the U.N. adopted the Universal Charter of Human Rights; and it is most fitting that on United Nations Day, 1988, we should commemorate the 40th anniversary of that document, whose preamble reminds us so eloquently that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world."

As we examine the international situation today, we find a world with greater prospects for freedom, justice, and peace than even a year ago. Share in the credit surely goes to the United Nations for its work as a facilitator in resolving regional conflicts.

We can all be grateful for the progress being made on U.N. reform. A more efficient and streamlined organization can better focus on the real problems that shatter the peace and cause human suffering in too many regions. We can be grateful as well for the service and sacrifices of the members of the U.N. Peacekeeping Forces, and we join in saluting them on their new and well-deserved honor, the Nobel Peace Prize.

Tribute is also in order to the life-saving mission of the World Health Organization (WHO), which celebrates its 40th anniversary this year. In the past 4 decades, the WHO has led the fight to eradicate smallpox, fostered vital work toward a vaccine against malaria, and worked to reduce the tragedy of preventable childhood deaths through universal immunization, oral rehydration therapy, and other activities. The WHO is now battling the Human Immunodeficiency Virus (HIV) around the globe. In these ways, the WHO exemplifies the finest traditions of United Nations specialized agencies. Despite differences in language, training, cultural background, and politics, people from many nations are cooperating to bring the blessings of health and safety to everyone—proof of the difference the U.N. can make for all.

The many other technical and specialized agencies of the United Nations achieve much as well. The International Labor Organization, the U.N. Industrial Development Organization, the International Civil Aviation Organization, the International Atomic Energy Agency, and the Food and Agriculture Organization are some of the agencies that seek to serve humanity's needs.

These accomplishments remind us on United Nations Day and throughout the year to reflect with appreciation on the purpose and promise of the ideals upon which the U.N. was founded.

NOW, THEREFORE, I, RONALD REAGAN, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim Monday, October 24, 1988, as United Nations Day. I urge all Americans to acquaint themselves with the activities and accomplishments of the United Nations. I have appointed Stanley C. Pace

to serve as United States National Chairman for the 1988 United Nations Day, and I welcome the role of the United Nations Association of the United States of America in working with him to celebrate this special day.

IN WITNESS WHEREOF, I have hereunto set my hand this nineteenth day of October, in the year of our Lord nineteen hundred and eighty-eight, and of the Independence of the United States of America the two hundred and thirteenth.

Ronald Reagan

[FR Doc. 88-24535
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Rules and Regulations

Federal Register
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Friday, October 21, 1988

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.
The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR Part 1479

Forage Assistance Program

AGENCY: Commodity Credit Corporation, USDA.

ACTION: Interim rule.

SUMMARY: This interim rule sets forth the terms and conditions for the conduct of the emergency Forage Assistance Program ("FAP") provided for in section 103 of the Disaster Assistance Act of 1988 (Pub. L. 100–387). The Commodity Credit Corporation (CCC) is authorized to provide for cost-share assistance in an amount not to exceed 50 percent of the cost of reseeding incurred by owners and operators of established pasture damaged in 1988 by drought or a related condition resulting from the 1988 drought. Assistance may be provided for only the reseeding of nonannual crops planted for pasture purposes. Not more than $50,000,000 of CCC funds may be expended to carry out FAP. These regulations set forth standards for determining losses, effective cost-share rates, payment limitations and other program provisions.

DATES: The effective date of this interim rule is October 20, 1988. Comments must be received by November 21, 1988, to be assured of consideration.

ADDRESS: Comments should be forwarded to James R. McMullen, Director, Conservation and Environmental Protection Division, ASCS, P.O. Box 2415, Washington, DC 20013.

FOR FURTHER INFORMATION CONTACT: James R. McMullen, Director, Conservation and Environmental Protection Division, ASCS, P.O. Box 2415, Washington, DC 20013; telephone: 202–447–6221.

SUPPLEMENTAL INFORMATION: This interim rule has been reviewed for compliance with Executive Order 12291 and Departmental Regulation 1512–1 and has been classified as "nonmajor". It has been determined that these program provisions will not result in: (1) An annual effect on the economy of $100 million or more, (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local governments, or geographic regions, or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The title and number of the Federal Assistance Program to which this rule applies are: Title—Forage Assistance Program; Number—10.FAP; 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 publish a notice of proposed rule-making with respect to the subject matter of this rule.

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

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

The regulations implement the Forage Assistance Program (FAP) provided for in section 103 of the Disaster Assistance Act of 1988 (Pub. L. 100–387) ("the 1988 Act"). That section provides that the Secretary of Agriculture shall implement an emergency forage program for established pasture damaged by the drought or related condition in 1988, under which the Secretary shall enter into cost-share agreements with owners or operators of such damaged land to provide for reseeding of nonannual forage crops on such land to facilitate late fall 1988 and early spring 1989 grazing and haying. Assistance may be provided to such owners and operators only when: (1) The forage crop will not regenerate naturally; (2) reseeding is the most cost-effective method to reestablish the forage crop; and (3) reseeding is not undertaken simply to improve the forage crop damaged by the drought.

Under the FAP, payment may only be made to cover half the reseeding costs, including the costs of seed, fertilizer, and other related costs incurred in reseeding pasture to a nonannual forage crop. FAP payments will be made under agreements entered into between the CCC and eligible owners or eligible operators of the land to be reseeded. FAP payments will be made only for eligible costs for reseeding which are undertaken in compliance with the FAP agreement. The total FAP payments that a person, as determined in accordance with 7 CFR Part 795, may receive may not exceed $3,500.

Not more than $50,000,000 of CCC funds may be expended for FAP. Within that limit, CCC may prorate the funds among eligible persons to ensure the equitable award of funds.

The FAP regulations are implemented as an interim rule without prior comment in order that FAP assistance may be made timely to eligible owners or operators of pastureland.

List of Subjects in 7 CFR Part 1479

Administrative practices and procedures, Agreements, Forage, Reseeding established pasture, Cost-share assistance, and Drought damage.

Interim Rule

Accordingly, Subchapter B, Chapter XIV of Title 7 of the Code of Federal Regulations is amended by adding the following new Part 1479—

PART 1479—FORAGE ASSISTANCE PROGRAM

Sec.

1479.1 General statement.
1479.2 Administration.
1479.3 Definitions.
1479.4 Funding.
1479.5 Eligible established pasture.
1479.6 Eligible costs.
1479.7 Eligible person.
1479.8 Application for FAP Agreement.
1479.9 FAP Agreement.

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1479.10 Obligations of person entering into FAP Agreement.
1479.11 Payment limitation.
1479.12 Liens and claims of creditors; setoffs.
1479.13 Appeals.
1479.14 Misrepresentation and scheme or device.
1479.15 Estates, trusts, and minors.
1479.16 Death, incompetency, or disappearance.
1479.17 Other regulations.
1479.18 Paperwork Reduction Act assigned numbers.

Authority: Secs. 4 and 5 of the Commodity Credit Corporation Charter Act, as amended, 62 Stat. 1070, as amended, 1072 (15 U.S.C. 714b and 714c); sec. 103 of the Disaster Assistance Act of 1988, 102 Stat. 932 (7 U.S.C. 1471d *note*).

§ 1479.1 General statement.

The regulations in this part set forth the terms and conditions of the Forage Assistance Program (FAP) authorized by section 103 of the Disaster Assistance Act of 1988. Within specified limits, CCC is authorized to pay eligible persons 50 percent of the cost of reseeding established pasture damaged in 1988 due to 1988 drought or related conditions.

§ 1479.2 Administration.

(a) This part shall be administered by CCC under the general direction and supervision of the Executive Vice President, CCC. The program shall be carried out in the field by State and County Agricultural Stabilization and Conservation (ASC) committees (State and county committees).

(b) State and county committees, and representatives and employees thereof, do not have the authority to modify or waive any of the provisions of the regulations in this part, as amended or supplemented.

(c) The State committee shall take any action required by this part which has not been taken by the county committee. The State committee shall also:

(1) Correct, or require a county committee to correct, any action taken by such county committee which is not in accordance with this part; or

(2) Require a county committee to withhold taking any action which is not in accordance with this part.

(d) No delegation herein to a State or county committee shall preclude the Executive Vice President, CCC, or a designee, from determining any question arising under the program or from reversing or modifying any determination made by a State or county committee.

§ 1479.3 Definitions.

(a) In determining the meaning of the provisions of this part, unless the context indicates otherwise, words importing the singular include and apply to several persons and things, words importing the plural include the singular, words importing the masculine gender include the feminine, and words used in the present tense include the future as well as the present.

(b) The following terms contained in this part shall have the following meanings:

"*Approving Official*" means a representative of CCC who is authorized by the Executive Vice President, CCC, to approve an application for assistance made in accordance with this part.

"*ASCS*" means the Agricultural Stabilization and Conservation Service.

"*CCC*" means the Commodity Credit Corporation.

"*County*" means a county or similar geographic area as determined by CCC.

"*DASCO*" means Deputy Administrator or Acting Deputy Administrator, State and County Operations, ASCS, U.S. Department of Agriculture.

"*Established pasture*" means land in permanent vegetative cover used exclusively for grazing by livestock.

"*Executive Vice President*" means the Executive Vice President of the Commodity Credit Corporation.

"*FAP Agreement*" means the cost-share agreement entered into by an eligible person and CCC pursuant to the provisions of this part.

"*Forage crop*" means a nonannual crop which is used for livestock for grazing.

"*Local ASCS Office*" means with respect to:

(1) Individual pastures on a farm which has been assigned as ASCS farm serial number, the county ASCS office which serves such farm; or

(2) All other pastures, the county ASCS office which serves the county in which the pasture is located.

"*Operator*" means a person who is in general control of the farming operations on the farm as determined by CCC.

"*Secretary*" means the Secretary of Agriculture.

"*State*" means any State of the United States, the Commonwealth of Puerto Rico, the Virgin Islands, or Guam.

"*State committee*", "*State office*", "*county committee*", or "*county office*" means the respective ASC committee or ASCS office.

(c) In the regulations in this part and in all instructions, terms, and documents in connection therewith, all other words and phrases specifically relating to ASCS operations shall, unless the context of the subject matter otherwise requires, have the meanings assigned to them in the regulations governing reconstitution of farms, allotments, and bases in 7 CFR Part 719.

§ 1479.4 Funding.

No more than $50 million of CCC funds may be expended for the program FAP assistance for which persons are otherwise eligible under this part may be adjusted, prorated, or reduced as the Executive Vice President deems appropriate to facilitate the equitable proration of funds for this purpose.

§ 1479.5 Eligible established pasture.

FAP cost-share assistance shall be available only for reseeding eligible established pasture. Such pasture shall be only established pasture which has been damaged in 1988 due to the 1988 drought or related 1988 conditions.

§ 1479.6 Eligible costs.

(a) FAP payments shall only be made with respect to 50 percent of costs incurred by an eligible person only for the cost of replanting a forage crop on the eligible established pasture. Such costs shall include only the cost of the seeds, planting, seedbed preparation, and nutrients needed to ensure successful plant survival, and labor as based on standard labor rates as determined by the county committee used to physically plant such seeds. Eligible costs specifically exclude items such as fencing, pesticides, irrigation, irrigation equipment, measures to protect seedings from wildlife, and general land and pasture improvements.

(b) Eligible costs shall not include costs incurred for replanting a forage crop differing significantly from the forage crop constituting the qualifying loss, except as determined by CCC. If such substitution is approved, eligible costs shall, unless approved in written instructions issued by DASCO, be the lessor of:

(1) The actual costs incurred for the substituted forage crop; or

(2) The estimated costs which would have been incurred for the original forage crop.

(c) Eligible costs shall include costs which have been incurred for which the eligible owner has presented adequate documentation, including evidence such costs were incurred and paid. Costs which have been incurred but not yet paid by the eligible owner are not eligible costs.

(d) The amount of payments which shall be made by CCC, subject to the availability of funds, shall not exceed 50 percent of the eligible costs as determined by CCC.

(e)(1) Notwithstanding the provisions of paragraph (b) of this section, an

application for payment shall not be approved by the county committee without the written approval of the State committee if such payment would exceed $100.00 per acre for the reseeded acres constituting the qualifying loss.

(2) The State committee may not, without the written approval of DASCO approve an application for payment if such payment would exceed $150.00 per acre.

(f) FAP assistance may only be provided to eligible persons when:

(i) The forage crop will not regenerate naturally;

(2) Reseeding in the most cost-effective method to reestablish such crop; and

(3) Reseeding is not undertaken simply to improve the forage crop damaged by the drought.

(g) FAP cost-share assistance shall be available only if the request by an eligible person for assistance under this part is filed by May 15, 1989.

(h) All activities for which FAP assistance is requested shall be completed by the date specified in the FAP agreement.

§ 1479.7 Eligible person.

(a) A person shall be eligible for FAP assistance only if the person is an owner or operator of eligible established pasture.

(b) A person is an eligible person for FAP assistance only to the extent of eligible costs incurred by such person. A person shall be considered an eligible person only for a FAP payment up to the net costs incurred by that person exclusive of any payment or reimbursement to that person or that person's account for such costs; provided further that if the applicant is the operator of the property such operator shall not be deemed to have incurred costs for reseeding to the extent that such operator has been, or is, reimbursed or paid by the owner of the land, directly or indirectly, for such costs.

(c) An eligible person may be an individual, partnership, corporation, association, estate, trust, or other business enterprise or legal entity, including:

(1) Any Indian tribe under the Indian Self-Determination and Education Assistance Act;

(2) Any Indian organization or entity chartered under the Indian Reorganization Act;

(3) Any tribal organization under the Indian Self-Determination and Education Assistance Act; and,

(4) Any economic enterprise under the Indian Financing Act of 1974 that meets the requirements of this part. Federal, State and local governments and agencies and political subdivisions thereof are specifically excluded.

§ 1479.8 Application for FAP Agreement.

(a) Application for FAP agreement shall be filed by the eligible owner or operator on a form approved by CCC with the local ASCS office.

(b)(1) The county committee or designee shall review each application. The county committee and, if designated by the county committee, the county executive director, is authorized to approve or disapprove all applications provided the applicant is not a county committee member or an ASCS employee.

(2) The State committee, or a designee, is authorized to approve or disapprove applications of the county committee members and all ASCS employees except an application which may be submitted by the State Executive Director.

(3) DASCO, or a designee shall approve or disapprove applications of State committee members and the State Executive Director.

(4) All applications forwarded to a higher authority for consideration shall be accompanied by committee recommendations. No application shall be approved unless the applicant meets all eligibility requirements. Information furnished by the applicant and any other information, including knowledge of the county and State committee members concerning the applicant's normal operations, shall be taken into consideration in making recommendations and approvals. If information furnished by the applicant is incomplete or ambiguous and sufficient information is not otherwise available with respect to the applicant's farming operations in order to make a determination as to the applicant's eligibility, the application shall not be approved until sufficient additional information is provided by the applicant.

(5) An applicant shall be notified in writing of the action taken by the approving official with respect to the application.

§ 1479.9 FAP Agreement.

The FAP agreement shall set forth the reseeding requirements, incuding the period for which the reseeded forage crop must be maintained, seeding rates, eligible seed, fertilizer, and the amount of the eligible established pasture to be reseeded. The requirements for reseeding in the FAP agreement shall be in accord with county FAP reseeding standards developed by the county committee.

§ 1479.10 Obligations of person entering into FAP Agreement.

(a) A person entering into a FAP agreement must:

(1) Submit all documentation requested by the approving official which is necessary to make all determinations specified in this part;

(2) Comply with all terms and conditions of such agreement and of this part;

(3) Execute all required documents; and

(4) Comply with all applicable noxious weed laws.

(b) In the event of a determination by CCC that a person was erroneously determined to be eligible or has become ineligible for all or part of a payment made under this part for any reason, including a failure to comply with the terms and conditions of this part, such person shall refund any payment paid under this part together with interest. Such interest shall be charged at the rate determined for late payment charges under 7 CFR Part 1403 and computed from the date of disbursement by CCC of the payment to be refunded to the date of the refund.

§ 1479.11 Payment limitation.

No person, as determined under Part 795 of this title, shall receive more than $3,500 of payments under this part.

§ 1479.12 Liens and claims of creditors; setoffs.

Any payment or portion thereof due any person under this part shall be allowed without regard to questions of title under State law, and without regard to any claim or lien in favor of any person except agencies of the U.S. Government. The regulations governing set-offs and withholdings found at Part 13 of this title shall be applicable to this part.

§ 1479.13 Appeals.

Any person who is dissatisfied with a determination made with respect to this part may make a request for reconsideration or appeal of such determination in accordance with the appeal regulations set forth at Part 780 of this chapter.

§ 1479.14 Misrepresentation and Scheme or Device.

A person who is determined by the State committee or the county committee to have:

(a) Adopted any scheme or other device which tends to defeat the purpose of this program;

(b) Made any fraudulent representation; or

(c) Misrepresented any fact affecting a program determination shall be ineligible to receive assistance under this program.

§ 1478.15 Estates, trusts, and minors.

(a) Program documents executed by persons legally authorized to represent estates or trusts will be accepted only if such person furnishes evidence of their authority to execute such documents.

(b) A minor who is an eligible person shall be eligible for assistance under this subpart only if such person meets one of the following requirements:

(1) The right of majority has been conferred on the minor by court proceedings or by statute;

(2) A guardian has been appointed to manage the minor's property and the applicable program documents are executed by the guardian; or

(3) A bond is furnished under which the surety guarantees any loss incurred for which the minor would be liable had the minor been an adult.

§ 1478.16 Death, incompetency, or disappearance.

In the case of death, incompetency or disappearance, of any owner who is eligible to receive assistance in accordance with this part, such person or persons specified in Part 707 of this title may receive such assistance.

§ 1479.17 Other regulations.

The following regulations shall also apply to this part unless otherwise specified in those regulations:

(a) Part 12, Highly Erodible Land and Wetland Conservation;

(b) Part 790, Incomplete Performance Based Upon Action or Advice of an Authorized Representative of the Secretary;

(c) Part 791, Authority to Make Payments When There Has Been a Failure To Comply With the Program;

(d) Part 796, Denial of Program Eligibility for Controlled Substance Violations;

(e) Part 1403, Interest on Delinquent Debt; and

(f) All other parts of the Code of Federal Regulations which are applicable to 7 CFR Part 1479.

§ 1479.18 Paperwork Reduction Act assigned numbers.

The information collection requirements of this part shall be submitted to the Office of Management and Budget (OMB) for purposes of the Paperwork Reduction Act and it is anticipated that an OMB Number will be assigned.

Signed at Washington, DC, on October 17, 1988.

Milton Hertz,

Executive Vice President, Commodity Credit Corporation.

[FR Doc. 88-24430 Filed 10-20-88; 8:45 am]

BILLING CODE 3410-05-M

Animal and Plant Health Inspection Service

9 CFR Part 78

[Docket No. 88-151]

Brucellosis in Cattle; State and Area Classifications

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Affirmation of interim rule.

SUMMARY: We are affirming without change an interim rule that amended the brucellosis regulations concerning the interstate movement of cattle by changing the classification of Virginia from a split status of Class Free/Class A to all Class Free. We have determined that Virginia now meets the standards for Class Free status. This action relieves certain restrictions on the interstate movement of cattle from Virginia.

EFFECTIVE DATE: November 21, 1988.

FOR FURTHER INFORMATION CONTACT: Dr. Jan Huber, Senior Staff Veterinarian, Domestic Programs Support Staff, VS, APHIS, USDA, Room 812, Federal Building, 6505 Belcrest road, Hyattsville, MD 20782, 301-436-5965.

SUPPLEMENTARY INFORMATION:

Background

In an interim rule effective July 20, 1988, and published in the **Federal Register** on July 25, 1988 (53 FR 27844-27846, Docket Number 88-119) we amended the brucellosis regulations contained in 9 CFR Part 78 by removing an area of Virginia (Clarke County) from the list of Class A states in § 78.41(b) and adding it to the list of Class Free states in § 78.41(a). This action changed the status of Virginia from Class Free and Class A to all Class Free, and relieved certain restrictions on moving cattle interstate from Virginia.

Comments on the interim rule were required to be postmarked or received on or before September 23, 1988. We received no comments. The facts presented in the interim rule still provide a basis for this rule.

Executive Order 12291 and Regulatory Flexibility Act.

We are issuing this rule in conformance with Executive Order 12291, and we have determined that it is not a "major rule." Based on information compiled by the Department, we have determined that this rule will have an effect on the economy of less than $100 million; will not cause a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; and will not cause a significant adverse effect 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.

For this action, the Office of Management and Budget has waived its review process required by Executive Order 12291.

Cattle moved interstate are moved for slaughter, for use as breeding stock, or for feeding. Changing the status of Virginia from Class Free/Class A to all Class Free reduces certain testing and other requirements governing the interstate movement of cattle from Virginia. Testing requirements for cattle moved interstate for immediate slaughter or to quarantined feedlots are not affected by this change. Cattle from certified brucellosis free herds moving interstate are not affected by this change.

The groups affected by this action will be certain herd owners in Virginia, as well as buyers and importers of Virginia cattle. Approximately 8,454 cattle are tested for brucellosis in Virginia each year, at an average cost to the seller of $7 per test. We estimate that approximately 105 of these tests are conducted on cattle in Clarke County, Virginia. Therefore, Class Free status could result in a potential savings of approximately $735 for Clarke County's livestock industry. Since Clarke County, Virginia, has approximately 251 cattle herds, the annual savings to each herd owner will be approximately $2.93 per herd. We have therefore determined that changing Virginia's brucellosis status will not significantly affect market patterns, and will not have a significant economic impact on the small entities affected by this interim rule.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

This rule contains no information collection or recordkeeping requirements under the Paperwork

Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with state and local officials. (See 7 CFR Part 3015, Subpart V.)

List of Subjects in 9 CFR Part 78

Animal diseases, Brucellosis, Cattle, Hogs, Quarantine, Transportation.

PART 78—BRUCELLOSIS

Accordingly, we are adopting as a final rule, without change, the interim rule that amended 9 CFR Part 78 and that was published at 53 FR 27844–27846 on July 25, 1988.

Authority: 21 U.S.C. 111–114a–1, 114g, 115, 117, 120, 121, 123–126, 134b, 134f; 7 CFR 2.17, 2.51, and 371.2(d).

Done in Washington, DC, this 18th day of the October, 1988.

Larry B. Slagle,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 88–24429 Filed 10–20–88; 8:45 am]

BILLING CODE 3410–34–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 88–NM–132–AD; Amdt. 39–6054]

Airworthiness Directives: Boeing Models 727 and 737 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to Boeing Models 727 and 737 series airplanes, which requires repetitive testing of the takeoff warning system, and repair or replacement of any inoperative component, if necessary. This amendment is prompted by reports of a significant number of inoperative warning systems discovered during a one-time inspection of all Boeing Model 727 series airplanes takeoff warning systems, as requested by a recent FAA Action Notice. This condition, if not corrected, could result in an attempted takeoff with the airplane in the improper configuration and with the takeoff warning system inoperative.

EFFECTIVE DATE: November 10, 1988.

ADDRESSES: The applicable service information may be obtained from Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124. This information may be examined at FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, FAA, Northwest Mountain Region, 17900 Pacific Highway South, C–68966, Seattle, Washington 98168.

FOR FURTHER INFORMATION CONTACT: Mr. Alvin R. Habbestad, Systems and Equipment Branch, ANM–130S; telephone (206) 431–1942. Mailing address: Seattle Aircraft Certification Office, FAA, Northwest Mountain Region, 17900 Pacific Highway South, C–68966, Seattle, Washington 98168.

SUPPLEMENTARY INFORMATION: On September 16, 1988, the FAA issued Action Notice A8000.30, which called for a one-time check of the takeoff warning system of Boeing Model 727 series airplanes. Results of the checks have revealed that approximately 3% of the takeoff warning systems checked were out of tolerance or were inoperative. The takeoff warning system designs on the Boeing Model 737 series airplanes are similar to those of the Model 727 designs, and are subject to similar failures. This condition, if not corrected, could result in an attempted takeoff when the airplane is not in the proper takeoff configuration, and with the takeoff warning system inoperative.

Since this condition may exist or develop on other airplanes of the same type design, this AD requires a repetitive operational and functional check of the takeoff warning system at 200 flight hour intervals, and repair or replacement or any inoperative component, if necessary, prior to further flight.

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

The regulations adopted herein will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant 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 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:

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:

Boeing: Applies to Models 727 and 737 series airplanes, certificated in any category. Compliance required as indicated, unless previously accomplished.

To prevent attempted takeoff with the airplane in the improper configuration and the takeoff warning system inoperative, accomplish the following:

A. Prior to the accumulation of 200 flight hours after the effective date of this AD and thereafter at intervals not to exceed 200 flight hours, perform an operational and functional check of the takeoff configuration warning system in accordance with the established and approved procedures in Section 31–26–0 of the FAA-approved Boeing Model 727 or Model 737 Maintenance Manual, as appropriate. Repair or replace any inoperative component before further flight.

Note: The following items are to be included in the required checks:

1. Throttle Switch(es)—assure proper contact
2. Flap position switches
3. Elevator out of green band switches
4. Speed brake switch
5. APU door switch (if installed)
6. Leading edge slat switches
7. Air/Ground Relay

B. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager,

Seattle Aircraft Certification Office, FAA, Northwest Mountain Region.

Note: The request for alternate means of compliance should be forwarded through an FAA Principal Maintenance Inspector (PMI), who may add any comments and then send it to the Manager, Seattle Aircraft Certification Office.

C. Special flight permits may be issued in accordance with FAR 21.197 and 21.99 to operate airplanes to a base in order to compiy with the requirements of this AD.

All persons affected by this directive who have not already received the appropriate service information from the manufacturer may obtain copies upon request to the Boeing Commercial Airplane Company, P.O. Box 3707, Seattle, Washington 98124. This information may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, FAA, Northwest Mountain Region, 9010 East Marginal Way South, Seattle, Washington.

This amendment becomes effective November 10, 1988.

Issued in Seattle, Washington, on October 14, 1988.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate Aircraft Certification Service.

[FR Doc. 88-24424 Filed 10-20-88; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 39

[Docket No. 88-NM-89-AD; Amdt. 39-6055]

Airworthiness Directives: Boeing Model 757 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain Boeing Model 757 series airplanes, which requires modification of the wing and body duct leak detection system. This amendment is prompted by reports that operators have experienced duct leak detection from the right pneumatic air duct leak detection system when a significant leak had actually developed in the left pneumatic duct. This condition, if not corrected, could result in the flight crew switching off the inappropriate bleed system, causing loss of all air inflow and airplane depressurization.

EFFECTIVE DATE: December 7, 1988.

ADDRESSES: The applicable service information may be obtained from Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124. This information may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, FAA, Northwest Mountain Region, 9010 East Marginal Way South, Seattle, Washington.

FOR FURTHER INFORMATION CONTACT: Mr. Weston B. Slifer, Systems and Equipment Branch, ANM-130S; telephone (206) 431-1945. Mailing address: FAA, Northwest Mountain Region, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

SUPPLEMENTARY INFORMATION: A proposal to amend Part 39 of the Federal Aviation Regulations to include an airworthiness directive which requires modification of the wing and body duct leak detection system on Boeing Model 757 series airplanes, was published in the Federal Register on August 8, 1988 (53 FR 29693).

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the two comments received.

Both commenters requested that the proposed compliance time of 15 months be extended to 18 months or to 21 months so that the modification could be accomplished during various normally scheduled maintanance cycles. The FAA does not concur. The proposed compliance time was established based on risk assessment, parts availability, and known maintenance intervals. Neither commenter has provided any new data that would justify a longer compliance time. The FAA has determined that the proposed 15 months is the maximum allowable timeframe for accomplishing the modification without compromising safety.

One commenter also suggested that the compliance time be extended since the manufacturer has quoted a 300-day lead time for obtaining the kits necessary to accomplish the required modification. The FAA does not concur. The manufacturer has advised FAA that adequate required parts will be available to affected operators within the proposed compliance time.

After careful review of the available data, including the comments noted above, the FAA had determined that air safety and the public interest require the adoption of the rule as proposed.

There are approximately 168 Boeing Model 757 series airplanes in the worldwide fleet. It is estimated that 103 airplanes of U.S. registry will be affected by this AD, that it will take approximately 16 manhours per airplane to accomplish the required initial inspection and test, and that the avarage labor cost will be $40 per manhour. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $88,271.

The regulations adopted herein will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, the FAA has determined that this regulation is not considered to be major under Executive Order 12291 or significantly under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and it is further certified under the criteria of the Regulatory Flexibility Act that this rule will not have a significant economic impact, positive or negative, on a substantial number of small entities, because few, if any, Model 757 airplanes are operated by small entities. A final evaluation has been parpared for this regulation and has been placed in the docket.

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 Section 39.13 of Part 39 of the Federal Aviation Regulations (14 CFR 39.13) as follows:

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

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

2. By adding the following new airworthiness directive:

Boeing: Applies to Model 757 series airplanes, as listed in Boeing Service Bulletin 757-26-0016, dated May 5, 1988, certificated in any category. Compliance required within the next 15 months after the effective date of this AD, unless previously accomplished.

To prevent depressurization due to loss of all bleed air inflow following crew action based on an erroneous duct leak indication, accomplish the following:

A. Modify the wing and body duct leak detection system in accordance with Boeing Service Bulletin 757-26-0016, dated May 5, 1988.

B. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager,

Seattle Aircraft 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, Seattle Aircraft Certification Office.

C. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base for the accomplishment of the inspections required by this AD.

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124. These documents may be examined at FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, FAA, Northwest Mountain Region, 9010 East Marginal Way South, Seattle, Washington.

This amendment becomes effective December 7, 1988.

Issued in Seattle, Washington, on October 17, 1988.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate Aircraft Certification Service.

[FR Doc. 88-24425 Filed 10-20-88; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 95

[Docket No. 25712; Amdt. No. 346]

IFR Altitudes; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts miscellaneous amendments to the required IFR (instrument flight rule) altitudes and changeover points for certain Federal airways, jet routes, or direct routes for which a minimum or maximum en route authorized IFR altitude is prescribed. These regulatory actions are needed because of changes occurring in the National Airspace System. These changes are designed to provide for the safe and efficient use of the navigable airspace under instrument conditions in the affected areas.

EFFECTIVE DATE: October 20, 1988.

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 95 of the Federal Aviation Regulations (14 CFR Part 95) prescribes new, amended, suspended, or revoked IFR altitudes governing the operation of all aircraft in IFR flight over a specified route or any portion of that route, as well as the changeover points (COPs) for Federal airways, jet routes, or direct routes as prescribed in Part 95. The specified IFR altitudes, when used in conjunction with the prescribed changeover points for those routes, ensure navigation aid coverage that is adequate for safe flight operations and free of frequency interference. The reasons and circumstances which create the need for this amendment involve matters of flight safety, operational efficiency in the National Airspace System, and are related to published aeronautical charts that are essential to the user and provide for the safe and efficient use of the navigable airspace. In addition, those various reasons or circumstances require making this amendment effective before the next scheduled charting and publication date of the flight information to assure its timely availability to the user. The effective date of this amendment reflects those considerations. In view of the close and immediate relationship between these regulatory changes and safety in air commerce, I find that notice and public procedure before adopting this amendment is unnecessary, impracticable, and contrary to the public interest and that good cause exists for making the amendment 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 95

Aircraft, Airspace.

Robert L. Goodrich,

Acting Director, Flight Standards Service.

Adoption of the Amendment

Accordingly and pursuant to the authority delegated to me by the Administrator, Part 95 of the Federal Aviation Regulations (14 CFR Part 95) is amended as follows effective at 0901 GMT:

PART 95—[AMENDED]

1. The authority citation for Part 95 continues to read as follows:

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

2. Part 95 is amended to read as follows:

BILLING CODE 4910-13-M

REVISIONS TO MINIMUM ENROUTE IFR ALTITUDES & CHANGEOVER POINTS

AMENDMENT 346 EFFECTIVE DATE, OCTOBER 20, 1988

FROM	TO	MEA

§95.1001 DIRECT ROUTES-U.S.

IS AMENDED TO DELETE

SANTA MONICA, CA VOR/DME	PASO ROBLES, CA VORTAC	5000

§95.1001 DIRECT ROUTES-U.S.

BAHAMA ROUTES

2 LIMA IS AMENDED BY ADDING

NETTA, BF FIX	MARSH HARBOUR, BF NDB	*2000
*1200 - MOCA		MAA-45000

IS AMENDED TO READ IN PART

NASSAU, BF NDB	NETTA, BF FIX	*2000
*1500 - MOCA		MAA-45000

69V IS AMENDED BY ADDING

*WALIK, FL FIX	PALM BEACH, FL VORTAC	**2000
*6000 - MRA		MAA-45000
**1600 - MOCA		

IS AMENDED TO READ IN PART

BENZI, BF FIX	*WALIK, FL FIX	**4000
*6000 - MRA		MAA-45000
**1200 - MOCA		

§95.6003 VOR FEDERAL AIRWAY 3

IS AMENDED TO READ IN PART

BOSTON, MA VORTAC	PEASE, NH VOR	3000

§95.6004 VOR FEDERAL AIRWAY 4

IS AMENDED TO READ IN PART

ITALY, WV FIX	FILES, WV FIX	5000
SHAWNEE, VA VORTAC	ARMEL, VA VORTAC	5000

§95.6007 VOR FEDERAL AIRWAY 7

IS AMENDED TO READ IN PART

TALOR, WI FIX	*PETTY, WI FIX	4000
*7000 - MCA PETTY FIX, S BND		

§95.6010 VOR FEDERAL AIRWAY 10

IS AMENDED TO READ IN PART

BRADFORD, IL VORTAC	PLANO, IL FIX	2700

IS AMENDED TO DELETE

PLANO, IL FIX	VAINS, IL FIX	*4000
*2100 - MOCA		

§95.6024 VOR FEDERAL AIRWAY 24

IS AMENDED TO READ IN PART

JANESVILLE, WI VORTAC	FARMM, IL FIX	2900

§95.6097 VOR FEDERAL AIRWAY 97

IS AMENDED TO READ IN PART

FARMM, IL FIX	JANESVILLE, WI VORTAC	2900

§95.6100 VOR FEDERAL AIRWAY 100

IS AMENDED TO READ IN PART

ROCKFORD, IL VORTAC	BELLA, IL FIX	2800
BELLA, IL FIX	FARMM, IL FIX	2900

§95.6138 VOR FEDERAL AIRWAY 138

IS AMENDED TO READ IN PART

OMAHA, NE VORTAC	HARLN, IA FIX	3500

§95.6173 VOR FEDERAL AIRWAY 173

IS AMENDED TO READ

CAPITAL, IL VORTAC	PEOTONE, IL VORTAC	4500

§95.6227 VOR FEDERAL AIRWAY 227

IS AMENDED TO READ IN PART

PONTIAC, IL VORTAC	PLANO, IL FIX	3000

IS AMENDED TO DELETE

PLANO, IL FIX	VAINS, IL FIX	*4000
*2100 - MOCA		

FROM	TO	MEA
§95.6233 VOR FEDERAL AIRWAY 233		
IS AMENDED TO READ IN PART		
CAPITAL, IL VORTAC	EWITT, IL FIX	2600
EWITT, IL FIX	ROBERTS, IL VORTAC	2600
§95.6239 VOR FEDERAL AIRWAY 239		
IS AMENDED TO READ IN PART		
FORNEY, MO VOR	BNTON, MO FIX	2900
§95.6267 VOR FEDERAL AIRWAY 267		
IS AMENDED TO READ IN PART		
BISCAYNE BAY, FL VORTAC *2000 - MOCA	DOUGS, FL FIX	*5000
§95.6379 VOR FEDERAL AIRWAY 379		
IS AMENDED TO READ IN PART		
NOTTINGHAM, MD VORTAC	JETTA, MD FIX	1900
JETTA, MD FIX	GRACO, MD FIX	3000
GRACO, MD FIX	KENTON, DE VORTAC	1800

FROM	TO	MEA
§95.6419 VOR FEDERAL AIRWAY 419		
IS AMENDED TO READ IN PART		
WESTMINSTER, MD VOR/DME *2400 - MOCA	MODENA, PA VORTAC	*3000
§95.6429 VOR FEDERAL AIRWAY 429		
IS AMENDED TO DELETE		
JOLIET, IL VORTAC	VAINS, IL FIX	2500
§95.6437 VOR FEDERAL AIRWAY 437		
IS AMENDED BY ADDING		
BISCAYNE BAY, FL VORTAC *2000 - MOCA	DOUGS, FL FIX	*5000
DOUGS, FL FIX	PAHOKEE, FL VORTAC	1500
IS AMENDED TO READ IN PART		
PAHOKEE, FL VORTAC	MELBOURNE, FL VOR/DME	3000
§95.6505 VOR FEDERAL AIRWAY 505		
IS AMENDED TO READ IN PART		
ALMAY, MN FIX *2500 - MOCA	PRAGS, MN FIX	*4600

FROM	TO	MEA	MAA
§95.7042 JET ROUTE NO. 42			
IS AMENDED TO READ IN PART			
ROBBINSVILLE, NJ VORTAC	LAURN, NY FIX	18000	45000
LAURN, NY FIX	LA GUARDIA, NY VOR/DME	18000	30000
LA GUARDIA, NY VOR/DME	MARIO, NY FIX	18000	33000
MARIO, NY FIX	HARTFORD, CT VORTAC	18000	45000

[FR Doc. 88-24426 Filed 10-20-88; 8:45 am]
BILLING CODE 4910-13-C

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

14 CFR Part 1203

Information Security Program

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: NASA is amending 14 CFR Part 1203 by revising § 1203.202 (f) and (g) to reflect the current organzational position titles. Word changes are made to § 1203.604(c)(2)(ii) for clarity.

EFFECTIVE DATE: October 21, 1988.

ADDRESS: Director, NASA Security Office, National Aeronautics and Space Administration, Washington, DC 20546.

FOR FURTHER INFORMATION CONTACT: Erwin V. Minter, 202–453–2953.

SUPPLEMENTARY INFORMATION: Since this action is internal and administrative in nature and does not affect the existing regulations, notice and public comments are not required.

The National Aeronautics and Space Administration has determined that:

1. This rule is not subject to the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601–612, since it will not exert a significant economic impact on a substantial number of small entities.

2. This rule is not a major as defined in Executive Order 12291.

List of Subjects in 14 CFR Part 1203

Classified information, Foreign relations.

For reasons set out in the Preamble, 14 CFR Part 1203 is amended as follows:

PART 1203—INFORMATION SECURITY PROGRAM

1. The authority citation for Part 1203 continues to read as follows:

Authority: 42 U.S.C. 2451 et seq. and E.O. 12356.

2. Section 1203.202 is amended by revising paragraphs (f) and (g) to read as follows:

§ 1203.202 Responsibilities

* * * * *

(f) The Senior Security Specialist, NASA Security Office, NASA Headquarters, who serves as a member and Executive Secretary of the NASA Information Security Program Committee, is responsible for the NASA-wide coordination of security classification matters.

(g) The Chief, Information and Physical Security Branch, NASA Security Office, is responsible for establishing procedures for the safeguarding of classified information of material (e.g., accountability, control, access, storage, transmission, and marking) and for ensuring that such procedures are systematically reviewed; and those which are duplicative or unnecessary are eliminated.

3. Section 1203.604 is amended by revising paragraph (c)(2)(ii) to read as follows:

§ 1203.604 Mandatory review for declassification.

* * * * *

(c) * * *

(2) * * *

(ii) The office designated to receive requests for records specifically citing the Freedom of Information Act pursuant to Part 1206 of this chapter.

* * * * *

October 14, 1988.

James C. Fletcher,

Administrator.

[FR Doc. 88–24388 Filed 10–20–88; 8:45 am]

BILLING CODE 7510–01–M

DEPARTMENT OF COMMERCE

Office of the Secretary

15 CFR Parts 15 and 15a

[Docket No. 81013–8213]

Service of Process and Testimony of Employees of the Department of Commerce and Production of Documents in Legal Proceedings

AGENCY: Department of Commerce.

ACTION: Final rule.

SUMMARY: The Department of Commerce is amending 15 CFR Parts 15 and 15a which prescribe policies and procedures to be followed with respect to service of process on the Department and its employees, the testimony of Department employees regarding official matters, and the production of offical documents in legal proceedings. These regulations serve as a statement of policy and the amendments broaden the scope of the existing regulations and provide for more comprehensive guidelines for Department components and employees, outside agencies and other persons regarding the appropriate procedures for service of process, testimony and the production of documents.

EFFECTIVE DATE: October 21, 1988.

FOR FURTHER INFORMATION CONTACT: M. Timothy Conner, (202) 377–1067.

SUPPLEMENTARY INFORMATION: Because this rule concerns agency management and personnel, it is not a rule or regulation within the meaning of section 1(a) of Executive Order 12291, and it is not subject to the requirements of that Order. Accordingly, no preliminary or final regulatory impact analysis has to be or will be prepared.

This rule, relating to agency management and personnel, is exempt from all requirements of section 553 of the Administrative Procedures Act (5 U.S.C. 553) including a delayed effective date and therefore will be effective immediately upon publication in the **Federal Register.**

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

This final rule does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under Executive Order 12612.

This rule does not contain collections of information for purposes of the Paperwork Reduction Act.

List of Subjects in 15 CFR Parts 15 and 15a

Administrative practice and procedure, Courts, Government employees.

For the reasons set forth in the preamble, 15 CFR Subtitle A is amended as follows:

1. Part 15 is revised to read as follows:

PART 15—SERVICE OF PROCESS

Sec.

15.1 Scope and purpose.

15.2 Definitions.

15.3 Acceptance of service of process.

Authority: 5 U.S.C. 301; 15 U.S.C. 1501, 1512, 1513, 1515, and 1518; Reorganization Plan No. 5 of 1950; 44 U.S.C. 3101.

§ 15.1 Scope and purpose.

(a) This part sets forth the procedures to be followed when a summons or complaint is served on the Department, a component, or the Secretary or a Department employee in his or her official capacity.

(b) This part is intended to ensure the orderly execution of the affairs of the

Department and not to impede any legal proceeding.

(c) This part does not apply to subpoenas. The procedures to be followed with respect to subpoenas are set out in Part 15a.

(d) This part does not apply to service of process made on a Department employee personally on matters not related to official business of the Department or to the official responsibilities of the Department employee.

§ 15.2 Definitions.

For the purpose of this part:

(a) "General Counsel" means the General Counsel of the United States Department of Commerce or other Department employee to whom the General Counsel has delegated authority to act under this part, or the chief legal officer (or designee) of the Department of Commerce component concerned.

(b) "Component" means Office of the Secretary or an operating unit of the Department as defined in Department Organization Order 1–1.

(c) "Department" means the Department of Commerce.

(d) "Department employee" means any officer or employee of the Department, including commissioned officers of the National Oceanic and Atmospheric Administration.

(e) "Legal proceeding" means a proceeding before a tribunal constituted by law, including a court, an administrative body or commission, or an administrative law judge or hearing officer.

(f) "Official business" means the authorized business of the Department.

(g) "Secretary" means Secretary of Commerce.

§ 15.3 Acceptance of service of process.

(a) Except as otherwise provided in this part, any summons or complaint to be served in person or by registered or certified mail or as otherwise authorized by law on the Department, a component or the Secretary or a Department employee in their official capacity, shall be served on the General Counsel of the United States Department of Commerce, Washington, DC 20230.

(b) Any summons or complaint to be served in person or by registered or certified mail or as otherwise authorized by law on the Patent and Trademark Office or the Commissioner of Patents and Trademarks or an employee of the Patent and Trademark Office in his or her official capacity, shall be served on the Solicitor for the Patent and Trademark Office or a Department employee designated by the Solicitor.

(c) Except as otherwise provided in this part, any component or Department employee served with a summons or complaint shall immediately notify and deliver the summons or complaint to the office of the General Counsel. Any employee of the Patent and Trademark Office served with a summons or complaint shall immediately notify and deliver the summons or complaint to the office of the Solicitor.

(d) Any Department employee receiving a summons or complaint shall note on the summons or complaint the date, hour, and place of service and whether service was by personal delivery or by mail.

(e) When a legal proceeding is brought to hold a Department employee personally liable in connection with an action taken in the conduct of official business, rather than liable in an official capacity, the Department employee by law is to be served personally with process. Service of process in this case is inadequate when made upon the General Counsel or the Solicitor or their designees. Except as otherwise provided in this part, a Department employee sued personally for an action taken in the conduct of official business shall immediately notify and deliver a copy of the summons or complaint to the office of the General Counsel. Any employee of the Patent and Trademark Office sued personally for an action taken in the conduct of official business shall immediately notify and deliver a copy of the summons or complaint to the Office of the Solicitor.

(f) A Department employee sued personally in connection with official business may be represented by the Department of Justice at its discretion. See 28 CFR 50.15 and 50.16 (1987).

(g) The General Counsel or Solicitor or Department employee designated by either, when accepting service of process for a Department employee in an official capacity, shall endorse on the Marshal's or server's return of service form or receipt for registered or certified mail the following statement: "Service accepted in official capacity only." The statement may be placed on the form or receipt with a rubber stamp.

(h) Upon acceptance of service or receiving notification of service, as provided in this section, the General Counsel and Solicitor shall take appropriate steps to protect the rights of the Department, component, the Secretary or Department employee involved.

2. Part 15a is revised to read as follows:

PART 15a—TESTIMONY BY EMPLOYEES AND THE PRODUCTION OF DOCUMENTS IN LEGAL PROCEEDINGS

Sec.

15a.1 Scope.
15a.2 Definitions.
15a.3 Department policy.
15a.4 Testimony or production of documents: General rule.
15a.5 Testimony of Department employees in proceedings involving the United States.
15a.6 Legal proceedings between private litigants.
15a.7 Procedures when a Department employee receives a subpoena.

Authority: 5 U.S.C. 301; 15 U.S.C. 1501, 1512, 1513, 1515, and 1518; Reorganization Plan No. 5 of 1950; 44 U.S.C. 3101.

§ 15a.1 Scope.

(a) This part prescribes the policies and procedures of the Department with respect to the testimony of Department employees as witnesses in legal proceedings and the production of documents of the Department for use in legal proceedings pursuant to a request, order, or subpoena.

(b) The Secretary is by law responsible for the custody, use, and preservation of all documents and other property of the Department and for the official conduct of Department employees, including the appearance of any Department employee in a legal proceeding.

(c) This part does not apply to any legal proceeding in which a Department employee is to testify, while on leave status, as to facts or events that are in no way related to the official business of the Department.

(d) This part is intended to ensure the orderly execution of the affairs of the Department and not to impede any legal proceeding and in no way affects the rights and procedures governing public access to records pursuant to the Freedom of Information Act or the Privacy Act. See 15 CFR 15a.4.

(e) Components of the Department may prescribe or retain supplementary regulations not inconsistent with this Part.

§ 15a.2 Definitions.

For the purpose of this part:

(a) "Component" means Office of the Secretary or an operating unit of the Department as defined in Department Organization Order 1–1.

(b) "Demand" means a request, order, or subpoena for testimony or documents for use in a legal proceeding.

(c) "Department" means the United States Department of Commerce.

(d) "Department employee" means any officer or employee of the Department, including commissioned officers of the National Oceanic and Atmospheric Administration.

(e) "Document" means any record, paper, and other property held by the Department, including without limitation official letters, telegrams, memoranda, reports, studies, calendar and diary entries, maps, graphs, pamphlets, notes, charts, tabulations, analyses, statistical or informational accumulations, any kind of summaries of meetings and conversations, film impressions, magnetic tapes, and sound or mechanical reproductions.

(f) "General Counsel" means the General Counsel of the Department or other Department employee to whom the General Counsel has delegated authority to act under this part, or the chief legal officer (or designee) of the Department of Commerce component concerned.

(g) "Legal proceeding" means a proceeding before a tribunal constituted by law, including a court, an administrative body or commission, an administrative law judge or hearing officer or any discovery proceeding in support thereof.

(h) "Official business" means the authorized business of the Department.

(i) "Secretary" means Secretary of Commerce.

(j) "Testimony" means a statement given in person before a tribunal or by deposition for use before the tribunal or any other statement given for use before a tribunal in a legal proceeding.

(k) "United States" means the Federal Government, its departments and agencies, and individuals acting on behalf of the Federal Government.

§ 15a.3 Department policy.

The Department's policy is that its documents will not be voluntarily produced and Department employees will not voluntarily appear as witnesses in a legal proceeding. The reasons for this policy include:

(a) To conserve the time of Department employees for conducting official business;

(b) To minimize the possibility of involving the Department in controversial or other issues that are not related to its mission;

(c) To prevent the possibility that the public will misconstrue variances between personal opinions of Department employees and Department policy;

(d) To avoid spending the time and money of the United States for private purposes; and

(e) To preserve the integrity of the administrative process.

§ 15a.4 Testimony or production of documents; general rule.

(a) No Department employee shall give testimony concerning the official business of the Department or produce any document in any legal proceeding without the prior authorization of the General Counsel. Where appropriate, a Department employee may be instructed in writing not to give testimony or produce a document. Without the approval of the General Counsel, no Department employee shall answer inquiries from a person not employed by the Department regarding testimony or documents subject to a demand or a potential demand under the provisions of this Part. All inquiries, unless they involve a demand or potential demand on an employee of the Patent and Trademark Office, shall be referred to the General Counsel. Inquiries involving a demand or potential demand on an employee of the Patent and Trademark Office shall be referred to the Solicitor.

(b) A certified copy of a document for use in a legal proceeding will be provided upon written request and payment of applicable fees. Written requests for certification shall be addressed to the chief legal counsel for the component having possession, custody, or control of the document. Unless governed by another applicable provision of law or component regulation, the applicable fees include charges for certification and reproduction as set out in 15 CFR 4.9. Other reproduction costs and postage fees, as appropriate, must also be borne by the requester.

(c)(1) *Request for testimony or document.* A request for testimony of a Department employee, other than an employee of the Patent and Trademark Office, shall be addressed to the General Counsel, Room 5870, Department of Commerce, Washington, DC 20230. A request for testimony of an employee of the Patent and Trademark Office shall be made to the Solicitor for the Patent and Trademark Office. The mailing address of the Solicitor is Box 8, Patent and Trademark Office, Washington, DC 20231. A request for a document, other than a document within the possession, custody, and control of the Patent and Trademark Office, shall be made to the General Counsel. A request for a document within the possession, custody, and control of the Patent and Trademark Office shall be made to the Solicitor.

(2) *Subpoenas.* A subpoena for testimony by a Department employee or a document, other than testimony of an employee of the Patent and Trademark Office or a document within the possession, custody, and control of the Patent and Trademark Office, shall be served in accordance with the Federal Rules of Civil or Criminal Procedure as appropriate, or applicable state procedure, and a copy of the subpoena shall be sent to the General Counsel. A subpoena for testimony by an employee of the Patent and Trademark Office or a document within the possession, custody, and control of the Patent and Trademark Office shall be served in accordance with the Federal Rules of Civil or Criminal Procedure as appropriate, or applicable state procedure, and a copy of the subpoena shall be sent to the Solicitor.

(3) *Affidavit.* Every request and subpoena shall be accompanied by an affidavit or declaration under 28 U.S.C. 1746 or, if an affidavit or declaration is not feasible, a statement setting forth the title of the legal proceeding, the forum, the requesting party's interest in the legal proceeding, the reasons for the request or subpoena, a showing that the desired testimony or document is not reasonably available from any other source, and if testimony is requested, the intended use of the testimony, a general summary of the testimony desired, and a showing that no document could be provided and used in lieu of testimony. The purpose of this requirement is to permit the General Counsel to make an informed decision as to whether testimony or production of a document should be authorized.

(d) Any Department employee, other than an employee of the Patent and Trademark Office, who is served with a demand shall immediately notify the General Counsel. An employee of the Patent and Trademark Office served with a demand shall immediately notify the Solicitor.

(e) The General Counsel may authorize and direct a Department employee to testify concerning official business or to produce a document in a legal proceeding when: the Department has a significant interest in the legal proceeding, in the opinion of the General Counsel, production of a document or presenting factual or expert testimony by a Department employee would be in the best interest of the Department or in the public interest, or in such other circumstances as the General Counsel may determine are appropriate. When production of a document is authorized by the General Counsel, fees will be assessed in accordance with paragraph (b) of this section.

(f) The Secretary retains the authority to authorize and direct testimony in

accordance with paragraph (e) of this section in those cases where a statute or Presidential order mandates a personal decision by the Secretary.

(g) The General Counsel may consult or negotiate with an attorney for a party or the party, if not represented by an attorney, to refine or limit a demand so that compliance is less burdensome or obtain information necessary to make the determination required by paragraph (e) of this section. Failure of the attorney or party to cooperate in good faith to enable the General Counsel or Secretary to make an informed determination under this part may serve as the basis for a determination not to comply with the demand.

(h) A determination under this part to comply or not to comply with a demand is not an assertion or waiver of privilege, lack of relevance, technical deficiencies or any other ground for noncompliance. The Department reserves the right to oppose any demand on any legal ground independent of any determination under this part.

§ 15a.5 Testimony of Department employees in proceedings involving the United States.

(a) A Department employee may not testify as an expert or opinion witness for any party other than the United States.

(b) When appropriate, the General Counsel may authorize a Department employee to give testimony as an expert or opinion witness on behalf of the United States.

(c) Whenever, in any legal proceeding involving the United States, a request is made by an attorney representing or acting under the authority of the United States, the General Counsel will make all necessary arrangements for the Department employee to give testimony on behalf of the United States. Where appropriate, the General Counsel may require reimbursement to the Department of the expenses associated with a Department employee giving testimony on behalf of the United States.

§ 15a.6 Legal proceedings between private litigants.

(a) Testimony by a Department employee and production of documents in a legal proceeding not involving the United States shall be governed by § 15a.4.

(b) If a Department employee is authorized to give testimony in a legal proceeding not involving the United States, the testimony, if otherwise proper, shall be limited to facts within the personal knowledge of the Department employee. A Department employee is prohibited from giving expert or opinion testimony, answering hypothetical or speculative questions, or giving testimony with respect to subject matter which is privileged. If a Department employee is authorized to testify in connection with the employee's involvement or assistance in a quasi-judicial proceeding which is taking place or took place before the Department, that employee is further prohibited from giving testimony on the manner and extent to which the record of the quasi-judicial proceeding was considered or studied or as to the bases, reasons, mental processes, analyses, or conclusions for the decision rendered in the quasi-judicial proceeding.

§ 15a.7 Procedures when a Department employee receives a subpoena.

(a) Except in the case of an employee of the Patent and Trademark Office, any Department employee who receives a subpoena shall immediately forward the subpoena to the General Counsel. In the case of an employee of the Patent and Trademark Office, the subpoena shall immediately be forwarded to the Solicitor. The General Counsel will determine the extent to which a Department employee will comply with the subpoena in accordance with the provisions of § 15a.4(e).

(b) If the Department employee is not authorized by the General Counsel to comply with the subpoena, the Department employee shall appear at the time and place stated in the subpoena, produce a copy of this Part, and respectfully refuse to provide any testimony or produce any document. *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

(c) Where the Department employee is an employee of the Office of the Inspector General, the Inspector General, in consultation with the General Counsel, will make any necessary determinations under paragraphs (a) and (b) of this section.

(d) When necessary or appropriate, the General Counsel will request assistance from the Department of Justice or a U.S. Attorney or otherwise assure the presence of an attorney to represent the interests of the Department, a component of the Department, or a Department employee.

Date: October 13, 1988.

Robert H. Brumley,

General Counsel.

[FR Doc. 88-24361 Filed 10-20-88; 8:45 am]

BILLING CODE 3510-BW-M

Bureau of Export Administration

15 CFR Part 773

[Docket No. 80463-8063]

Foreign Consignees Removed or Suspended from Distribution Licenses

AGENCY: Bureau of Export Administration, Commerce.

ACTION: Final rule.

SUMMARY: The Distribution License (DL) is a special license authorizing license holders to export eligible commodities to approved consignees in specified countries, without dollar value or quantity limits. Under the DL procedure, foreign consignees are authorized to ship between themselves and their customers without requesting permission from the DL holder. A requirement that DL holders notify all their consignees on the license when the Office of Export Licensing has prohibited the sale or transfer of commodities to specified firms or individuals currently appears in the Export Administration Regulations (15 CFR 773.3(f)(3)(v)). This rule amends § 773.3(1)(4)(ii) to clarify the notification procedures to be followed by the DL holder when consignees are deleted, suspended or revoked from a Distribution License. Clarification of these procedures will ensure that currently approved consignees do not continue to reexport commodities to newly deleted consignees under a Distribution License.

EFFECTIVE DATE: October 21, 1988.

FOR FURTHER INFORMATION CONTACT: Michael Hoffman, Office of Export Licensing, Bureau of Export Administration, Department of Commerce, Telephone: (202) 377-3287.

SUPPLEMENTARY INFORMATION:

Rulemaking Requirements

1. Because this rule concerns a foreign and military affairs function of the United States, it is not a rule or regulation within the meaning of section 1(a) of Executive Order 12291, and it is not subject to the requirements of that Order. Accordingly, no preliminary or final Regulatory Impact Analysis has to be or will be prepared.

2. Section 13(a) of the Export Administration Act of 1979, as amended (50 U.S.C. app. 2412(a)), exempts this rule from all requirements of section 553 of the Administrative Procedure Act (APA) (5 U.S.C. 553), including those requiring publication of a notice of proposed rulemaking, an opportunity for public comment, and a delay in effective

date. This rule is also exempt from these APA requirements because it involves a foreign and military affairs function of the United States. Section 13(b) of the EAA does not require that this rule be published in proposed form because this rule does not impose a new control. Further, no other law requires that notice of proposed rulemaking and an opportunity for public comment be given for this rule.

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

4. This rule contains a collection of information subject to the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*). This collection has been approved by the Office of Management and Budget under control number 0694–0015. Public reporting burden for notifying all foreign consignees whenever a foreign consignee is suspended, removed or revoked from a Distribution License is estimated to average 20 minutes per response. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to the Office of Administration, Bureau of Export Administration, Room 3889, Department of Commerce, Washington, DC 20230 and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

5. This rule does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under Executive Order 12612.

Accordingly, this rule is being issued in final form. However, as with other Department of Commerce rules, comments from the public are always welcome. Written comments (six copies) should be submitted to: Joan Maguire, Regulations Branch, Bureau of Export Administration, Department of Commerce, P.O. Box 273, Washington, DC 20044.

List of Subjects in 15 CFR Part 773

Exports, Reporting and recordkeeping requirements.

Accordingly, 15 CFR Part 773 of the Export Administration Regulations is amended as follows:

PART 773—[AMENDED]

1. The authority citation for Part 773 continues to read as follows:

Authority: Pub. L. 96–72, 93 Stat. 503 (50 U.S.C. app. 2401 *et seq.*), as amended by Pub. L. 97–145 of December 29, 1981, by Pub. L. 99–64 of July 12, 1985, and Pub. L. 100–418 of August 23, 1988; E.O. 12525 of July 12, 1985 (50 FR 28757, July 16, 1985); Pub. L. 95–223 of December 28, 1977 (50 U.S.C. 1701 *et seq.*); E.O. 12532 of September 9, 1985 (50 FR 36861, September 10, 1985) as affected by notice of September 4, 1986 (51 FR 31925, September 8, 1986); Pub. L. 99–440 of October 2, 1986 (22 U.S.C. 5001 *et seq.*); and E.O. 12571, October 27, 1986 (51 FR 39505, October 29, 1986).

2. In § 773.3, paragraph (f)(3)(v) is amended by adding a parenthetical clause after the fourth sentence to read as set forth below and paragraph (l)(4)(ii) is amended by revising the paragraph heading and by adding three sentences to the end of the paragraph to read as follows:

§ 773.3 Distribution License.

* * * * *

(f) *Action on license applications.*

* * *

(3) * * *

(v) * * * (See § 773.3(1)(4)(ii) regarding specific notification procedures.) * * *

* * * * *

(l) *Amendments of Distribution Licenses.* * * *

(4) * * *

(ii) *Deletion, suspension or revocation of consignees.* * * * Whenever a license holder submits a Form ITA–685P deleting a consignee or whenever the licensee learns that the Office of Export Licensing has suspended or revoked the Distribution License consignee status of any of his Distribution License consignees, he must immediately notify all other consignees of the deletion, suspension or revocation. The notice must state that the deleted, suspended or revoked party is no longer eligible to receive goods or technical data under the licensee's Distribution License. It need not specify the reason for the suspension unless the consignee has been denied export privileges by the U.S. Department of Commerce.

* * * * *

Dated: October 14, 1988.

Michael E. Zacharia,

Assistant Secretary for Export Administration.

[FR Doc. 88–24408 Filed 10–20–88; 8:45 am]

BILLING CODE 3510–DT–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 73

[Docket No. 87C–0379]

Listing of Color Additives for Coloring Contact Lenses; Carbazole Violet

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the color additive regulations to provide for the safe use of carbazole violet for coloring contact lenses. This action is in response to a petition filed by Wesley-Jessen.

DATES: Effective November 22, 1988, except as to any provisions that may be stayed by the filing of proper objections; written objections and requests for a hearing by November 21, 1988.

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

FOR FURTHER INFORMATION CONTACT: Mary W. Lipien, Center for Food Safety and Applied Nutrition (HFF–335), Food and Drug Administration, 200 C Street SW., Washington, DC 20204, 202–472–5690.

SUPPLEMENTARY INFORMATION:

I. Introduction

In a notice published in the Federal Register of January 26, 1988 (53 FR 2093), FDA announced that a color additive petition (CAP 7C0210) had been filed by Wesley-Jessen, 400 West Superior St., Chicago, IL 60610, proposing that 21 CFR Part 73 of the color additive regulations be amended to provide for the safe use of carbazole violet (CAS Reg. No. 6358–30–1, Colour Index No. 51319) to color contact lenses. The petition was filed under section 706 of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 376).

II. Applicability of the Act

With the passage of the Medical Device Amendments of 1976 to the act (Pub. L. 94–295), Congress mandated the listing of color additives for use in medical devices when the color additive comes in direct contact with the body for a significant period of time (21 U.S.C. 376(a)). The use of carbazole violet as a color additive in contact lenses is subject to this listing requirement. The color additive is added to contact lenses in such a way that at least some of the

color additive will come in contact with the eye when the lenses are worn. In addition, the lenses are intended to be placed on the eye for several hours a day, each day, for 1 year or more. Thus, the color additive will be in direct contact with the body for a significant period of time. Consequently, the use of the color additive currently before the agency is subject to the statutory listing requirement.

III. The Color Additive

The color additive carbazole violet (CAS Reg. No. 6358–30–1, Colour Index No. 51319) is prepared by reacting aminoethyl carbazole with chloranil in a high-boiling solvent (trichlorobenzene), followed by ring closure using benzene sulfonyl chloride. The product, which is composed of large particles, is filtered, washed, and dried. Particle size is reduced by mixing the crude product with an inorganic salt and a wetting agent which are then washed out during processing.

IV. Safety Evaluation

FDA concludes from the data submitted in the petition and from other relevant information that the upper limit of exposure to carbazole violet from its use in contact lenses is 280 nanograms per day. The agency-calculated upper limit was based on two factors. First, FDA has established a maximum practical use level of 50 micrograms per lens for color additives in contact lenses (Ref. 1). Second, the agency made two worst-case assumptions: (1) That a user will replace lenses tinted with carbazole violet once each year with a new pair of lenses tinted with the color additive at the maximum use level; and (2) that 100 percent of the color additive will migrate from the lenses into the eyes over the 1-year period. Because these assumptions are worst-case estimates, exposure to carbazole violet from its use for coloring contact lenses is likely to be far less than 280 nanograms per day.

To establish that the color additive carbazole violet is safe for use in coloring contact lenses, the petitioner conducted an in vitro cytotoxicity study on the color additive using L929 mouse fibroblast cells. The mouse cell cultures were exposed to 50,000 micrograms per milliliter of neat color additive. In this study, there were no changes in the morphology of cells that were in contact with the color additive. Thus, the study demonstrated that this concentration of the color additive is noncytotoxic by direct contact, and that the non-effect level for this color additive is greater than 50,000 micrograms per milliliter.

To relate this no-effect concentration for carbazole violet to the maximum concentration level in the eye that would result from the use of this color additive in contact lenses, the agency estimated that the daily exposure of the color additive in each eye (140 nanograms) will be diluted by the average daily volume of tears produced in each eye (1.68 milliliters). This concentration is equal to a maximum daily concentration of 83 nanograms of color additive per milliliter in the tear flow and eye area. This concentration is more than 600,000 times less than the dose of carbazole violet that was shown to have no adverse effect in the cytotoxicity study.

Based upon the available toxicity data, the small amount of the color additive added to the contact lens, and the agency's exposure calculation, FDA finds that the color additive carbazole violet is safe for use in contact lenses. FDA further concludes that the safety margin is sufficiently large that a limitation on the amount of the color additive that may be present in the lens is not required beyond the limitation that only the amount necessary to accomplish the intended technical effect may be used. Batch certification is not required to ensure safety.

V. Conclusions

Based on data contained in the petition and other relevant material, FDA concludes that there is a reasonable certainty that no harm will result from the petitioned use of carbazole violet for coloring contact lenses, and that this color additive is safe for its intended use. In addition, based upon the data it considered, the agency finds that carbazole violet is suitable for use in coloring contact lenses.

VI. Inspection of Documents

In accordance with § 71.15 (21 CFR 71.15), the petition and the documents that FDA considered and relied upon in reaching its decision to approve the petition are available for inspection at the Center for Food Safety and Applied Nutrition by appointment with the information contact person listed above. As provided in 21 CFR 71.15, the agency will delete from the documents any materials that are not available for public disclosure before making the documents available for inspection.

VII. Environmental Impact

The agency has carefully considered the potential environmental effects of this action. FDA has concluded that the action will not have a significant impact on the human environment, and that an environmental impact statement is not required. The agency's finding of no significant impact and the evidence suporting that finding, contained in an environmental assessment, may be seen in the Dockets Management Branch (address above) between 9 a.m. and 4 p.m., Monday through Friday. This action was considered under FDA's final rule implementing the National Environmental Policy Act (21 CFR Part 25).

VIII. Reference

The following reference has been placed on display in the Dockets Management Branch (address above) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. Memorandum of February 19, 1985, from the Food Additive Chemistry Evaluation Branch to the Petitions Control Branch, Re: "Color Additives in Contact Lenses."

IX. Objections

Any person who will be adversely affected by this regulation may at any time on or before November 21, 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.

List of Subjects in 21 CFR Part 73

Color additives, Cosmetics, Drugs, Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, Part 73 is amended as follows:

PART 73—LISTING OF COLOR ADDITIVES EXEMPT FROM CERTIFICATION

1. The authority citation for 21 CFR Part 73 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. New § 73.3107 is added to Subpart D to read as follows:

§ 73.3107 Carbazole violet.

(a) *Identity.* The color additive is carbazole violet (Pigment Violet 23) (CAS Reg. No. 6358–30–1, Colour Index No. 51319).

(b) *Uses and restrictions.* (1) The substance listed in paragraph (a) of this section may be used as a color additive in contact lenses in amounts not to exceed the minimum reasonably required to accomplish the intended coloring effect.

(2) Authorization for this use shall not be construed as waiving any of the requirements of sections 510(k), 515, and 520(g) of the Federal Food, Drug, and Cosmetic Act (the act) with respect to the contact lens in which the color additive is used.

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

(d) *Exemption from certification.* Certification of this color additive is not necessary for the protection of the public health, and therefore the color additive is exempt from the certification requirements of section 706(c) of the act.

Dated: October 18, 1988.

John M. Taylor,

Associate Commissioner for Regulatory Affairs.

[FR Doc. 88–24459 Filed 10–20–88; 8:45 am]

BILLING CODE 4160–01–M

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21 CFR Part 73

[Docket No. 87C–0253]

Listing of Color Additives for Coloring Contact Lenses; Chromium-Cobalt-Aluminum Oxide

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the color additive regulations to provide for the safe use of chromium-cobalt-aluminum oxide for coloring contact lenses. This action is in response to a petition filed by CooperVision, Inc.

DATES: Effective November 22, 1988, except for any provisions that may be stayed by the filing of proper objections; written objections and requests for a hearing by November 21, 1988.

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

FOR FURTHER INFORMATION CONTACT: Mary W. Lipien, Center for Food Safety and Applied Nutrition (HFF–335), Food and Drug Administration, 200 C Street, SW., Washington, DC 20204, 202–472–5690.

SUPPLEMENTARY INFORMATION:

I. Introduction

In a notice published in the **Federal Register** of September 1, 1987 (52 FR 32965), FDA announced that a color additive petition (CAP 7C0209) had been filed by CooperVision, Inc., 2610 Orchard Parkway, San Jose, CA 95134, proposing that 21 CFR Part 73 of the color additive regulations be amended to provide for the safe use of chromium-cobalt-aluminum oxide to color contact lenses. The petition was filed under section 706 of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 376).

II. Applicability of the Act

With the passage of the Medical Device Amendments of 1976 to the act (Pub. L. 94–295), Congress mandated the listing of color additives for use in medical devices when the color additive comes in direct contact with the body for a significant period of time (21 U.S.C. 376(a)). The use of chromium-cobalt-aluminum oxide as a color additive in contact lenses is subject to this listing requirement. The color additive is added to contact lenses in such a way that at least some of the color additive will come in contact with the eye when the lenses are worn. In addition, the lenses are intended to be placed on the eye for several hours a day, each day for 1 year or more. Thus, the color additive will be in direct contact with the body for a significant period of time. Consequently, the use of the color additive currently before the agency is subject to the statutory listing requirement.

III. The Color Additive

The chemical identity of the color additive chromium-cobalt-aluminum oxide (CAS Reg. No. 68187–11–1, Colour Index No. 77343) is the same as that described in 21 CFR 73.1015(a), which authorizes the use of the additive for coloring linear polyethylene sutures. The composition of the additive is identical to that described in 21 CFR 73.1015(b). The range of metal concentrations in the specifications under § 73.1015 occurs because the additive is an inorganic pigment of varying chromium, cobalt, and aluminum composition, rather than a compound of precisely defined chemical composition.

IV. Safety Evaluation

FDA concludes from the data submitted in the petition and from other relevant information that the upper limit of exposure to chromium-cobalt-aluminum oxide from its use in contact lenses is 760 nanograms per day. The agency-calculated upper limit was based on two factors. First, from information submitted by the petitioner, FDA estimated that the maximum use level of the color additive is 138 micrograms per lens. Second, the agency made two worst-case assumptions: (1) That a user will replace lenses tinted with chromium-cobalt-aluminum oxide once each year with a new pair of lenses tinted with the color additive at the maximum use level; and (2) that 100 percent of the color additive will migrate from the lenses into the eyes over the 1-year period. Because these assumptions are worst-case estimates, exposure to chromium-cobalt-aluminum oxide from its use for coloring contract lenses is likely to be far less than 760 nanograms per day.

To establish that the color additive chromium-cobalt-aluminum oxide is safe for use in coloring contact lenses, the petitioner conducted an in vitro cytotoxicity study on the color additive using L929 mouse fibroblast cells. The cell cultures were exposed to the color additive at various levels. The study demonstrated that the maximum concentration of pigment tested, 300 micrograms per milliliter, and that the no-effect level is greater than 300 micrograms per milliliter.

To relate this no-effect concentration for chromium-cobalt-aluminum oxide to the maximum concentration level in the eye that would result from the use of this color additive in contact lenses, the agency estimated that the daily exposure of the color additive in each eye (380 nanograms) will be diluted by the average daily volume of tears produced in each eye (1.68 milliliters). This concentration is equal to a maximum daily concentration of 0.226 micrograms of color additive per milliliter in the tear flow and eye area. This concentration is more than 1,000 times less than the no-effect dose for chromium-cobalt-aluminum oxide found in the cytotoxicity study. Data from 5-day and 21-day ocular irritation studies in rabbits tested with the colored contact lenses showed no irritation or toxicity to the ocular environment.

Therefore, based upon the available toxicity data, the small amount of the color additive added to the contact lens, and the agency's exposure calculation, FDA finds that the color additive chromium-cobalt-aluminum oxide is safe for use in contact lenses. FDA further concludes that the safety margin is sufficiently large that a limitation on the amount of the color additive that may be present in the lens is not required beyond the limitation that only the amount necessary to accomplish the intended technical effect may be used. Batch certification is not required to ensure safety.

V. Conclusions

Based on data contained in the petition and other relevant material, FDA concludes that there is a reasonable certainty that no harm will result from the petitioned use of chromium-cobalt-aluminum oxide for coloring contact lenses, and that this color additive is safe for its intended use. In addition, based upon the data it considered, the agency finds that chromium-cobalt-aluminum oxide is suitable for use in coloring contact lenses and is adding new § 73.3110a to Subpart D of the color additive regulations.

VI. Inspection of Documents

In accordance with § 71.15 (21 CFR 71.15), the petition and the documents that FDA considered and relied upon in reaching its decision to approve the petition are available for inspection at the Center for Food Safety and Applied Nutrition by appointment with the information contact person listed above. As provided in § 71.15, the agency will delete from the documents any materials that are not available for public disclosure before making the documents available for inspection.

VII. Environmental Impact

The agency has carefully considered the potential environmental effects of this action. FDA has concluded that the action will not have a significant impact on the human environment, and that an environmental impact statement is not required. The agency's finding of no significant impact and the evidence supporting that finding, contained in an environmental assessment, may be seen in the Dockets Management Branch (address above) between 9 a.m. and 4 p.m., Monday through Friday. This action was considered under FDA's Final rule implementing the National Environmental Policy Act (21 CFR Part 25).

VIII. Objections

Any person who will be adversely affected by this regulation may at any time on or before November 21, 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 a notice of the objections that the agency has received or lack thereof in the Federal Register.

List of Subjects in 21 CFR Part 73

Color additives, Cosmetics, Drugs, Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, Part 73 is amended as follows:

PART 73—LISTING OF COLOR ADDITIVES EXEMPT FROM CERTIFICATION

1. The authority citation for 21 CFR Part 73 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. New § 73.3110a is added to Subpart D to read as follows:

§ 73.3110a Chromium-cobalt-aluminum oxide.

(a) *Identity.* The color additive chromium-cobalt-aluminum oxide (Pigment Blue 36) (CAS Reg. No. 68187–11–1, Colour Index No. 77343) shall conform in identity and specifications to the requirements of § 73.1015 (a) and (b).

(b) *Uses and restrictions.* (1) The substance listed in paragraph (a) of this section may be used as a color additive in contact lenses in amounts not to exceed the minimum reasonably required to accomplish the intended coloring effect.

(2) Authorization for this use shall not be construed as waiving any of the requirements of sections 510(k), 515, and 520(g) of the Federal Food, Drug, and Cosmetic Act (the act) with respect to the contact lens in which the color additive is used.

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

(d) *Exemption from certification.* Certification of this color additive is not necessary for the protection of the public health, and therefore the color additive is exempt from the certification requirements of section 706(c) of the act.

Dated: October 18, 1988.

John M. Taylor,

Associate Commissioner for Regulatory Affairs.

[FR Doc. 88–24458 Filed 10–20–88; 8:45 am]

BILLING CODE 4160–01–M

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21 CFR Part 172

[Docket No. 82F–0185]

Direct Food Additives; Food Additives Permitted for Direct Addition to Food for Human Consumption; Dimethyl Dicarbonate

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the food additive regulations to provide for the safe use of dimethyl dicarbonate as a yeast inhibitor in wines. This action responds to a petition filed by Mobay Chemical Corp.

DATES: Effective October 21, 1988; written objections and requests for a hearing by November 21, 1988. The Director of the Office of the Federal Register approves the incorporation by reference of certain publications at 21 CFR 172.133(a)(2), effective October 21, 1988.

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

FOR FURTHER INFORMATION CONTACT: JoAnn Ziyad, Center for Food Safety and Applied Nutrition (HFF–334); Food

and Drug Administration, 200 C Street SW., Washington, DC 20204, 202–426–9463.

SUPPLEMENTARY INFORMATION: In a notice published in the **Federal Register** of July 13, 1982 (47 FR 30291), FDA announced that a petition (FAP 2A3636) has been filed by Mobay Chemical Corp., Penn Lincoln Parkway West, Pittsburgh, PA 15205, proposing that the food additive regulations be amended to provide for the safe use of dimethyl dicarbonate as a cold sterilant in beverages and fruit juices. Subsequently, the petition was amended to request the use of dimethyl dicarbonate to prevent the growth of yeasts in wines only.

Dimethyl dicarbonate is unstable in aqueous solution and breaks down almost immediately after addition to beverages. In wine and aqueous liquids, the principal breakdown products are methanol and carbon dioxide. Dimethyl carbonate and methylethl carbonate, as well as carbomethoxy amino and hydroxy adducts of amines, sugars, and fruit acids, are also formed in minor amounts. Dimethyl dicarbonate also may react with traces of ammonia or ammonium ions in wines to form trace quantities of methyl carbamate. Methyl carbamate has been shown to cause cancer in laboratory animals.

In accordance with 21 CFR 171.1, FDA has reviewed the safety of the food additive dimethyl dicarbonate, as well as that of the by-products formed during hydrolysis and reaction of the food additive with other constituents found in wines. The results of that review are discussed below.

I. Determination of Safety

Under section 409(c)(3)(A) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 348(c)(3)(A)), the so-called "general safety clause" of the statute, a food additive cannot be approved for a particular use unless a fair evaluation of the data available to FDA establishes that the additive is safe for that use. Under section 409(c)(5)(A) of the act (21 U.S.C. 348(c)(5)(A)), in determining whether a proposed use of a food additive is safe, among the relevant factors to be considered is the probable consumption of the additive and of any substance formed in or on food because of the use of the additive. The concept of safety embodied in the Food Additives Amendment of 1958 is explained in the legislative history of the provision: "Safety requires proof of a reasonble 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 circumstance." (H. Rept. 2284, 85th Cong., 2nd Sess. 4 (1958)). This concept of safety has been incorporated into FDA's food additive regulations (21 CFR 170.3(i)). The anticancer or Delaney clause of the Food Additives Amendment (section 409(c)(3)(A) of the act (21 U.S.C. 348(c)(3)(A))) provides further that no food additive shall be deemed to be safe if it is found to induce cancer when ingested by man or animal.

In the past, FDA often refused to approve a use of an additive that contained even minor amounts of a carcinogenic chemical, even though the additive as a whole had not been shown to cause cancer. The agency now believes that the Delaney or anticancer clause is applicable only when the food additive as a whole is found to cause cancer. An additive that has not been shown to cause cancer but that contains a carcinogenic constituent, or whose use will lead to the formation of trace amounts of a carcinogenic substance in or on food, may be properly evaluated under the general safety clause of the statute.[1] Risk assessment procedures are used to determine whether there is a reasonable certainty that no harm will result from the proposed use of the additive. Developments in scientific technology and experience with risk assessment procedures make it possible for FDA to establish the safety of such additives.

The agency's position on additives that contain a carcinogenic constituent but that have themselves not been shown to cause cancer 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, which contains a carcinogenic chemical but has itself not been shown to cause cancer. Relying heavily on the reasoning in the agency's decision to list the above color additive, the United States Court of Appeals for the Sixth Circuit rejected the challenge to FDA's action and affirmed the listing regulation. The agency believes that it is consistent with the *Scott* decision to interpret the constituents policy to include the current situation, which relates to the possible formation of trace amounts of a carcinogenic substance from the use of a food additive in food but in which the additive itself has not been shown to cause cancer.

II. Safety of Petitioned Use of Dimethyl Dicarbonate

FDA finds that the petitioned use level of 100 to 200 parts per million (ppm) of dimethyl dicarbonate will result in virtually no exposure of consumers to the additive itself. Dimethyl dicarbonate is unstable in aqueous solution and breaks down almost immediately after addition to the food (beverages) to form primarily carbon dioxide and methanol. The instability of dimethyl dicarbonate is confirmed by data submitted by the petitioner showing that dimethyl dicarbonate cannot be detected by analysis of food to which it has been added.

To establish that dimethyl dicarbonate is safe for use as an inhibitor of yeast in wine, the petitioner submitted data from acute, subchronic, and chronic toxicity studies. In the subchronic and chronic toxicity studies, rats received either water, orange juice, or wine treated with 4,000 (ppm) of dimethyl dicarbonate (20 times the proposed use level in wine) as the drinking fluid while the controls received water, orange juice, or wine. These studies revealed no adverse effects from water, orange juice, or wine treated with dimethyl dicarbonate.

In other chronic toxicity studies, dogs received either water or orange juice treated with 4,000 ppm of dimethyl dicarbonate as the drinking fluid. These studies also revealed no adverse effects from the water or orange juice treated with dimethyl dicarbonate.

The petitioner also submitted a 2-generation rat study in which rats received drinking fluids that were treated with dimethyl dicarbonate (4,000 ppm). This study revealed no adverse effects. These chronic and multigeneration studies of dimethyl dicarbonate did not produce any evidence that it is a carcinogen.

III. Safety of Substances That May be Present in Wine Due to Use of the Additive

Because dimethyl dicarbonate decomposes into other chemical species when added to aqueous solutions such as wine, FDA has also evaluated the safety of the chemicals formed as a result of the addition of dimethyl dicarbonate to wine.

A. Minor Reaction Products

The minor reaction products formed in wine from the use of dimethyl

[1] However, the statute calls for a different treatment from compounds whose use as a food additive, color additive, or new animal drug administered to food-producing animals results in the formation of carcinogenic metabolites in the animal. Such compounds and their metabolites are subject to the relevant Delaney Clause and DES proviso (21 U.S.C. 348(c)(3)(A) (food additives); 376(b)(5)(B) (color additives); 360b(d)(1)(H)(ii) (new animal drugs)); as well as the general safety clause. See the Commissioner's decision on the withdrawal of approval of new animal drug applications for diethylstilbestrol (44 FR 54852 at 54868–54869; September 21, 1979).

dicarbonate include methylethyl carbonate and carbomethoxy amino- and hydroxy-adducts of amines, sugars, and naturally occurring fruit acids such as lactic acid, citric acid, and ascorbic acid (vitamin C). Dimethyl carbonate, an impurity in dimethyl dicarbonate, is also found in wine in minor amounts as a result of the use of the additive.

The petitioner presented data to show that the addition of 100 to 200 ppm of dimethyl dicarbonate to wine is effective in inhibiting the growth of most species of yeast found in wine. Based on this level of addition, for a wine intake of 232 grams per person per day (the 90th percentile consumption level for "drinkers only"—Most recent USDA Food Consumption Survey, 1977–78), and based on data submitted by the petitioner, the agency estimates that the maximum daily consumption of the minor reaction products resulting from the addition of dimethyl dicarbonate to wine is from 2 to 5 milligrams per person per day. Because these reaction products were formed in the dimethyl dicarbonate-treated fluids (water and wine) used in the subchronic and chronic rat and dog studies submitted by the petitioner, the safety of the reaction products is evidenced by the findings of no-adverse effects in these studies.

The safety of methylethyl carbonate was further evaluated in a subchronic toxicity study in rats in which this substance was added to the drinking water at levels of 0, 1,000, 3,000 and 10,000 ppm for 3 months. The average daily consumption of methylethyl carbonate ranged from approximately 0.1 milligram per kilogram to 1 gram per kilogram body weight per day. No adverse effects in rats from drinking the water treated with methylethyl carbonate were seen in this study.

A teratogenicity study was conducted with pregnant female rats of the Long-Evans FB30 strain. The animals were fed diets containing methylethyl carbonate at levels of 0, 100, 1,000 and 10,000 ppm. No signs of toxicity were noted in the study report. However, there was a dose-related reduction in fluid intake and a slight decrease in body weight gain in pregnant females receiving methylethyl carbonate throughout the gestational period. The reduced fluid intake appears to be attributable to the bad taste and smell of the water containing the methylethyl carbonate. All test and control females were sacrificed at day 20 (Cesarean sections were performed), and the fetuses were examined. No embryotoxic or teratogenic effects were found in this examination.

To establish the safety of dimethyl carbonate the petitioner submitted a subchronic study in which dimethyl carbonate was incorporated into the drinking water at levels of 0, 1,000, 3,000 and 10,000 ppm. An increase in body weight gain was observed in male rats at all treated levels. No adverse effects were found in this study at 10,000 ppm or at lower levels.

B. Carbon Dioxide

Carbon dioxide, one of the principal hydrolysis products of dimethyl dicarbonate, is a natural product of animal metabolism. Prolonged exposure to concentrations of carbon dioxide (in inhaled air) at levels higher than 5 volume per cent may lead to unconsciousness and death (Ref. 7). Carbon dioxide is present in solution as the carbonate and bicarbonate anions, however, and is routinely used to carbonate beverages (Ref. 8). The levels of carbon dioxide present in wine as a result of the use of dimethyl dicarbonate are well below the levels found in carbonated beverages. Thus, the agency has no evidence that carbon dioxide would be harmful under the intended conditions of use.

C. Methanol

Methanol is the principal reaction product of concern resulting from addition of dimethyl dicarbonate to wine. Theoretically, complete hydroloysis of dimethyl dicarbonate would yield 2 moles of methanol and 2 moles of carbon dioxide from each mole of dimethyl dicarbonate added to wine. On a weight basis, this yield corresponds to approximately 48 milligrams of methanol for each 100 milligrams of the additive added to a liter of wine. In aqueous/alcoholic solutions such as wine, the theoretical level of methanol is not achieved because dimethyl dicarbonate may also react with naturally occurring minor constituents of the solution to form other chemicals in trace amounts. However, to estimate a worst case exposure of consumers to methanol from the proposed use of the additive, the agency assumed complete hydrolysis of dimethyl dicarbonate to methanol and carbon dioxide. Based on the addition of 100 to 200 mg dimethyl dicarbonate to one liter of wine and on a wine intake of 232 grams per person per day (90th percentile consumption level), the agency estimates that the daily intake of methanol from this use of dimethyl dicarbonate would range from 11 to 22 milligrams per person per day (0.18 to 0.36 milligram per kilogram body weight for a 60 kilogram person) (Ref. 1).

The agency considers the daily intake of methanol from the addition of dimethyl dicarbonate to wine, even when added to the amount of methanol naturally present in other foods such as fresh fruits and vegetables and grain alcohol, to be safe. An adult human can metabolize up to 1500 milligrams of methanol per hour with no adverse symptoms or effects (Ref. 2). The levels of methanol that occur in wine and fruit juices average up to 140 milligrams per liter and an additional 50 to 100 milligrams per liter may result from the use of dimethyl dicarbonate, assuming a wine intake of 232 grams per person per day (Ref. 1). The total methanol exposure from these sources would be up to 50 to 60 milligrams per person per day. There is, therefore, a large margin of safety between the methanol intake and the amount which can be safely ingested.

D. Methyl Carbamate

1. Carcinogenicity. Reaction of dimethyl dicarbonate with naturally occurring ammonia or ammonium ions in wine may result in the formation of trace amounts of methyl carbamate which has been shown to be carcinogenic in rats (Ref. 3). FDA has evaluated the safety of this reaction by-product using risk assessment procedures to estimate the upper-bound limit of risk presented by the presence of this chemical as an impurity in wine treated with dimethyl dicarbonate. Based on this evaluation, the agency has concluded that under the proposed conditions of use, dimethyl dicarbonate is safe.

2. Basis for evaluation. The risk assessment procedures that FDA used in this evaluation are similar to the methods that it has used to examine the risk associated with the presence of minor carcinogenic impurities in various food and color additives (see, e.g., 49 FR 13018; April 2, 1984). This evaluation of the risk from the use of dimethyl dicarbonate has two aspects: (1) Assessment of the probable exposure to methyl carbamate produced in food from the use of dimethyl dicarbonate; and (2) extrapolation of the risk observed in the animal bioassay to the conditions of probable exposure to humans.

Based on the level of methyl carbamate produced from the addition of dimethyl dicarbonate to wine as a yeast inhibitor, as well as the estimated lifetime consumption of wine, FDA estimated the worst case exposure to methyl carbamate to be 2.4 micrograms per person per day (Refs. 1, 4, and 5). The agency used data in a carcinogenesis bioassay report on methyl carbamate conducted by the National Toxicology Program (NTP)

(Ref. 4) to estimate the upper-bound level of lifetime human risk from exposure to this chemical stemming from the proposed use of dimethyl dicarbonate.

The bioassay report consisted of results from studies of methyl carbamate in both rats and mice. The bioassay in B6C3F1 mice was reported by NTP to be negative. The bioassay of methyl carbamate in F344/N rats consisted of a 2-year chronic study and a parallel study with sacrifices at 6, 12, and 18 months. The 2-year study employed a high dosage level of 200 milligrams per kilogram body weight. The parallel study employed one dosage level of 400 milligrams per kilogram body weight. An increase in hepatocellular neoplasms was found at the high dose in female F344/N rats of the 2-year study. In the parallel study, hepatocellular neoplasms were found at 6 months in both sexes, and the sacrifices at the later times revealed a classic picture of progression from benign to highly malignant neoplasms dependent upon the length of time of exposure. The NTP concluded that "there was clear evidence of carcinogenic activity for male and female F344/N rats given methyl carbamate as indicated by incidences of hepatocellular neoplastic nodules and hepatocellular carcinoma" (Ref. 3).

3. Results of evaluation. Using the NTP bioassay report, the Center for Food Safety and Applied Nutrition's Quantitative Risk Assessment Committee (QRAC) estimated the human cancer risk from the potential exposure to methyl carbamate stemming from the proposed use of dimethyl dicarbonate as a yeast inhibitor in wine (Refs. 4 and 5).

The QRAC used a quantitative risk assessment procedure (linear proportional model) to extrapolate from the dose used in the animal experiment through zero to cover the very low doses expected to be encountered under the proposed conditions of use of the additive. This procedure is not likely to understimate the actual risk from the very low doses and may, in fact, exaggerate it because the extrapolation models used are designed to estimate the maximum risk consistent with the data. For this reason, the estimate can be used with confidence to determine to a reasonable certainty whether any harm will result from the proposed conditions and a level of use of 200 ppm of the food additive.

Based on a worst case exposure to methyl carbamate (2.4 micrograms per person per day), FDA estimated, using a simple linear model, that the upper-bound limit of individual lifetime risk from potential exposure to methyl carbamate is 2.4×10^{-8} or less than 1 in 42 million. Because of numerous conservatisms in the exposure estimate, lifetime avaraged individual exposure to methyl carbamate is expected to be substantially less than the estimated daily intake, and, therefore, the calculated upper-bound risk would be less. Thus, the agency concludes that there is a reasonable certainty of no harm from the exposure to methyl carbamate that results from the use of up to 200 ppm of dimethyl dicarbonate in wine.

4. Need for specifications. The agency has also considered whether a specification is necessary to control the amount of methyl carbamate that may be formed in wine treated with the additive. The agency finds that the amount of methyl carbamate formed in wine may be controlled by limiting the amount of dimethyl dicarbonate that can be added to the wine to 200 ppm or less rather than by setting a specification for the level of methyl carbamate impurity in wine. The petitioner submitted data to show that the maximum level of methyl carbamate impurity formed in commercial wine is less than 10 parts per billion (ppb) for each 100 ppm of dimethyl dicarbonate added to wine. A 200 ppm level of dimethyl dicarbonate is sufficient to control the growth of all significant genera and species of yeast in wine that has been adequately pasteurized or ultra/filtered according to current good maufacturing practices to reduce the microbial count to 500 per milliliter (ml) or less.

E. Ethyl Carbamate

The petitioner submitted studies in which gas chromatography/mass spectroscopy was used to measure the formation of ethyl carbamate (urethane) in dimethyl dicarbonate-treated wine and model wine solutions, in the presence of high concentrations of ammonium ions. These studies, conducted over a 12-month period, failed to show the formation of ethyl carbamate in excess of endogenous levels found in wine. These studies also did not show evidence of formation of ethyl carbamate by transesterification of methyl carbamate. Thus there is no indication that the use of dimethyl dicarbonate affects the level of ethyl carbamate in wine.

The agency is aware that ethyl carbamate, an animal carcinogen, occurs as a contaminant in wine. The agency is in the process of obtaining as much information as possible about the levels of such ethyl carbamate contamination. In addition, in cooperation with the wine industry, a program, has been instituted to find and control the formation of ethyl carbamate so as to reduce it to the extent possible. (Agreement Between the Association of American Vintners, the Wine Institute, and FDA, "Ethyl Carbamate Voluntary Program," Jan. 7, 1988) (Ref. 6).

IV. Conclusion on Safety

FDA has evaluated all of the data in the petition pertaining to the use of dimethyl dicarbonate in wine and has determined that the additive is safe for its proposed use.

To ensure the safe to the additive, FDA, under 21 U.S.C. 348(c)(1)(A), finds that it is necessary to require that the label of the package containing the additive contain, in addition to other information required by the Federal Food, Drug, and Cosmetic Act, (1) the name of the additive, "dimethyl dicarbonate," and (2) directions to provide that not more than 200 ppm of dimethyl dicarbonate will be added to the wine.

In accordance with 171.1(h) (21 CFR 171.1(h)), the petition and the documents that FDA considered and relied upon in reaching its decision to approve the petition are available for inspection at the Center for Food Safety and Applied Nutrition by appointment with the information contact person listed above. As provided in 21 CFR 171.1(h), the agency will delete from the documents any materials that are are not available for public disclosure before making the documents available for inspection.

The agency has carefully considered the potential environmental effects of this action. FDA has concluded that the action will not have a significant impact on the human environment and that an environmental impact statement is not required. The agency's finding of no significant impact and the evidence supporting that finding may be seen in the Dockets Management Branch (address above) between 9 a.m. and 4 p.m., Monday through Friday. Under FDA's regulations implementing the National Environmental Policy Act (21 CFR Part 25), an environmental assessment is required for an action of this type under 21 CFR 25.31a(a).

V. References

The following references have been placed on display in the Dockets Management Branch (address above) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday:

1. Memorandum dated January 14, 1987, Regulatory Food Chemistry Branch to GRAS Review Branch, "Dimethyl Dicarbonate

(DMDC) in Wine. Submission of September 5, 1986; Exposure Estimate for Methyl Carbamate (MC) and Methanol in Wine."

2. Letter of A.J. Lehman, February 12, 1963, in Food Additive Petition No. 0A0043 (FAP 0A0043).

3. NTP Technical Report on the Toxicology and Carcinogensis Studies of Methyl Carbamate in F344/N Rats and B6C3F1 Mice, National Toxicology Program U.S. Department of Health and Human Service, Reprt No. 328, 1986.

4. Memorandum dated October 28, 1986, Quantitative Risk Assessment Committee to Office of Toxicological Sciences, "Methyl Carbamate in Wine."

5. Memorandum dated November 20, 1987, Quantitative Risk Assessment Committee to Office of Toxicological Sciences, "Methyl Carbamate in Wine."

6. "Ethyl Carbamate Voluntary Program," Final Agreement Between the Wine Institute, the Association of American Vintners and the Food and Drug Administration, January 7, 1988.

7. Ballou, W. Robert, "Carbon Dioxide," *Encyclopedia of Chemical Technology*, 4:725–742, 1978

8. Mones, Martha, "Carbonated Beverages," *Encyclopedia of Chemical Technology*, 4:710–725, 1978.

Any person who will be adversely affected by this regulation may at any time on or before November 21, 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.

List of Subjects in 21 CFR Part 172

Food additives, Reporting and recordkeeping requirements, Incorporation by reference.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under the authority delegated to the Commissioner of Food and Drugs, Part 172 is amended as follows:

PART 172—FOOD ADDITIVES PERMITTED FOR DIRECT ADDITION TO FOOD FOR HUMAN CONSUMPTION

1. The authority citation for 21 CFR Part 172 continues to read as follows:

Authority: Secs. 201(s), 409, 72 Stat. 1784–1788 as amended (21 U.S.C. 321(s), 348); 21 CFR 5.10 and 5.61.

2. Section 172.133 is added to Subpart B to read as follows:

§ 172.133 Dimethyl dicarbonate.

Dimethyl dicarbonate (CAS Reg. No. 4525–33–1) may be safely used in wine in accordance with the following prescribed conditions:

(a) The additive meets the following specifications:

(1) The additive has a purity of not less than 99.8 percent as determined by the following titration method:

Principles of Method

Dimethyl dicarbonate (DMDC) is mixed with excess diisobutylamine with which it reacts quantitatively. The excess amine is backtitrated with acid.

Apparatus

250-milliliter (mL) Beaker
100-mL Graduate cylinder
25-mL Pipette
10-mL Burette (automatic, eg., Metrohm burette)
Stirrer
Device for potentiometric titration
Reference electrode
Glass electrode

Reagents

Acetone, analytical-grade
Solution of 1 *N* diisobutylamine in chlorobenzene, distilled
1 *N* Acetic Acid

Procedure

Accurately weigh in about 2 grams of the sample (W) and dissolve in 100 mL acetone. Add accurately 25 mL of the 1 *N* diisobutylamine solution by pipette and allow to stand for 5 minutes. Subsequently, titrate the reaction mixture potentiometrically with 1 *N* hydrochloric acid (consumption = *a* mL) while stirring. For determining the blank consumption, carry out the analysis without a sample (consumption = *b* mL).

Calculation

$$\frac{(b-a)\times 13.4}{W} = \%\ \text{DMDC}$$

Note.—For adding the diisobutylamine solution, always use the same pipette and wait for a further three drops to fall when the flow has stopped.

(2) The additive contains not more than 2,000 ppm (0.2 percent) dimethyl carbonate as determined by a method entitled "Gas Chromatography Method for Dimethyl Carbonate Impurity in Dimethyl Dicarbonate," which is incorporated by reference in accordance with 5 U.S.C. 552(a). Copies are available from the Division of Food and Color Additives, Center for Food Safety and Applied Nutrition (HFF–334), 200 C Street SW., Washington, DC 20204, or available for inspection at the Office of the Federal Register, 1100 L Street NW., Washington, DC 20408.

(b) The additive is used or intended for use as an inhibitor of yeast in wine under normal circumstances of bottling where the viable yeast count has been reduced to 500 per milliliter or less by current good manufacturing practices such as flash pasteurization or filtration. The additive may be added to wine in an amount not to exceed 200 parts per million (ppm).

(c) To ensure the safe use of the food additive, the label of the package containing the additive shall bear, in addition to other information required by the Federal Food, Drug, and Cosmetic Act:

(1) The name of the additive "dimethyl dicarbonate."

(2) Directions to provide that not more than 200 ppm of dimethyl dicarbonate will be added to the wine.

Dated: October 17, 1988.

John M. Taylor,

Associate Commissioner for Regulatory Affairs.

[FR Doc. 88–24417 filed 10–20–88; 8:45 am]

BILLING CODE 4160–01–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Community Planning and Development

24 CFR Part 570

[Docket No. R–88–1204; FR–1895]

Community Development Block Grants; Final Rule; Corrections

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Final rule; corrections.

SUMMARY: The purpose of this document is to make editorial corrections to a final rule published September 6, 1988 (53 FR 34416), that amended substantial portions of its Community Development

Block Grants (CDBG) regulation at 24 CFR Part 570.

FOR FURTHER INFORMATION CONTACT: James R. Broughman, Director, Entitlement Cities Division, Office of Block Grant Assistance, Room 7280, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410–5000, telephone (202) 755–5977. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On September 6, 1988 (53 FR 34416), the Department amended substantial portions of its Community Development Block Grants (CDBG) regulation at 24 CFR Part 570 in order to update and make more efficient the CDBG program. The rule also incorporated legislative changes to Title I of the Housing and Community Development Act of 1974 contained in the Housing and Urban-Rural Recovery Act of 1983 and the Housing and Community Development Act of 1987.

Accordingly, the following corrections are made in FR Doc. 88–20101 published in the **Federal Register** on September 6, 1988 at 53 FR 34416:

§ 570.3 [Corrected]

1. In § 570.3(j), on page 34437, third column, correct "1970" to read "1960".

2. In § 570.3(v)(3)(i), on page 34438, second column, line 8, correct the word "act" to read "Act".

3. In § 570.3(w), on page 34438, third column, in lines 5 and 7, correct "section" to read "Section", and in line 8, correct "program" to read "Program".

4. In § 570.3(x), on page 33438, third column, in lines 5 and 10, correct the word "section" to read "Section", and in line 11, correct "program" to read "Program".

5. On page 34439, third column, in the table of contents, in § 570.204, correct the word "subrecipients".

§ 570.200 [Corrected]

6. In § 570.200(j)(2) concluding text, on page 34442, first column, line 11, correct "(j)(3)x" to read "(j)(3)".

§ 570.202 [Corrected]

7. § 570.202(b)(6), on page 34443, third column, line 2, correct "of" to read "or".

8. In § 570.202(d), on page 34444, first column, top of page, line 6, correct "of" to read "or".

§ 570.206 [Corrected]

9. In § 570.206(c), on page 34445, third column, line 14, correct "high proposition of lower income" to read "high proportion of low and moderate income".

10. In § 570.206(g) introductory text, on page 34445, third column, line 15, correct "by lower income households," to read "by low and moderate income households," and in line 19, correct "affordable rents/costs by lower income" to read "affordable rents/costs by low and moderate income".

11. In § 570.206(g)(3), on page 34446, column one, line 7, correct "program" to read "Program".

12. In § 570.206(g)(6), on page 34446, column one, line 5, correct "lower income persons" to read "low and moderate income persons".

§ 570.207 [Corrected]

13. In § 570.207(b)(2)(ii), on page 34446, third column, correct "work" to read "works".

§ 570.208 [Corrected]

14. In § 570.208(a)(3)(i)(A), on page 34448, first column, correct "non-elderly housing project;" to read "non-elderly rental housing project;".

15. In § 570.208(d)(1), on page 34449, first column, in last sentence, correct "§ 570.505" to read "§ 570.505".

§ 570.301 [Corrected]

16. In § 570.301(b)(1)(i), on page 34449, second column, correct "recieved" to read "received", and omit close parenthetical after the word "use", and insert close parenthetical after the word "activities" and before the semi-colon.

§ 570.303 [Corrected]

17. § 570.303(h), on page 34450, second column, last line, correct "105(1)(11)" to read "105(a)(11)".

§ 570.506 [Corrected]

18. In § 570.506(b), on page 34454, second column, line 10, correct "used in the definition of "low and moderate income person" at § 570.3;" to read "used in the definitions of "low and moderate income person" and low and moderate income household" (as applicable) at § 570.3;".

19. Section 570.506(b)(2)(ii), on page 34454, second column, is correctly revised to read "The income characteristics of families and unrelated individuals in the service area; and".

20. In § 570.506(g)(5), on page 34456, first column, correct "the hiring and training of lower income residents and the use of local businesses." to read "the hiring and training of low and moderate income persons and the use of local businesses."

§ 570.606 [Corrected]

21. In § 570.606(b)(1)(iii)(B), on page 34459, third column, line 3, correct by removing "a" at end of line.

22. In § 570.606(d), on page 34461, second column, line 18 is corrected by removing the citation reference, "(see 24 CFR 570.201(i))".

§ 570.608 [Corrected]

23. In § 570.608(c), on page 34462, second column, in the introductory paragraph, correct by removing the last sentence, "These requirements shall be implemented not later than September 21, 1987."

24. In § 570.608(c)(2), on page 34462, third column, the definition for "Elevated blood lead level or EBL." is corrected to read, "Excessive absorption of lead, that is, a confirmed concentration of lead in whole blood of 25 μg/dl (micrograms of lead per deciliter of whole blood) or greater."

§ 570.609 [Corrected]

25. In § 570.609, on page 34463, second column, line 4, correct the word, "service" to read "services".

§ 570.610 [Corrected]

26. In § 570.610, on page 34463, second column, correct section heading to read, "Uniform administrative requirements and cost principles".

§ 570.611 [Corrected]

27. In § 570.611(a)(2), on page 34463, third column, in the parenthetical phrase on line 12, correct the word "of" to read "or".

§ 570.904 [Corrected]

28. In § 570.904(c)(2)(iv), on page 34469, first column, line 8, correct "(C)(1)" to read "(c)(1)".

Authority: Title I, Housing and Community Development Act of 1974 (42 U.S.C. 5301–20); and sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

Dated: October 17, 1988.

Grady J. Norris,

Assistant General Counsel for Regulations.

[FR Doc. 88–24393 Filed 10–20–88; 8:45 am]

BILLING CODE 4210–29–M

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24 CFR Part 570

[Docket No. R–88–1338; FR–2178]

Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments; Technical Amendment

AGENCY: Department of Housing and Urban Development.

ACTION: Technical Amendment.

SUMMARY: This document amends certain sections in the HUD portion of a common final rule that established consistency and uniformity among Federal agencies in the administration of grants and cooperative agreements to State, local and federally recognized Indian tribal governments.

EFFECTIVE DATE: October 1, 1988.

FOR FURTHER INFORMATION CONTACT: Edward L. Girovasi, Jr., Director, Policy and Evaluation Division, Office of Procurement and Contracts, Department of Housing and Urban Development, Room 5260, 451 Seventh Street SW., Washington, DC 20410. Telephone (202) 755–5294. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On March 11, 1988 (53 FR 8034), a common final rule was published in the **Federal Register** to implement OMB Circular A–102 "Uniform Administrative Requirements for Grants to State and Local Governments". The rule established consistency and uniformity among the Federal agencies in the administration of grants and cooperative agreements to State, local and federally recognized Indian tribal governments.

The Department's portion of the rule contained erroneous references to a citation that is being revised in this document.

Accordingly, 24 CFR Part 570 is amended as follows:

PART 570—[AMENDED]

1. The authority citation for Part 570 continues to read as follows:

Authority: Title I of the Housing and Community Development Act of 1974 (42 U.S.C. 5301–5320); sec. 7(d) of the Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

§ 570.500 [Amended]

2. Section 570.500(a)(2) is amended by revising the reference to "§ 570.503(b)(7)" to read "§ 570.503(b)(8)".

§ 570.503 [Amended]

3. Section 570.503(b)(8)(i) is amended by revising the reference to "§ 570.901" to read "§ 570.208 (formerly § 570.901)".

§ 570.505 [Amended]

4. Section 570.505(a)(1) is amended by revising the reference to "570.901" to read "§ 570.208 (formerly § 570.901)".

Dated: October 17, 1988.

Grady J. Norris,

Assistant General Counsel for Regulations.

[FR Doc. 88–24392 Filed 10–20–88; 8:45 am]

BILLING CODE 4210–29–M

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 199

[DoD Regulation 6010.8–R, Amdt. No. 15]

Civilian Health and Medical Program of the Uniformed Services (CHAMPUS); Minor Revisions to the CHAMPUS DRG-BASED Payment System and Fiscal Year 1989 Rates

AGENCY: Office of the Secretary, DoD.

ACTION: Final rule.

SUMMARY: This final rule makes minor revisions to the final rule which was published on August 31, 1988 (53 FR 33461). It revises the comprehensive CHAMPUS regulation, DoD 6010.8–R (32 CFR Part 199), pertaining to payment for inpatient hospital services under the CHAMPUS DRG-based payment system which was implemented on October 1, 1987. These changes are necessary to conform to changes affecting the Medicare Prospective Payment System (PPS) upon which the CHAMPUS DRG-based payment system is modeled.

EFFECTIVE DATE: This amendment is effective for inpatient hospital admission occurring on or after October 1, 1988.

ADDRESS: Office of the Civilian Health and Medical Program of the Uniformed Services, (OCHAMPUS), Office of Program Development, Aurora, CO 80045–6900.

For copies of the **Federal Register** containing this notice, contact the Superintendent of Documents, U.S. Government Printing Office, Washington, DC. 20402, (202) 783–3238.

The charge for the **Federal Register** is $1.50 for each issue payable by check or money order to the Superintendent of Documents.

FOR FURTHER INFORMATION CONTACT: Stephen E. Isaacson, Office of Program Development, OCHAMPUS, telephone (303) 361–4005.

To obtain copies of this document, see the **"ADDRESS"** section above. Questions regarding payment of specific claims under the CHAMPUS DRG-based payment system should be addressed to the appropriate CHAMPUS contractor.

SUPPLEMENTARY INFORMATION: On June 3, 1988, we published a proposed amendment of rule to modify the CHAMPUS DRG-based payment system which was implemented on October 1, 1987. We provided a 30-day comment period on the proposed amendment of rule and published the final rule on August 31. This final rule includes a number of changes to conform to statutory or regulatory changes to the Medicare PPS as well as changes to expand the CHAMPUS DRG-based payment system to alcohol/drug abuse services and psychiatric services in general hospital settings. We refer the reader to the proposed and final rule for more detailed explanations of the changes to the CHAMPUS DRG-based payment system and the implementing regulations in 32 CFR Part 199.

I. Minor Revision to the CHAMPUS Regulation Relating to the DRG-Based Payment System

Several of the provisions of our final rule were designed to conform to the Medicare PPS and the final Medicare rule which was expected to be published about the same time as our final rule. However, publication of the Medicare final rule was delayed, and subsequently certain changes were made to areas in which CHAMPUS has duplicated the Medicare procedures. This minor revision to the rule is promulgated to make the CHAMPUS DRG-based payment system conform to the Medicare PPS in connection with the payment formula for cost outlier cases.

In our proposed rule we stated that "for the most part, our outlier policy follows the outlier procedures used in the Medicare PPS" and that CHAMPUS would make changes similar to the outlier changes proposed for the Medicare PPS (53 FR 20580). This was reiterated in our final rule which stated that "we think that * * * the policies would continue to be the same for both the Medicare PPS and for the CHAMPUS DRG-based payment system" (53 FR 33466).

In our final rule we established the marginal cost factor for cost outliers at 80 percent in order to conform to the expected Medicare PPS formula. In addition, the threshold for cost outliers was set at $27,000, also to conform to the anticipated final amount for the Medicare PPS. In their final rule, however, the Health Care Financing Administration (HCFA) changed the marginal cost factor to 75 percent and the threshold amount to $28,000 for the Medicare PPS, effective November 1, 1988. This minor revision makes corresponding changes under the CHAMPUS DRG-based payment system. All other outlier policies as contained in our final rule remain unchanged.

Mindful of the usual practice under the Administrative Procedure Act of providing at least 30 days advance notice before implementing new regulatory requirements, our adoption of the new Medicare threshold and

marginal cost factor amounts will not apply to cases involving admissions prior to November 21, 1988. For outlier cases arising from admissions prior to November 21, 1988, we are preserving the prior status quo in effect during fiscal year 1988. In other words, in effect, the cost outlier formula change adopted in our August 31 rule (designed to take effect October 1) based on what we thought the Medicare PPS would implement is being vacated. In its place we are adopting, effective some 30 days hence, the formula the Medicare PPS actually established. In the meantime we are restoring the formula that was in place prior to the August 31 rule.

Although not completely in line with our normal procedure, the approach reflected here seems most reasonable to avoid regulatory confusion. No new round of notice and public comment for this minor regulatory revisions is necessary because it follows so directly from the comment period just provided in connection with our August 31, 1988 final rule. In addition, the action of, in effect, vacating the cost outlier revision adopted in the August 31 rule need not be preceded by 30 days advance notice because it merely restores the prior status quo for a brief period and is necessary to avoid the regulatory confusion that would result if the August 31 change were allowed to go into effect pending the effective date of the new revision.

One final twist is that the marginal payment percentage set out in our June 3 proposed rule and August 31 final rule, which is being vacated for the most part by this final rule, is being preserved for neonatal services and services in children's hospitals. This is because of a requirement contained in the Department of Defense Appropriations Act of Fiscal Year 1989, which permits DOD to begin DRG system coverage for these services if a number of "special measures" are adopted, one of which is "a special outlier policy for children's hospitals and neonatal services that combines the thresholds in effect under CHAMPUS DRG regulations for fiscal year 1988 with the higher marginal cost factors proposed by 53 FR 20580 (June 3, 1988)." *See* House Conference Report No. 100–1002, 100th Congress, 2d Session, pp. 104–5.

II. Note Regarding Slight Change to Rates and Weights

Attachments to our final rule provided the rates and weights to be used under the CHAMPUS DRG-based payment system during FY 1989. Under the CHAMPUS DRG-based payment system, our Adjusted Standardized Amounts (ASAs), weights, and cost-share amounts are calculated using the same update factors used for the Medicare PPS (§ 199.14(a)(1)(iii)(E)(*2*)) and using the area wage indexes used in the Medicare PPS (§ 199.14(a)(1)(iii)(F)).

Subsequent to publication of our final rule, HCFA revised the Medicare PPS update factors for FY 1989 and the area wage index to be used. We had based our update factors on a market basket of 5.0 percent which HCFA intended to use at the time, but HCFA has recalculated the market basket to be 5.4 percent. In addition, HCFA has changed the wage indexes that will be used during FY 1989 under the Medicare PPS. We have recalculated our ASAs, weights and cost-share amounts using these new wage indexes.

The revised CHAMPUS weights and rates are now being calculated to reflect these revisions and will be published in the **Federal Register** for the information of interested parties within approximately 10 days. The revised numbers do not involve changes in the CHAMPUS regulation, but rather a slightly different result of applying the regulation.

III. Regulatory Procedures

Executive Order 12291 requires that a regulatory impact analysis be performed on any major rule. A "major rule" is defined as one which would result in annual effect on the national economy of $100 million or more or have other substantial impacts.

The Regulatory Flexibility Act (RFA) requires that each federal agency prepare, and make available for public comment, a regulatory flexibility analysis when the agency issues regulations which would have a significant impact on a substantial number of small entities. For purposes of the Regulatory Flexibility Act, we consider small entities to include many nonprofit and for-profit hospitals.

This final rule is not a major rule under Executive Order 12291. The change set forth in this final rule, is a minor revision to a previously published final rule. Moreover this final rule will have a very minor impact and will not significantly affect a substantial number of small entities. In light of the above, no regulatory impact analysis is required.

IV. Other Required Information

A. Effective Date

This final rule is effective for inpatient hospital admissions occurring on or after October 1, 1988. However, as noted above, the rule contains provisions restoring the previously used cost outlier formula for outlier cases arising from admissions between October 1, 1988, and November 21, 1988, and adopting the new formula for admissions thereafter.

B. Paperwork Reduction Act

This notice does not impose information collection requirements. Therefore, it does not need to be reviewed by the Executive Officer of Management and Budget under the authority of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501–3511).

List of Subjects in 32 CFR Part 199

Claims, Handicapped, Health Insurance, and Military personnel.

PART 199—[AMENDED]

Accordingly, 32 CFR Part 199 is amended as follows:

1. The authority citation for Part 199 continues to read as follows:

Authority: 10 U.S.C. 1079, 1086, 5 U.S.C. 301.

2. Section 199.14 is amended by revising paragraph (a)(1)(iii)(E)(*1*)(*ii*) to read as follows:

§ 199.14 Basic program benefits.

* * * * *

(a) * * *

(1) * * *

(iii) * * *

(E) * * *

(*1*) * * *

(*ii*) *Cost outliers.* Any discharge which has standardized costs that exceed a threshold of the greater of two times the DRG-based amount or $28,000 ($13,500 for neonatal services and for services in children's hospitals) shall qualify as a cost outlier. The standardized costs shall be calculated by multiplying the total charges by the factor described in § 199.14(a)(1)(iii)(D)(*4*) and adjusting this amount for indirect medical education costs. Cost outliers shall be reimbursed the DRG-based amount plus 75 percent (90 percent for DRGs related to burn cases and 80 percent for neonatal services and for services in children's hospitals) of all costs exceeding the threshold. Additional payment for cost outliers shall be made only upon request by the hospital. Notwithstanding the threshold amount stated in the first sentence of this paragraph and the marginal payment percentage stated in the third sentence of this paragraph, for all discharges to patients admitted prior to November 21, 1988, a threshold amount of $13,500 (rather than $28,000) shall apply and (except for burn cases, neonatal services and services in children's hospitals) a marginal payment

percentage of 60 percent (rather than 75 percent) shall apply.

* * * * *

Linda Bynum,

Alternate OSD Federal Register Liaison, Department of Defense.

October 18, 1988.

[FR Doc. 88-24380 Filed 10-20-88; 8:45 am]

BILLING CODE 3810-01-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

[AD-FRL-3404-7]

Standards of Performance for New Stationary Sources; Determination of Carbon Monoxide Emissions From Stationary Sources

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This action: (1) Amends Method 10 and adds Method 10B to Appendix A, both of which concern the determination of carbon monoxide emissions from stationary sources, (2) revises Performance Specification 4 (PS 4) of Appendix B concerning carbon monoxide continuous emission monitoring systems (CEM's) in stationary sources, and (3) amends § 60.106 regarding test methods and procedures. Method 10 is being amended by adding an alternative interference scrubber so that the method can be used to evaluate nondispersive infrared CEMS's. Conforming changes are being made to PS 4 and § 60.106. These amendments were proposed in the **Federal Register** on August 25, 1987 (52 FR 32026).

EFFECTIVE DATE: October 21, 1988.

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

ADDRESSES: *Docket.* Docket No. A-87-07, containing materials relevant to this rulemaking, is available for public inspection and copying between 8:00 a.m. and 4:00 p.m., Monday through Friday, at EPA's Central Docket Section, South Conference Center, Room 4, 401 M Street SW., Washington, DC 20460. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Foston Curtis or Roger Shigehara, Emission Measurement Branch (MD-19), Technical Support Division, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone (919) 541-1063.

SUPPLEMENTARY INFORMATION:

I. The Rulemaking

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

II. Public Participation

The opportunity to hold a public hearing on October 9, 1987, at 10:00 a.m., was presented in the proposal notice, but no one desired to make an oral presentation. The public comment period was from August 25, 1987, to November 9, 1987.

III. Significant Comments and Changes to the Proposed Rulemaking

One comment letter was received from the proposal of the rulemaking. The commenter supported the proposal and made general comments regarding the maintenance requirements of Method 10B. No method changes were recommended and, consequently, none have been made to the proposed rule.

IV. Administrative

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

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

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

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

This rule does not contain any information collection requirements subject to OMB review under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*

List of Subjects in 40 CFR Part 60

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

Date: October 7, 1988.

Lee M. Thomas,

Administrator.

40 CFR Part 60 is amended as follows:

PART 60—[AMENDED]

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

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

§ 60.106 [Amended]

2. In § 60.106(b), by adding, after the first sentence, the following sentence: "Method 10A or 10B may be used as an alternative method to Method 10."

Appendix A—[Amended]

3. In Appendix A, by amending Method 10 as follows:

a. In sections 5.3.3 and 7.2, by removing the word "paragraph" and adding, in its place, the word "section".

b. In section 7.1.1, by removing the symbol "¶" and adding, in its place, the word "section".

c. In sections 7.1.1 and 7.1.2, by deleting the reference "(36 FR 24886)".

d. By redesignating section 10 as section 11, and redesignating the

citation numbers 10.1 through 10.6 as 11.1 through 11.6, and by adding a new section 10 to read as follows:

10. Alternative Procedures

10.1 Interference Trap. The sample conditioning system described in Method 10A, sections 2.1.2 and 4.2, may be used as an alternative to the silica gel and ascarite traps.

4. By adding Method 10B to Appendix A as follows:

* * * * *

METHOD 10B—DETERMINATION OF CARBON MONOXIDE EMISSIONS FROM STATIONARY SOURCES

1. Applicability and Principle

1.1 Applicability. This method applies to the measurement of carbon monoxide (CO) emissions at petroleum refineries and from other sources when specified in an applicable subpart of the regulations.

1.2 Principle. An integrated gas sample is extracted from the sampling point and analyzed for CO. The sample is passed through a conditioning system to remove interferences and collected in a Tedlar bag. The CO is separated from the sample by gas chromatography (GC) and catalytically reduced to methane (CH_4) prior to analysis by flame ionization detection FID. The analytical portion of this method is identical to applicable sections in Method 25 detailing CO measurement. The oxidation catalyst required in Method 25 is not needed for sample analysis. Complete Method 25 analytical systems are acceptable alternatives when calibrated for CO and opérated by the Method 25 analytical procedures.

Note: Mention of trade names or commercial products in this method does not constitute the endorsement or recommendation for use by the Environmental Protection Agency.

1.3 Interferences. Carbon dioxide (CO_2) and organics potentially can interfere with the analysis. Carbon dioxide is primarily removed from the sample by the alkaline permanganate conditioning system; any residual CO_2 and organics are separated from the CO by GC.

2. Apparatus

2.1 Sampling. Same as in Method 10A, section 2.1.

2.2 Analysis.

2.2.1 Gas Chromatographic (GC) Analyzer. A semicontinuous GC/FID analyzer capable of quantifying CO in the sample and containing at least the following major components.

2.2.1.1 Separation Column. A column that separates CO from CO_2 and organic compounds that may be present. A ⅛-in. OD stainless-steel column packed with 5.5 ft of 60/80 mesh Carbosieve S–II (available from Supelco) has been used successfully for this purpose. The column listed in Addendum 1 of Method 25 is also acceptable.

2.2.1.2 Reduction Catalyst. Same as in Method 25, section 2.3.2.

2.2.1.3 Sample Injection System. Same as in Method 25, section 2.3.4, equipped to accept a sample line from the Tedlar bag.

2.2.1.4 Flame Ionization Detector. Linearity meeting the specifications in section 2.3.5.1 of Method 25 where the linearity check is carried out using standard gases containing 20–, 200–, and 1,000–ppm CO. The minimal instrument range shall span 10 to 1,000 ppm CO.

2.2.1.5 Data Recording System. Same as in Method 25, section 2.3.6.

3. *Reagents*

3.1 Sampling. Same as in Method 10A, section 3.1.

3.2 Analysis.

3.2.1 Carrier, Fuel, and Combustion Gases. Same as in Method 25, sections 3.2.1, 3.2.2, and 3.2.3.

3.2.2 Linearity and Calibration Gases. Three standard gases with nominal CO concentrations of 20–, 200–, and 1,000–ppm CO in nitrogen.

3.2.3 Reduction Catalyst Efficiency Check Calibration Gas. Standard CH_4 gas with a concentration of 1,000 ppm in air.

4. Procedure

4.1 Sample Bag Leak-checks, Sampling, and CO_2 Measurement. Same as in Method 10A, sections 4.1, 4.2, and 4.3.

4.2 Preparation for Analysis. Before putting the GC analyzer into routine operation, conduct the calibration procedures listed in section 5. Establish an appropriate carrier flow rate and detector temperature for the specific instrument used.

4.3 Sample Analysis. Purge the sample loop with sample, and then inject the sample. Analyze each sample in triplicate, and calculate the average sample area (A). Determine the bag CO concentration according to section 6.2.

5. Calibration

5.1 Carrier Gas Blank Check. Analyze each new tank of carrier gas with the GC analyzer according to section 4.3 to check for contamination. The corresponding concentration must be less than 5 ppm for the tank to be acceptable for use.

5.2 Reduction Catalyst Efficiency Check. Prior to initial use, the reduction catalyst shall be tested for reduction efficiency. With the heated reduction catalyst bypassed, make triplicate injections of the 1,000-ppm CH_4 gas (section 3.2.3) to calibrate the analyzer. Repeat the procedure using 1,000-ppm CO (section 3.2.2) with the catalyst in operation. The reduction catalyst operation is acceptable if the CO response is within 5 percent of the certified gas value.

5.3 Analyzer Linearity Check and Calibration. Perform this test before the system is first placed into operation. With the reduction catalyst in operation, conduct a linearity check of the analyzer using the standards specified in section 3.2.2. Make triplicate injections of each calibration gas, and then calculate the average response factor (area/ppm) for each gas, as well as the overall mean of the response factor values. The instrument linearity is acceptable if the average response factor of each calibration gas is within 2.5 percent of the overall mean value and if the relative standard deviation (calculated in section 6.9 of Method 25) for each set of triplicate injections is less than 2 percent. Record the overall mean of the response factor values as the calibration response factor (R).

6. Calculations

Carry out calculations retaining at least one extra decimal figure beyond that of the acquired data. Round off results only after the final calculation.

6.1 Nomenclature.

A = Average sample area.

B_w = Moisture content in the bag sample, fraction.

C = CO concentration in the stack gas, dry basis, ppm.

C_b = CO concentration in the bag sample, dry basis, ppm.

F = Volume fraction of CO_2 in the stack, fraction.

P_{bar} = Barometric pressure, mm Hg.

P_w = Vapor pressure H_2O in the bag (from Table 10–2, Method 10A), mm Hg.

R = Mean calibration response factor, area/ppm.

6.2 CO Concentration in the Bag. Calculate C_b using Equations 10B–1 and 10B–2. If condensate is visible in the Tedlar bag, calculate B_w using Table 10A–1 of Method 10A and the temperature and barometric pressure in the analysis room. If condensate is not visible, calculate B_w using the temperature and barometric pressure at the sampling site.

$$B_w = \frac{P_w}{P_{bar}} \qquad \text{Eq. 10B–1}$$

$$C_b = \frac{A}{R(1-B_w)} \qquad \text{Eq. 10B–2}$$

6.3 CO Concentration in the Stack.

$$C = C_b(1-F) \qquad \text{Eq. 10B–3}$$

7. Bibliography

1. Butler, F.E, J.E. Knoll, and M.R. Midgett. Development and Evaluation of Methods for Determining Carbon Monoxide Emissions. Quality Assurance Division, Environmental Monitoring Systems Laboratory, U.S. Environmental Protection Agency, Research Triangle Park, NC 27711. June 1985. 33p.

2. Salo, A.E., S. Witz, and R.D. MacPhee. Determination of Solvent Vapor Concentrations by Total Combustion Analysis: A Comparison of Infrared with Flame Ionization Detectors. Paper No. 75–33.2. (Presented at the 68th Annual Meeting of the Air Pollution Control Association. Boston, Massachusetts. June 15, 1975.) 14 p.

3. Salo, A.E., W.L. Oaks, and R.D. MacPhee. Measuring the Organic Carbon Content of Source Emissions for Air Pollution Control. Paper No. 74–190. (Presented at the 67th Annual Meeting of the Air Pollution

Control Association. Denver, Colorado. June 9, 1974.) 25 p.

* * * * *

Appendix B—[Amended]

5. In Appendix B, by revising section 3.2 of Performance Specification 4 to read as follows:

3.2. Reference Methods. Unless otherwise specified in an applicable subpart of the regulation, Method 10 is the RM for this PS. When evaluating nondispersive infrared continuous emission analyzers, Method 10 shall use the alternative interference trap specified in section 10.1 of the method. Method 10A or 10B is an acceptable alternative to method 10.

[FR Doc. 88-23900 Filed 10-20-88; 8:45 am]

BILLING CODE 6560-50-M

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40 CFR Part 704

[OPTS-82032A; FRL-3466-5]

EDTMPA and its Salts; Submission of Notice of Manufacture or Import

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is requiring manufacturers and importers of the chemical substances phosphonic acid, (1,2-ethanediylbis(nitrilo-bis(methylene))) tetrakis- (EDTMPA) (CAS No. 1429-50-1) and its salts to notify EPA of current and prospective manufacture or import of EDTMPA and its salts. This reporting rule will allow EPA to track the manufacture, import, and end uses of EDTMPA and its salts, and to investigate the health and environmental impacts of such activities. Small businesses that manufacture or import these substances are exempt from this rule.

DATES: In accordance with 40 CFR 23.5 (50 FR 7271), this rule shall be promulgated for purposes of judicial review at 1 p.m. eastern time on November 4, 1988. This rule shall become effective on December 5, 1988.

FOR FURTHER INFORMATION CONTACT: Michael M. Stahl, 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: (202-554-0551).

SUPPLEMENTARY INFORMATION: This rule allows EPA to track the manufacture, import, and end uses of EDTMPA and its salts, and to investigate the health and environmental impacts of such activities.

Public reporting burden for this collection of information is estimated to vary from 4 to 20.5 hours per response, with an average of 12.25 hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Chief, Information Policy Branch, PM-223, U.S. Environmental Protection Agency, 401 M St., SW., Washington, DC 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

I. Authority

EPA is promulgating this rule pursuant to section 8(a) of the Toxic Substances Control Act (TSCA), 15 U.S.C. 2607(a). Section 8(a) authorizes the Administrator to promulgate rules which require each person, (other than a small manufacturer or processor) who manufactures, imports, or processes or who proposes to manufacture, import, or process a chemical substance, to submit such reports as the Administrator may reasonably require.

II. Background

This rule was proposed on April 29, 1988 (53 FR 15428). EPA's Office of Toxic Substances (OTS) initiated assessment of the health risks from EDTMPA exposure in response to a TSCA section 8(e) notice reporting osteosarcomas in male rats orally dosed with the substance. A Chemical Hazard Information Profile on EDTMPA was prepared that identified the substance's use to prevent precipitation of calcium salts as the major potential source of exposure. Subsequent evaluation in the OTS Existing Chemicals Program confirmed the hazard concern.

EPA requires the information to be submitted in response to this rule because EDTMPA has potentially serious hazards to human health. Overall, the available information on EDTMPA suggests that humans exposed to the substance may be at risk of developing bone cancer, non-neoplastic bone disease, metabolic disturbances, or blood dyscrasias. Although EDTMPA appears to be used in limited quantities in cooling water treatment and electroplating and available exposure information indicates that current potential exposure is low, EPA's analysis indicates that quantities and uses do have risk associated with them. Also, EPA is not satisfied that this information on current uses is complete. EPA needs the requested information to confirm the actual current uses of EDTMPA and its salts to assess exposures and potential risks. In addition, EPA needs to know if expanded or new uses with higher exposure replace old uses so that EPA can take appropriate action.

III. Comments

A commenter suggested that EPA exclude from reporting the manufacture or import of EDTMPA and its salts for research and development (R&D) purposes, as a by-product, as an impurity, and as a non-isolated intermediate. Exemptions from TSCA section 8(a) reporting for the manufacture or import for R&D purposes, as a by-product, and as an impurity are already codified at 40 CFR 704.5. Thus, those persons who manufacture or import EDTMPA strictly for R&D purposes, as a by-product, or as in impurity, are exempt from the reporting requirements of this rule. EPA recognizes the commenter's concern with regard to the non-isolated intermediate exemption. Although EPA is not promulgating a non-isolated intermediate exemption in this rulemaking, such an exemption is actively being considered as part of the Comprehensive Assessment Information Rule (CAIR).

The commenter also suggested a small quantity exemption of 50,000 pounds for both initial and follow-up reporting. EPA does not believe that such an exemption should be established. A purpose of this rule is to give EPA the information it needs to anticipate changes in production and use before they lead to significant changes in exposure, and assess potential risks before they are significant. The assessment may take considerable time (1 or 2 years), and EPA believes that a change in production or a plant increasing its production to over 50,000 pounds per year may in 1 or 2 years time lead to significant exposure. This is especially true because in this time production may increase to well over 50,000 pounds per year, or multiple companies will produce up to the 50,000 pound limit. The purpose of this rule is not to find major changes in exposure as suggested by the commenter, but rather to help EPA anticipate major changes in exposure. The reporting burden/costs for this rule are relatively low, and the number of affected companies small. Only 1 company is expected to report. In light of this and the fact that EPA is interested in anticipating changes in exposure, a small quantity exemption is not established for this rule.

IV. Summary of This Rule

This rule applies to the following chemical substances identified on the TSCA Chemical Substance Inventory as:

CAS No.	Chemical name
1429-50-1	Phosphonic acid, [1,2-ethanediyl-bis[nitrilobis (methylene)]]tetrakis-(EDTMPA)
15142-96-8	Phosphonic acid, [1,2-ethanediby-bis[nitrilobis (methylene)]]tetrakis-, hexasodium salt
34274-30-1	Phosphonic acid, [1,2-ethanediby-bis[nitrilobis (methylene)]]tetrakis-, potassium salt
57011-27-5	Phosphonic acid, [1,2-ethanediby-bis[nitrilobis (methylene)]]tetrakis-, ammonium salt
67924-23-6	Cobaltate (6-), [[[1,2-ethanediby-bis[nitrilobis (methylene)]]tetrakis[phosphonato]](8-)]-, pentapotassium hydrogen, (OC-6-21)-
67969-67-9	Cobaltate (6-), [[[1,2-ethanediby-bis[nitrilobis (methylene)]]tetrakis[phosphonato]](8-)- N,N',O,O'',O''',O''''']-, pentasodium hydrogen, (OC-6-21)-
67989-89-3	Cuprate (6-), [[[1,2-ethanediby-bis[nitrilobis (methylene)]]tetrakis[phosphonato]](8-)]-, pentapotassium hydrogen, (OC-6-21)-
68025-39-8	Cobaltate (6-), [[[1,2-ethanediby-bis[nitrilobis (methylene)]]tetrakis[phosphonato]](6-)- N,N',O,O'',O''',O''''], pentaammonium hydrogen, (OC-6-21)-
68188-96-5	Phosphonic acid, [1,2-ethanediby-bis[nitrilobis (methylene)]]tetrakis-, tetrapotassium salt
68309-98-8	Cadmate (6-), [[[1,2-ethanediby-bis[nitrilobis (methylene)]]tetrakis[phosphonato]](8-)]-, pentapotassium hydrogen, (OC-6-21)-
68901-17-7	Phosphonic acid, [1,2-ethanediby-bis[nitrilobis (methylene)]]tetrakis-, octaammonium salt
68958-86-1	Nickelate (6-), [[[1,2-ethanediby-bis[nitrilobis (methylene)]]tetrakis[phosphonato]](8-)]-, pentaammonium hydrogen, (OC-6-21)-
68958-87-2	Nickelate (6-), [[[1,2-ethanediby-bis[nitrilobis (methylene)]]tetrakis[phosphonato]](8-)]-, pentapotassium hydrogen, (OC-6-21)-
68958-88-3	Nickelate (6-), [[[1,2-ethanediby-bis[nitrilobis (methylene)]]tetrakis[phosphonato]](8-)]-, pentasodium hydrogen, (OC-6-21)-

This rule requires each manufacturer and importer initially to report the quantity of each substance manufactured or imported for the person's most recently completed corporate fiscal year, a description of the commercial uses of the substance during the most recently completed corporate fiscal year, the estimated quantity proposed to be manufactured or imported in the current corporate fiscal year, and a description of the intended commercial uses of the substance during the current corporate fiscal year. Follow-up reporting is required when a person manufactures or imports a substance in a quantity 50 percent greater than the quantity reported in the most recently submitted report, and/or when the person manufactures or imports a substance for a use not previously reported. Because of the potentially large number of substances analogous to the EDTMPA anion, EPA is announcing its intent to add such analogous substances to this rule through notice and comment rulemaking. However, the data received from this rule may allow EPA to make a class judgement as to hazard potential of the analogous substances and obviate the need to gather additional data by amending the rule to add substances.

EPA is aware that duplicative reporting with the Inventory Update Rule (40 CFR Part 710, Subpart B) is a possibility. However, if a report for this section 8(a) rule is submitted within the year preceding the start of a reporting period under the Inventory Update Rule (IUR), the submitter will not be required by the IUR to report the same information again for that reporting period. The details of this exemption are set forth in 40 CFR 710.35. For example, the next recurring reporting period under the IUR is from August 25, 1990 to December 23, 1990 for any person who manufactured for commercial purposes 10,000 pounds (4,540 kilograms) or more of a chemical substance at any site owned or controlled by that person at any time during the person's latest complete corporate fiscal year before August 25, 1990. Thus, if a person has reported for this section 8(a) rule within the year preceding the start of the IUR reporting period just described, such person is exempt from reporting under the IUR.

There are separate reports for each listed substance. Initial reports required under this rule include the following information:

1. Name and Chemical Abstracts Service Registry Number of the substance for which the report is submitted.

2. Company name and headquarters address.

3. Name, address, and telephone number of the principal technical contact.

4. The total quantity (by weight in pounds) of the substance manufactured or imported for the most recently completed corporate fiscal year.

5. A description of the commercial uses of the substance during the most recently corporate fiscal year, including the production volume for each use.

6. The estimated quantity (by weight in pounds) of the substance proposed to be manufactured or imported in the current corporate fiscal year.

7. A description of the intended commercial uses of the substance during the current corporate fiscal year, including the production volume for each use.

Follow-up reports required under this rule include the following information:

1. Name and Chemical Abstracts Service Registry Number of the substance for which the report is submitted.

2. Company name and headquarters address.

3. Name, address, and telephone number of the principal technical contact.

4. The estimated quantity (by weight in pounds) of the substance proposed to be manufactured or imported in the current corporate fiscal year.

5. A description of the intended commercial uses of the substance during the current corporate fiscal year, including the production volume for each use.

Reports must be submitted by January 3, 1989 to the following address: Document Processing Center (TS-790), Office of Toxic Substances, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460, ATTN: EDTMPA Reporting.

V. Confidentiality

The procedures for submitting a notice with a confidentiality claim are set forth in 40 CFR 704.7. A person submitting a claim of confidentiality attests, among other things, that: my company has taken measures to protect the confidentiality of the information, and we intend to continue to take such measures; the information is not, and has not been, reasonably obtainable by other persons (other than government bodies) without our consent; the information is not publicly available elsewhere; and the disclosure would cause substantial harm to the company's competitive position.

VI. Economic Impact

EPA estimates that compliance costs will range from $170 to $740 for each report. The cost estimate for data acquisition assumes that the data are known to or reasonably ascertainable by the person submitting the report. Costs include:

Data acquisition	$90 to $480
Notice preparation (typing)	$14 to $56
Managerial and legal review	$65 to $195
Total	$169 to $731

VII. Rulemaking Record

The following documents constitute the record for this rule (docket control number OPTS–82032A). All documents, including the index to this record, are available to the public in the TSCA Public Docket Office from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The TSCA Public Docket Office is located at EPA Headquarters, Rm. NE–G004, 401 M St., SW., Washington, DC. The docket includes the following information considered by the Agency in developing this rule:

1. The proposed rule (53 FR 15428, April 29, 1988).
2. Written comment received in response to the proposed rule.
3. A chemical hazard information profile for EDTMPA.
4. The TSCA section 8(e) notice (8EHQ–0683–0463*S*) on EDTMPA (submitted July 15, 1983).
5. Reporting and recordkeeping requirements (40 CFR Part 704).
6. Economic analysis of this final rule.

VIII. Regulatory Assessment Requirements

A. Executive Order 12291

Under Executive Order 12291, EPA must judge whether a rule is "major" and therefore requires a regulatory impact analysis. EPA has determined that this rule is not "major" because it does not have an effect of $100 million or more on the economy. EPA also anticipates that this rule will not have a significant effect on competition, costs, or prices.

This rule was submitted to the Office of Management and Budget (OMB) for review as required by Executive Order 12291.

B. Regulatory Flexibility Act

This rule will not have a significant economic impact on a substantial number of small entities. EPA expects only one company to report under this rule, well within Regulatory Flexibility Act guidelines. In addition, the rule exempts "small manufacturers" (as defined in 40 CFR 704.3) from reporting on these substances. Therefore, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), EPA has determined that this rule will not have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

The information collection requirements contained in this rule have been approved by OMB under the provisions of the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* and have been assigned OMB control number (2070–0067).

Public reporting burden for this collection of information is estimated to vary from 4 to 20.5 hours per response, with an average of 12.25 hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Chief, Information Policy Branch, PM–223, U.S. Environmental Protection Agency, 401 M St., SW., Washington, DC 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, marked "Attention Desk Officer for EPA."

List of Subjects in 40 CFR Part 704

Chemicals, Environmental protection, Hazardous materials, Imports, Recordkeeping and reporting requirements.

Dated: October 7, 1988.

Victor J. Kimm,

Acting Assistant Administrator for Pesticides and Toxic Substances.

Therefore, 40 CFR Part 704 is amended as follows:

PART 704—[AMENDED]

1. The authority citation for Part 704 continues to read as follows:

Authority: 15 U.S.C. 2607(a).

2. By adding § 704.95 to Subpart B to read as follows:

§ 704.95 Phosphonic acid, [1,2-ethanediylbis[nitrilobis-(methylene)]]tetrakis-(EDTMPA) and its salts.

(a) *Substances for which reporting is required.* The chemical substances for which reporting is required under this section are:

CAS No.	Chemical name
1429-50-1	Phosphonic acid, [1,2-ethanediylbis[nitrilobis (methylene)]] tetrakis-(EDTMPA)
15142-96-8	Phosphonic acid, [1,2-ethanediylbis[nitrilobis(methylene)]] tetrakis-, hexasodium salt
34274-30-1	Phosphonic acid, [1,2-ethanediylbis[nitrilobis(methylene)]] tetrakis-, potassium salt
57011-27-5	Phosphonic acid, [1,2-ethanediylbis[nitrilobis (methylene)]] tetrakis-, ammonium salt
67924-23-6	Cobaltate (6-), [[[1,2-ethanediylbis [nitrilobis (methylene)]] tetrakis-[phosphonato]] (8-)]-, pentapotassium hydrogen, (OC-6-21)-
67969-67-9	Cobaltate (6-), [[[1,2-ethanediylbis [nitrilobis (methylene)]] tetrakis-[phosphonato]] (8-)-N,N',O,O'',O''',O''''']-, pentasodium hydrogen, (OC-6-21)-
67989-89-3	Cuprate (6-), [[[1,2-ethanediylbis [nitrilobis (methylene)]] tetrakis-[phosphonato]] (8-)]-, pentapotassium hydrogen, (OC-6-21)-
68025-39-8	Cobaltate (6-), [[[1,2-ethanediylbis [nitrilobis (methylene)]] tetrakis-[phosphonato]] (6-)-N,N',O,O'',O''',O''''']-, pentaammonium hydrogen, (OC-6-21)-
68188-96-5	Phosphonic acid, [1,2-ethanediylbis [nitrilobis (methylene)]] tetrakis-, tetrapotassium salt
68309-98-8	Cadmate (6-), [[[1,2-ethanediylbis [nitrilobis (methylene)]] tetrakis-[phosphonato]] (8-)]-, pentapotassium hydrogen, (OC-6-21)-
68901-17-7	Phosphonic acid, [1,2-ethanediylbis [nitrilobis (methylene)]] tetrakis-, octaammonium salt
68958-86-1	Nickelate (6-), [[[1,2-ethanediylbis [nitrilobis (methylene)]] tetrakis-[phosphonato]] (8-)]-, pentaammonium hydrogen, (OC-6-21)-
68958-87-2	Nickelate (6-), [[[1,2-ethanediylbis [nitrilobis (methylene)]] tetrakis-[phosphonato]] (8-)]-, pentapotassium hydrogen, (OC-6-21)-
68958-88-3	Nickelate (6-), [[[1,2-ethanediylbis [nitrilobis (methylene)]] tetrakis [phosphonato]] (8-)]-, pentasodium hydrogen, (OC-6-21)-

(b) *Persons who must report.* Unless exempt as provided in § 704.5, reports must be submitted by:

(1) Persons who manufacture or import any of the substances identified in paragraph (a) of this section.

(2) Persons who propose to manufacture or propose to import any of the substances identified in paragraph (a) of this section. For the purposes of importer reporting under this section, an import site is the operating unit within the person's organization which is directly responsible for importing the substance and which controls the import transaction; the import site may in some cases be the organization's headquarters office in the United States.

(c) *What information to report.* Persons identified in paragraph (b) of this section must report to EPA, for each of the substances identified in paragraph (a) of this section, the following information to the extent known to or reasonably ascertainable by them.

(1) Initial Report:

(i) Name and Chemical Abstracts Service Registry Number of the substance for which the report is submitted.

(ii) Company name and headquarters address.

(iii) Name, address, and telephone number of the principal technical contact.

(iv) The total quantity (by weight in pounds) of the substance manufactured or imported for the person's most recently completed corporate fiscal year.

(v) A description of the commercial uses of the substance during the person's most recently completed corporate fiscal year, including the production volume for each use.

(vi) The estimated quantity (by weight in pounds) of the substance proposed to be manufactured or imported in the person's current corporate fiscal year.

(vii) A description of the intended commercial uses of the substance during the person's current corporate fiscal year, including the estimated production volume for each use.

(2) Follow-up Report:

(i) Name and Chemical Abstracts Service Registry Number of the substance for which the report is submitted.

(ii) Company name and headquarters address.

(iii) Name, address, and telephone number of the principal technical contact.

(iv) The estimated quantity (by weight in pounds) of the substance proposed to be manufactured or imported in the person's current corporate fiscal year.

(v) A description of the intended commercial uses of the substance during the person's current corporate fiscal year, including the estimated production volume for each use.

(d) *When to report.* (1) Persons specified in paragraph (b)(1) of this section who are manufacturing or importing the substance as of December 5, 1988 must submit an initial report described in paragraph (c)(1) of this section by January 3, 1989.

(2) Persons specified in paragraph (b)(2) of this section must submit an initial report within 30 days after making the management decision described in § 704.3 or by January 3, 1989, whichever is later.

(3) Persons specified in paragraph (b) of this section, who submitted a report described in paragraph (c)(1) of this section, must submit a follow-up report described in paragraph (c)(2) of this section within 30 days of making the management decision, described at § 704.3, to do either of the following events:

(i) Manufacture or import the substance in a quantity 50 percent greater than the quantity reported in the most recently submitted report.

(ii) Manufacture or import the substance for a use not reported for that substance in any previous report.

(e) *Certification.* Persons subject to this section must attach the following statement to any information submitted to EPA in response to this section: "I hereby certify that, to the best of my knowledge and belief, all of the attached information is complete and accurate." This statement must be signed and dated by the company's principal technical contact.

(f) *Recordkeeping.* Persons subject to the reporting requirements of this section must retain documentation of information contained in their reports for a period of 5 years from the date of the submission of the report.

(Approved by the Office of Management and Budget under Control Number 2070–0067)

[FR Doc. 88–24396 Filed 10–20–88; 8:45 am]

BILLING CODE 6560–50–M

Proposed Rules

Federal Register
Vol. 53, No. 204
Friday, October 21, 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.

DEPARTMENT OF AGRICULTURE

Office of the Secretary

7 CFR Part 1d

Rural Labor; Immigration Reform and Control Act of 1986

AGENCY: Office of the Secretary, USDA.

ACTION: Proposed rule.

SUMMARY: Section 302 of the Immigration Reform and Control Act of 1986, Pub. L. No. 99–603, 100 Stat. 3359 (hereinafter referred to as "the Act"), established the Special Agricultural Worker (SAW) program. This program provides for the adjustment in status of certain aliens who have resided in the United States and performed seasonal agricultural services for at least 90 man-days during the 12-month period ending on May 1, 1986, to that of an alien lawfully admitted for temporary residence. Section 302(a) of the Act states that "seasonal agricultural services" means "the performance of field work relating to planting, cultural practices, cultivating, growing and harvesting of fruits and vegetables of every kind and other perishable commodities, as defined in regulations by the Secretary of Agriculture." 8 U.S.C. 1160(h). This subsection requires the Secretary to publish regulations defining the fruits, the vegetables, and the other perishable commodities in which the field work related to planting, cultural practices, cultivating, growing, and harvesting will be considered "seasonal agricultural services" for purposes of the Act. The regulations were published in the Federal Register on June 1, 1987, at 52 FR 20372–76 (codified at 7 CFR Part 1d). This proposed rule reexamines whether the commodity "sod" meets the definition of "other perishable commodities" promulgated at 7 CFR Part 1d.7 in light of the decision and remand of this issue to the Secretary of Agriculture by the United States District Court for the Northern District of Illinois in *Heriberto Morales, et al.* v. *Richard E. Lyng, et al.*, Civil Action No. 87–C–20522. The proposed rule also reexamines whether field work in the production of sod is "seasonal" as that term is defined at 7 CFR 1d.8.

DATE: Comments must be received no later than November 7, 1988.

ADDRESS: Send comments to Room 227–E, Administration Building, United States Department of Agriculture, 14th and Independence Avenue SW., Washington, DC. 20250–1400. Written comments received may be inspected in Room 227–E of the Administration Building, 8:00 a.m. to 4:00 p.m., Monday through Friday, except holidays.

FOR FURTHER INFORMATION CONTACT: Al French, Special Assistant for Agricultural Labor to the Assistant Secretary for Economics, Room 227–E, Administration Building, United States Department of Agriculture, 14th and Independence Avenue SW., Washington, DC 20250–1400; telephone (202 447–4737.

SUPPLEMENTARY INFORMATION:

Background

Section 302(a) of the Act states that "seasonal agricultural services" means "the performance of field work relating to planting, cultural practices, cultivating, growing and harvesting of fruits and vegetables of every kind and other perishable commodities, as defined in regulations by the Secretary of Agriculture." 8 U.S.C. 1160(h). This subsection requires the Secretary of Agriculture to publish regulations defining the fruits, the vegetables, and the other perishable commodities in which the field work related to planting, cultural practices, cultivating, growing, and harvesting will be considered "seasonal agricultural services" for purposes of the Act.

On June 1, 1987, the United States Department of Agriculture (USDA) published its final rule defining the terms "fruits," "vegetables," and "other perishable commodities," as well as several other terms that were necessary to an understanding of the definition of "fruits," "vegetables," and "other perishable commodities."

In the final rule, USDA defined the term "fruits" as "the human edible parts of plants which consist of the mature ovaries and fused other parts or structures, which develop from flowers or inflorescence." 7 CFR ld.5. On August 19, 1988, the term "vegetables" was redefined as "the human edible herbaceous leaves, stems, roots, or tubers of plants, which are eaten, either cooked or raw, chiefly as the principal part of a meal, rather than as dessert." 53 FR 31630–39 (Aug. 19, 1988) (to be codified at 7 CFR ld.10). The term "other perishable commodites" is defined as "those commodities which do not meet the definition of fruits or vegetables, that are produced as a result of seasonal field work, and have critical and unpredictable labor demands." 7 CFR ld.7. "Critical and unpredictable labor demands" is defined to mean "that the period during which field work is to be initiated cannot be predicted with any certainty 60 days in advance of need." 7 CFR ld.3.

USDA stated, in the explanation of the proposed rule, that "critical and unpredictable labor demands" was defined to make it clear that the use of alien workers is predicated upon circumstances that create the critical, yet unpredictable demand for a labor force on short notice. 52 FR 13247 (April 22, 1987). Thus, USDA made it clear that labor demands must be both "critical" and "unpredictable." An exclusive list of those commodities that were determined to be subject to critical and unpredictable labor demands was provided within the definition of "other perishable commodities," as well as a list of examples of commodities that were determined to be not subject to critical and unpredictable labor demands. 7 CFR 1d.7. Sod was listed as an example of a commodity that was not a fruit or vegetable and was determined to be not subject to critical and unpredictable labor demands. *Id.*

USDA considered "horticultural specialties" to be a category of "other perishable commodities." USDA defined "horticultural specialties" to mean:

> [F]ield grown, containerized, and greenhouse produced nursery crops which include juvenile trees, shrubs, seedlings, budding, grafting and understock, fruit and nut trees, fruit plants, vines, ground covers, foliage and potted plants, cut flowers, herbaceous annuals, biennials and perennials, bulbs, corms, and tubers.

7 CFR 1d.6. In the statement of basis and purpose to the final rule, USDA explained:

Horticultural specialties, frequently called nursery products, involves seasonal and labor intensive field work including seed preparation and sowing, making of cuttings, pruning, staking, tying trees and vines, potting of rooted cuttings, and grafting and budding. These activities are highly subject to unpredictable weather influences. Thus, we have determined that they are other perishable commodities.

52 FR 20374 (June 1, 1987).

USDA defined the term "field work" to mean:

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

7 CFR 1d.4.

The definition of "field work" incorporates several other terms that were defined in the final rule, such as "agricultural lands," "critical and unpredictable labor demands," and "seasonal." "Agricultural lands" was defined as:

[A]ny land, cave, or structure, except packinghouses or canneries, used for the purpose of performing field work.

7 CFR 1d.2. "Seasonal" was defined to mean that:

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

7 CFR 1d.8 (emphasis added).

In the statement of basis and purpose to the final rule, USDA stated that:

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

Accordingly, we have not included sod and turfgrass as an "other perishable commodity" or as a "horticultural specialty".

52 FR 20375 (June 1, 1987). Thus, USDA excluded sod from "seasonal agricultural services" because USDA determined that sod is not "seasonal," nor is it an "other perishable commodity." Sod was excluded from "horticultural specialties" because sod is not subject to "critical and unpredictable labor demands." Although "sod" and "turfgrass" were mentioned separately in the statement of basis and purpose to the final rule, this proposed rule will refer to "sod" as the commodity in issue. Turfgrass is comprised of the upper stratum of soil bound by several species of mostly perennial grasses and is maintained as a mowed turf. Sod consists of pieces or strips of live turfgrass and adhering soil.

The United States District Court for the District of Columbia in *Northwest Forest Workers Association* v. *Richard E. Lyng*, 688 F. Supp. 1 (D.D.C. 1988), upheld as reasonable and supported by the legislative history of the Act, the USDA definition of "other perishable commodities" in terms of "critical and unpredictable labor demands." 688 F. Supp. at 6–7. The court held also that the USDA definitions of "field work" and "agricultural lands" were reasonable and were not arbitrary and capricious. *Id.* at 12–13.

In *Morales* v. *Lyng*, the court's magistrate recognized specifically that " '[h]orticultural specialties' is separately defined but is still a category of 'other perishable commodities.' " Magistrate's Report and Recommendations at 7 n.3. With this perspective, the court did not separately consider the exclusion of sod from "horticultural specialties." Indeed, the court focused on whether sod is subject to "critical and unpredictable labor demands," and whether sod is "seasonal." These criteria are the prerequisites to determining whether sod is to be included as a category of "other perishable commodities;" this is particularly so since it is apparent that relevant activities regarding sod constitute "field work."

The court in *Morales* v. *Lyng* noted that the term "seasonal" is defined in terms of employment, rather than in terms of the maturation of the crop. Magistrate's Report and Recommendations at 3. In finding arbitrary and capricious the rationale given by USDA to conclude that sod was not "seasonal," *i.e.*, that sod took "[m]ulti-years to reach maturity," 52 FR 20375 (June 1, 1987), the court stated:

The fact that a commodity's growth cycle is multi-annual does not directly lead to the conclusion that certain activities occur year round. Second, even if certain activities do occur year round like "growing", there is no reason to believe that certain employment practices such as harvesting and planting occur continuously and not during certain times of the year requiring extra help.

Slip op. at 3.

The court in *Morales* v. *Lyng* found also that the Secretary was arbitrary and capricious in failing to respond to comments that asserted that sod is subject to weather influences and consumer demands. Slip op. at 5–7. The court rejected as a *post hoc* rationalization the Secretary's explanation that consumer demands were irrelevant to the determination of "critical and unpredictable labor demands." Slip op. at 6. In light of the court findings, the court remanded to USDA the issue of whether sod meets the definition of "other perishable commodities," and whether sod is "seasonal," within the meaning of the USDA definition of that term.

One authority on sod production has described sod operations as follows:

The shorter the period between planting and harvesting, the greater the potential profit. However, harvesting cannot occur until the sod is strong enough to hold together well when handled. Species and cultivars that produce aggressive rhizomes or stolons are used because they develop sod strength more quickly * * *.

Sod production generally takes 18 to 24 months * * *. High levels of maintenance are necessary to produce sod in the most profitable length of time. Adequate fertilization, constant irrigation, and correct mowing practices are essential. Pesticides must be used to keep the sod totally free of weeds and insect or disease injury.

The sod is cut with large harvesting machines * * *. Some of the machines are quite sophisticated and cut, roll, and stack the sod on pallets in one operation. Typically, sod pieces are 12 to 18 inches wide and 4 to 6 feet long. Strips 4 feet by 45 feet are harvested when the sod will be installed by unrolling it from a bar on the back of a tractor. Sod should be cut as thin as possible to minimize soil loss, make the sod lighter and easier to handle, and to encourage rapid rooting.

R. Emmons, *Turfgrass Science and Management* (1984), pp. 384–85.

USDA recognizes that the fact that a commodity takes multi-years to reach maturity does not necessarily mean that the activities with respect to that commodity in all instances occur year round. However, it appears that the necessary production activities of planting, cultural practices (such as

fertilizing, irrigation, and pesticide application), cultivation (such as mowing), growing, and harvesting are performed generally on a year round basis, rather than performed exclusively at certain periods of the year. Thus, USDA proposes to determined that sod production does not fall within the definition of "seasonal."

USDA previously determined that sod did not meet the definition of "other perishable commodities" because the production of sod does not involve critical and unpredictable labor demands. USDA has explained that the critical and unpredictable labor demands criterion:

> [I]s predicated upon unpredictable circumstances and the more immediate needs for labor which result from those circumstances. Typical of the circumstances which creates the critical yet unpredictable demand for labor is weather or other climate conditions. As a result, a labor force would be needed upon short notice.

52 FR 13247 (April 22, 1987).

The mere fact that a commodity is affected by weather is not determinative as to a critical and unpredictable demand for labor. Since all crops grown in open fields are affected by weather, such a criterion would be overinclusive.

The USDA definition of "critical and unpredictable labor demands" refers to "the period during which field work is to be initiated cannot be predicted with any certainty 60 days in advance of need." 7 CFR ld.3. Although this definition is phrased in terms of predictability, the term "*critical*" is a necessary component of the definition. This definition was upheld in *National Forest Workers Association* v. *Lyng*, 688 F. Supp. 1, 5–7, and *Texas Farm Bureau, et al.* v. *Richard E. Lyng*, Civil Action No. M88–095–CA (E.D. Tex. Sept. 28, 1988). The issue of whether or not a commodity is subject to "critical and unpredictable labor demands," therefore, is determined by the 60 day predictability rule and the criticality of the field work in question. Thus, USDA must consider a number of factors in determining whether a commodity has a critical labor demand, in addition to whether the field work is unpredictable. These factors include the nature and extent to which the field work activities utilize labor, the importance of the timing of these activities, and the amount of labor needed. *Texas Farm Bureau* v. *Lyng*, Slip op. at 15.

The legislative history of the Act provides guidance in evaluating whether a commodity is to be considered a category of "other perishable commodites":

> The perishable crop industry differs from the rest of the agricultural industry in two important ways * * *. First, it is impossible for growers of perishable crops to predict more than a few days in advance when their need for workers will occur. Second, their need for workers is short and it is very intense.

131 Cong. Rec. S11326 (Sept. 12, 1985) (statement of Sen. DeConcini).

> Weather, which is a most uncontrollable characteristic, can make crops such as peaches ripen much more quickly than anticipated. These factors are critical when considering the unique needs of this industry.

131 Cong. Rec. S11344 (Sept. 12, 1985) (statement of Sen. Evans).

> When we say perishable crops we are not talking about those that can ripen on a tree and remain there for perhaps a month without injury. We are talking about those that must be harvested immediately when ripe as a function of wheather * * *.

131 Cong. Rec. S11606 (Sept. 17, 1985) (statement of Sen. Wilson).

Thus, Congress considered perishable commodities to include commodities in which labor requirements are critical and unpredictable as a result of factors which affected the readiness and the immediacy of the need to perform the field work activity, whether that activity is planting, cultural practices, cultivating, growing, harvesting, etc.

During the comment period, USDA received a number of comments stating:

> Within reasonable limits, the seasonal nature of labor requirements are [sic] quite predictable. Based on past experience, we can forecast our labor requirements both in terms of dates and number of workers. These figures are predictated on sod harvesting requirements, nurturing of immature sod and preparation of new fields for future years' sod growth.

and:

> Based on past experiences, we have peak season demands for seasonal agricultural workers. We can forecast these seasonal periods through past records of dates and number of workers. However, due to weather conditions and consumer demand, our labor requirements are critical and unpredictable. Labor is often needed on short notice during seasonal activities.

USDA concluded from these statements that sod production fails to meet the criteria for "critical and unpredictable labor demands." 52 FR 20375 (June 1, 1987).

In *Morales* v. *Lyng*, the court noted:

> In short, all of the comments could be reconciled in a plausible fashion and interpreted to mean that: general seasonal demands of extra laborers are predictable, but often within seasonal parameters, the demand for extra field workers is unpredictable.

Slip op. at 6. The observation of the court suggests that while labor needs may be forecast, they are nevertheless unpredictable due to weather and consumer demand.

Even assuming that weather and consumer demand create a demand for extra field workers, the question remains as to whether that demand is "critical and unpredictable" within the USDA definition that has been accepted by the courts," * * * the period during which field work is to be initiated cannot be predicted with any certainty 60 days in advance of need." 7 CFR ld.3.

Sod, unlike perishable commodities, does not have a demand for labor that is critical and unpredictable as a result of factors which affect the readiness and immediacy of the need to perform field work activities. None of the field work activities creates a "critical" need for a labor force on short notice. On a national basis, land preparation and planting, mowing, fertilizing, and harvesting activities that generally are mechanized and are done throughout the year. Moreover, with respect to the harvesting of sod, sod may be harvested at any time after it is "strong enough to hold together well when handled." R. Emmons, *Turfgrass Science and Management* (1984), at 384. Unharvested sod may be "stored" in the field in marketable condition by continuing its normal maintenance. Thus, while consumer demand for the commodity may be subject at times to short-term uncertainty, this occurs within generally predictable periods of demand. Such demand does not create a "*critical*" need for a large labor force on short notice.

Sod producers monitor consumer demand and may anticipate demand months in advance by observing development and construction in their market area. USDA recognizes that an individual producer might receive an unanticipated order for immediate delivery that would create for him an unpredictable labor demand. However, such a demand would not be critical since it is not necessary to harvest the sod immediately. Even if the producer were unable to fill that particular order, the sod, unlike perishable commodities which must be harvested when ready, remains marketable.

The criterion of "critical and unpredictable labor demands" can be judged to a large extent by the degree of mechanization used in field work. There is a clear expression of congressional intent that the SAW program is to include as "other perishable commodities" crops which "must be harvested by hand, thereby requiring a

large number of workers on short notice," and not "where mechanical harvesters can be used * * *." 131 Cong. Rec. S11322 (Sept. 12, 1985) (statement of Sen. Wilson); *see also* 131 Cong. Rec. S11325 (Sept. 12, 1985) (statement of Sen. Hatch); 131 Cong. Rec. S11335 (Sept. 12, 1985) (statement of Sen. Gorton); 131 Cong. Rec. S11606 (Sept. 17, 1985) (statement of Sen. Wilson); 131 Cong. Rec. S11607 (Sept. 7, 1985) (statement of Sen. Gorton); H.R. Rep. No. 99-682, 99th Cong., 2d Sess., Part 1, July 16, 1986, at p. 85. Mechanization affects labor demands in that the more mechanized the production of a particular crop is, the less critical and the more predictable the labor demands are. Highly mechanized crops do not generally experience a critical need for a number of workers on short notice. 53 FR 31636 (Aug. 19, 1988).

In *Texas Farm Bureau* v. *Lyng*, the United States District Court for the Eastern District of Texas found reasonable the USDA explanation that highly mechanized operations are not subject to critical and unpredictable labor demands. The court noted.

> Since the purpose of the SAW program was to provide a force of largely unskilled manual labor, the need for a large crew was deemed to be more critical than a few equipment operators. The U.S.D.A. believed this factor comported with congressional intent that the SAW program include crops which at harvest were labor intensive, but exclude those which were mechanically harvested.

Mem. Op. at 16. Thus, the court found reasonable the USDA exclusion of hay from "other perishable commodities" because the labor needs of hay production have been met largely by mechanization.

In *Morales* v. *Lyng*, the court's magistrate noted that: "With few exceptions, all the comments explain that sod farming is a labor intensive activity that requires seasonal laborers and is subject to critical and unpredictable labor demands." Magistrate's Report and Recommendations at 11. However, most of these same comments note that sod production is highly mechanized. In addition, USDA notes that authorities on sod are consistent in their description of the sod industry at being highly mechanized, rather than labor intensive. *See, e.g.*, R. Emmons, *Turfgrass Science and Management* (1984), at pp. 11, 385, 513, 525-26; G. Buchanan, *Commercial Turfgrass—Sod Production in Alabama*, Bulletin 529, Agricultural Experiment Station, Auburn University (1981), at pp. 15, 19, 21, 27. Preparation of land, planting, mowing, fertilizing, pesticide application, irrigation, and harvesting are the principal activities of sod farming and all of these are mechanized activities. Some activities, such as the application of pesticides and fertilizer, and irrigation, may become critical in a relatively short period of time. However, these are not labor intensive operations that would require a labor force on short notice, but are mechanized activities performed by the normal work complement. If delayed, the farmer may utilize the same workers that he intended to employ prior to the delay.

USDA recognizes that once harvested, sod must be installed in a short time, but such activity is beyond the scope of field work on agricultural lands and, thus, is beyond the scope of "seasonal agricultural services."

Accordingly, it appears that weather or consumer demands do not create a need for a labor force on short notice for sod producers which would be critical and unpredictable. After thorough review of labor demands with respect to sod field activities from planting through harvesting and reconsideration of the comments received during the original rulemaking, USDA proposes to continue its determination that sod field work is not subject to critical and unpredictable labor demands. Thus, USDA proposes to continue its determination that sod does not qualify for inclusion a category of "other perishable commodities."

Regulatory Impact

The Assistant Secretary for Economics has reviewed this rule in accordance with Executive Order No. 12291 and has determined that it is not a major rule. Under the framework of the Act, the Immigration and Naturalization Service (INS) will use this proposed rule to assist it in determining which special agricultural workers will be admitted to the United States for temporary residence. Thus, the primary benefits of this proposed rule are internal to the operation of the United States government.

This section, in and of itself, will not have a significant effect on the economy and will not result in a major increase in costs or prices for consumers, individuals, Federal, state, or local government agencies, or geographic regions; or have significant effect on competition, employment, investment, productivity, innovation, or the ability of United States based enterprises to compete with foreign-based enterprises in domestic or export markets.

Regulatory Flexibility Act

This proposed rule reexamines whether the commodity sod meets the definition of the term "other perishable commodities" as that term is defined in USDA regulations codified at 7 CFR 1d.7, and whether field work in the production of sod is "seasonal" as that term is defined in USDA regulations codified at 7 CFR 1d.8. The proposed rule does not contain any compliance or reporting requirements, or any timetables. The proposed rule will assist the INS in determining the special agricultural workers to be admitted for temporary residence. Thus, the proposed rule, in and of itself, will have no significant effect upon small entities.

Paperwork Reduction Act

This proposed rule does not require additional procedures or paperwork not already required by law. Therefore, the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. 3502 *et seq.*) are inapplicable.

National Environmental Policy Act

This proposed rule will not have an impact upon the environment.

List of Subjects in 7 CFR Part 1d

Immigration, Rural labor.

Accordingly, it is proposed to retain Part 1d—RURAL LABOR—IMMIGRATION REFORM AND CONTROL ACT OF 1986—DEFINITIONS as promulgated.

Done at Washington DC, this 19 day of October 1988.

Richard E. Lyng,

Secretary of Agriculture.

[FR Doc. 88-24470 Filed 10-20-88; 8:45 am]

BILLING CODE 3410-01-M

NUCLEAR REGULATORY COMMISSION

10 CFR Part 20

[Docket No. PRM-20-17]

The Rockefeller University; Receipt of Petition for Rulemaking

AGENCY: Nuclear Regulatory Commission.

ACTION: Petition for rulemaking: Notice of receipt.

SUMMARY: The Commission is publishing for public comment a notice of receipt of a petition for rulemaking dated July 22, 1988, which was filed with the Commission by The Rockefeller University. The petition was docketed by the Commission on August 15, 1988, and has been assigned Docket No. PRM-20-17. The petitioner requests that the Commission amend its regulations under which a licensee may dispose of animal tissue containing small amounts of radioactivity without regard to its

radioactivity by expanding the list of radioactive isotopes for which unregulated disposal is permitted. The petitioner also requests that the Commission make the unregulated disposal of these wastes a matter with which all jurisdictions must comply.

DATE: Submit comments by December 20, 1988.

Comments received after this date will be considered if it is practical to do so but the Commission is able to assure consideration only for comments received on or before this date.

ADDRESSES: Submit written comments to the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Branch.

For a copy of the petition, write the Regulatory Publications Branch, Division of Freedom of Information and Publications Services, Office of Administration and Resources Management, U.S. Nuclear Regulatory Commission, Washington, DC 20555.

The petition and copies of comments received may be inspected and copied for a fee at the NRC Public Document Room, 2120 L Street NW., Lower Level, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Michael T. Lesar, Acting Chief, Rules Review Section, Regulatory Publications Branch, Division of Freedom of Information and Publications Services, Office of Information and Resources Management, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Telephone: 301–492–8926 or Toll Free: 800–368–5642.

SUPPLEMENTARY INFORMATION: The Nuclear Regulatory Commission (NRC) has established regulations that permit a licensee to dispose of animal tissue contaminated with small amounts of certain radioactive isotopes without regard to its radioactivity (10 CFR 20.306(b)). Under this provision a licensee may dispose of animal tissue containing 0.05 microcurie or less or Hydrogen-3 or Carbon-14 per gram, averaged over the weight of the entire animal, as long as the tissue is not disposed of in a manner that would permit its use as food for humans or in animal feed.

In addition to disposing of animal tissues containing Hydrogen-3 or Carbon-14, the petitioner disposes of animal tissue containing small amounts of Sulfur-35, Calcium-45, Chromium-51, Iodine-125, and Iodine-131. In 1987, the petitioner disposed of nine 30 gallon drums in 55 gallon overpacks that contained animal tissue contaminated with small amounts of radioactive isotopes. The total content of radioactive isotopes in this material was 1.35 millicuries of Hydrogen-3, 4.35 millicuries of Carbon-14, 0.1 millicurie of Sulfur-35, 1.1 millicuries of Chromium-51, 1.0 millicurie of Calcium-45, and 0.01 millicurie each of Iodine-125 and Iodine-131. The petitioner states that each individual animal contained less than microcurie amounts of any radioactive isotope and that, averaged over the year, the overall amount of radioactive isotopes in animal tissue was 0.0078 microcurie per gram. The costs incurred by the petitioner in disposing of the material under the current regulations was $450 per drum. The petitioner believes that the costs involved are unnecessary expenditures in view of the low levels of radioactivity involved.

The petitioner requests that the NRC add Sulfur-35, Calcium-45, Chromium-51, Iodine-125, and Idoine-131 in concentrations not exceeding 0.001 microcurie per gram to the list of radioactive isotopes set out in 10 CFR 20.306(b). This would allow the petitioner to incinerate or otherwise dispose of animal tissue containing small quantities of these radioactive isotopes without regard to its radioactivity. The petitioner is currently incinerating 100 pounds of non-radioactive animal tissue per day in a permitted, controlled air incenerator.

The petitioner also requests that the NRC make the unregulated disposal of animal tissue containing radioactive isotopes under 10 CFR 20.306(b) a practice with which all jurisdictions must comply. According to the petitioner, the New York City Health Department does not recognize *de minimis* levels of radioactivity so that this provision must be made a matter of compatibility with "agreement agencies" in order to benefit the petitioner.

This petition has been reviewed in relation to the Commission's policy statement on petitions for disposal of radioactive waste streams below regulatory concern, Appendix B to 10 CFR Part 2 (51 FR 30839; August 29, 1986). It has been found that the petition does not contain sufficient information to qualify for expedited handling in accordance with this policy statement and its staff implementation plan (51 FR 30840; August 29, 1986).

Dated At Rockville, Maryland, this 18th day of October 1988.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,

Secretary of the Commission.

[FR Doc. 88–24401 Filed 10–20–88; 8:45 am]

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FEDERAL HOME LOAN BANK BOARD

12 CFR Ch. V

Mutual Savings and Loan Holding Companies

Dated: October 12, 1988.

AGENCY: Federal Home Loan Bank Board.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Federal Home Loan Bank Board (the "Board") is reviewing a number of issues that must be addressed in order to implement the mutual holding company provisions of the National Housing Act (the "NHA"), 12 U.S.C. 1730a(s), as added to the NHA by the Competitive Equality Banking Act of 1987 ("CEBA"), Pub. L. No. 100–86, 101 Stat. 552, 577–579 (1987). As part of its review, the Board is requesting public comment on the most significant of these issues, which are described below.

DATE: Comments must be received on or before November 21, 1988.

ADDRESS: Send comments to Director, Information Services Section, Office of the Secretariat, Federal Home Loan Bank Board, 1700 G Street, NW., Washington, DC 20552. Comments will be available for public inspection at the Board's Information Services Office at 801 17th Street, NW., Washington, DC 20006.

FOR FURTHER INFORMATION CONTACT: Jeff Miner, Assistant Deputy Director, Corporate and Securities Division, (202) 377–7546; V. Gerard Comizio, Director, Corporate and Securities Division, (202) 377–6411; or Julie L. Williams, Deputy General Counsel for Securities and Corporate Structure, (202) 377–6459; Office of General Counsel, Federal Home Loan Bank Board, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION:

Background

CEBA section 107(a) amends NHA section 408, 12 U.S.C. 1730a, by adding a new subsection (s) thereto, which provides for the establishment of mutual savings and loan holding companies.[1]

[1] CEBA section 107(b) provides for the establishment of mutual bank holding companies for savings banks and cooperative banks insured by the federal Deposit Insurance Corporation (the "FDIC"). *See section 3(g) of the bank Holding Company Act of 1956, 12 U.S.C. 1842. A number of state statutes also provide for state chartered mutual holding companies. Unless the context clearly indicates otherwise, all references herein to "mutual holding companies" are intended to refere only to mutual savings and loan* holding companies established pursuant to NHA section 408(s).

Pursuant to NHA section 408(s), any insured institution in the mutual form may reorganize to form a mutual holding company by "(A) chartering an interim savings institution, the stock of which is to be wholly owned by the mutual institution; and (B) transferring the substantial past of [the mutual institution's] assets and liabilities, including all of its insured liabilities, to the interim savings institution," NHA section 408(s)(1), *provided* (i) the plan of reorganization provides that "[p]ersons having ownership rights in the mutual institution * * * shall have the same ownership rights with respect to the mutual holding company," NHA section 408(s)(4), (ii) the plan is approved by the institution's board of directors and voting members, NHA section 408(s)(2), and (iii) the institution provides sixty days advance notice to the Federal Savings and Loan Insurance Corporation (The "FSLIC") and the FSLIC does not, within that time, disapprove the reorganization. NHA section 408(s)(3). (the FSLIC may, at its option, extend the time frame for disapproval by an additional thirty days. *Id.*)

The FSLIC is authorized to disapprove a proposed mutual holding company reorganization if (i) the FSLIC finds that the financial or managerial resources of the insured institution are inadequate or that the reorganization would otherwise threaten the safety and soundness of the institution; (ii) the insured institution fails to provide the FSLIC with information required by regulation or by specific request; or (iii) the institution fails to obtain approval of the reorganization from its board of directors and voting members. NHA section 408(s)(3)(C). In addition, and as a separate matter, the FSLIC is authorized to review and approve the proposed capitalization of mutual holding companies. NHA section 408(s)(3)(D). In no event may a mutual holding company be capitalized at a level that would deprive the newly formed subsidiary insured institution of sufficient capital to comply with the Board's minimum capital requirements, as set forth at 12 CFR 563.13. NHA section 408(s)(3)(D).

Mutual holding companies are permitted to "acquire * * * through merger" additional mutual insured institutions or mutual FDIC insured savings banks, to "acquire" or "merge with" other savings and loan holding companies, to "invest" in the stock of insured institutions, and to "invest" in any other corporation "the capital stock of which is available for purchase by an insured institution under Federal law or under the law of any State where the subsidiary insured institution or institutions [of the mutual holding company] have their home offices." NHA section 408(s)(5). If the term "invest" is interpreted in a manner that includes acquisitions of controlling blocks of stock in any corporation whose stock may be purchased by insured institutions under Federal law or the relevant State law (*see* discussion below under Item 5), then it appears that mutual holding companies would be able to engage, indirectly via subsidiaries, in a broad range of business activities. If instead the term is interpreted in a manner that includes only passive, non-controlling investments, then the permissible business activities of subsidiaries of mutual holding companies will be coextensive with the business activities that mutual holding companies are permitted to engage in directly, *i.e.*, those specified in NHA section 408(c)(2), exclusive of subclause (B) thereof (conducting an insurance agency or escrow business). NHA section 408(s)(5)(E). A mutual holding company that "acquires" or "merges with" a savings and loan holding company that engages in activities or holds assets that are impermissible for mutual holding companies must cause those nonconforming activities and/or assets to be disposed of or terminated within two years of such acquisition or merger. NHA section 408(s)(6).

Except as noted above, mutual holding companies are subject to the same statutory and regulatory provisions as are applicable to savings and loan holding companies generally, including (without limitation) provisions regarding transactions with affiliates, NHA section 408(d), (p), and (t), acquisitions of insured institutions, NHA section 408(e), declaration of dividends, NHA section 408(f), holding company indebtedness, NHA section 408(g), management interlocks, NHA section 408(i), and Board regulations implementing the foregoing statutory provisions, 12 CFR Parts 574, 583, and 584. NHA section 408(s)(7).

Discussion

The Board, as operating head of the FSLIC, is authorized to promulgate such regulations "as it deems necessary or appropriate to enable it to administer and carry out the purposes of" NHA section 408(s), as described above. NHA section 408(h)(1). In reviewing section 408(s), the Board has noted that a number of important issues that will have to be addressed in its implementing regulations are either not addressed or not definitively resolved by the statutory language. Accordingly, the Board has decided to seek public comment on certain key issues before promulgating a detailed set of proposed regulations. The issues are as follows:

1. What is the essential juridicial nature of a mutual holding company?

NHA section 408(s) specifies that a mutual insured institution "may recognize so as to become a mutual holding company" by chartering an interim subsidiary stock insured institution and transferring a substantial part of the mutual insured institutions assets and all of its insured deposits to the subsidiary institution. NHA section 408(s)(1). In other words, unlike traditional holding company reorganization where an insured institution in the stock form incorporates a new general business corporation to serve as the new holding company, under NHA section 408(s) the mutual insured institution itself becomes the holding company.

Thus, at the end of a reorganization under section 408(s), the basic legal document authenticating and defining the corporate existence of a mutual holding company will be the charter of a mutual insured institution, either state or federal. *Cf.* 12 CFR 544.1 (model charter for federal mutual associations). Although the Board could promulgate regulations requiring any mutual insured institution that wishes to reorganize under section 408(s) to amend its charter to change its name from "_____ Savings and Loan Association" or "_____ Savings Bank" to something reflecting its status as a mutual holding company and to specify that unless and until the mutual holding company lawfully ceases to operate as a mutual holding company (*see* Item 10 below) it may exercise only such powers as are set forth in NHA section 408(s)(5), these amendments seemingly would not alter the fundamental fact that the mutual holding company will still be an entity chartered under the relevant federal or state statute providing for the formation of thrift institutions. *See* Home Owners Loan Act, section 5(a), 12 U.S.C. 1464(a).

This raises the question whether mutual insured institutions that become mutual holding companies should be deemed to retain their fundamental identity as "insured institutions" for the purpose of determining the applicability of various statutory and regulatory provisions such as (i) NHA section 407(d) and section 21(f)(4) of the Federal Home Loan Bank Act ("FHLBank Act"), 12 U.S.C. 1441(f)(4), both of which provide for exit fees upon termination of FSLIC insurance, and (ii) NHA section

408(t), which provides an exception from the requirement of prior FSLIC approval for transactions between insured institutions in same holding company structure. The answer to this question is also relevant to how securities issued by mutual holding companies will be regulated under the federal securities laws. *See* Item 2 below.

In recognition of the hybrid nature of a mutual holding company, the Board is of the preliminary view that it should take a flexible approach to the question of whether a mutual holding company is an "insured institution." There are some statutory or regulatory provisions under which it would make sense to treat mutual holding companies as insured institutions, and there are others under which it would not. Thus, for example, for purposes of NHA section 407(a) and FHLBank Act section 21(f)(4), the Board is not inclined to view the transformation of a mutual insured institution into a mutual holding company as a termination of insurance requiring the payment of exit fees. The purposes of the exit fee provisions is to impose a final premium on deposits that are leaving the FSLIC system. In the context of mutual holding companies, deposits are merely being relocated within the FSLIC system, indeed within the same corporate structure.

In the context of NHA section 408(t), however, the Board is inclined to view mutual holding companies as traditional holding companies, rather than insured institutions. The exemption from prior approval provided by section 408(t) appears to be based upon the assumption that transactions between two affiliated entities within the same structure that are engaged in the same general business (*i.e.*, that of an insured institution) and both have FSLIC-insured deposits do not present the same level of risk to the FSLIC fund or insured institutions as do transactions between insured institutions and their other corporate affiliates. Since the powers and activities of a mutual holding company differ significantly from those of an insured institution, more closely approximating those of a traditional savings and loan holding company, NHA section 408(s)(5), and since transactions between mutual holding companies and their insured institution subsidiaries would present the possibility of a transfer of assets away from the FSLIC fund, it would seem more appropriate to treat mutual holding companies like typical savings and loan holding companies for purposes of transactions with their subsidiary insured institutions. *See* NHA sections 408 (d) and (p).

2. Should membership interests and/or debt securities issued by mutual holding companies be deemed subject to the Board's securities offering regulations set forth at 12 CFR Part 563g?

a. Issuance of Membership Interests

Persons who open savings or demand deposit accounts at federally-chartered mutual savings and loan associations and savings banks automatically become members of such institutions and, as such, are entitled, *inter alia*, to vote on certain corporate matters, to receive distributions on net earnings on the basis of accounts, and to receive certain distributions upon liquidation. *See* 12 CFR 544.1 (sections 6 and 8 of Model Charter). Persons who open accounts at most state-chartered, FSLIC-insured mutual savings and loan associations also receive similar rights. As noted above, NHA section 408(s)(4) prescribes that persons who possess ownership rights in mutual insured institutions that reorganize into the mutual holding company format must receive the same type of ownership rights in the mutual holding companies.

This raises the question of whether the issuance of such rights by mutual holding companies should be deemed to constitute the issuance of securities subject to the Board's securities offering regulations at 12 CFR Part 563g. Part 563g provides that "no insured institution shall offer or sell, directly or indirectly, any security issued by it unless the offer or sale is accompanied * * * by an offering circular which includes the information required by this Part * * * or * * * an exemption is available under this Part." 12 CFR 563g.2(a). For purposes of Part 563g, the term "security" is defined as set forth below. (For convenience of reference in the discussion that follows, the definition is divided into two parts.)

Part I: "Security" means any nonwithdrawable account * * *, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate * * *, investment contract, voting trust certificate or, in general, any interest or instrument commonly known as a "security" * * *,

Part II: except that a "security" shall not include an account insured, in whole or in part, by the Federal Savings and Loan Insurance Corporation or the Federal Deposit Insurance Corporation. 12 CFR 563g.1(a)(13).

In light of the foregoing, any determination that Part 563g is applicable to the interests to be issued by mutual holding companies would be dependent upon four findings: (i) That such interests fit into one or more of the specific categories of instruments named above or othewise qualify as "securities" under general principles of securities law, *see* Part I of the foregoing definition; (ii) that these interests are, in some meaningful sense, being issued by an insured institution, *see* 12 CFR 563g.2(a); (iii) that these interests do not qualify for the exemption for interests issued in connection with accounts insured by the FSLIC or the FDIC, *see*, Part II of the foregoing definition; and (iv) that these interests are being "offered for sale" and "sold." *See* 12 CFR 563g.2(a).

With respect to the first issue, *i.e.*, whether interests issued by mutual holding companies constitute "securities" within the meaning of Part I of the foregoing definition, the Board notes that Part I of the definition is virtually identical to the definition of "security" set forth in section 2(1) of the Securities Act of 1933 (the "'33 Act"), 17 U.S.C. 77a *et seq.*, and section 3(a)(10) of the Securities Exchange Act of 1934 (the "'34 Act"), 17 U.S.C. 78a *et seq.* Unfortunately, the existing case law discussing whether mutual ownership rights of the type described above constitute "securities" within the meaning of section 2(1) of the '33 Act and section 3(a)(10) of the '34 Act is sparse and inconclusive. Since the issuance of such rights by mutual insured institutions would be exempt from the registration requirements of the '33 Act and the '34 Act even if such accounts did constitute "securities," *see* section 3(a)(5) of '33 Act and section 12(g)(2)(C) of '34 Act, the only context in which the question could arise in the past was in fraud actions brought pursuant to section 17 of the '33 Act and section 10 of the '34 Act. Only a few such actions have actually been brought, and, arguably, each such action has involved membership interests that differ in some significant respect from the membership interests described above. *E.g., Tcherepnin v. Knight* 389 U.S. 332 (1967) (a withdrawable capital share in an Illinois building and loan association is a "security" within the meaning of the '34 Act primarily because the holders of such shares are entitled to dividends, rather than a fixed rate of interest, and because the legislative history of the '33 Act suggests that interests in bullding and loan associations were assumed to be "securities" requiring the section 3(a)(5) exemption); *Burrus, Coates & Burrus v. MacKethan*, 537 F. 2d 1262 (4th Cir. 1976) (a certificate of investment in an

S&L is not a security within the meaning of the '34 Act since the certificate is merely an account that pays a fixed rate of interest and confers no voting rights); *Hamblett v. Board of Savings and Loan Associations of Mississippi*, 742 F. Supp. 158, 164–167 (N.D. Miss. 1979) (same as *Burrus*, except conclusion applies to both '33 Act and '34 Act); *cf. also Marine Bank v. Weaver*, 455 U.S. 551, 556 (1982) (a certificate of deposit differs from the instrument considered in *Tcherepnin, supra*, in that it confers no voting rights and pays a fixed rate of interest; such CDs, especially when issued by a regulated bank, are not "securities" within the meaning of the '34 Act).

If the Board were to conclude that the issuance of mutual membership rights of the type described above by mutual holding companies constitutes the issuance of "securities" within the meaning of Part I of the definition set forth above, the Board would, as a second matter, have to consider whether such "securities" should be deemed to be issued by insured institutions. This, of course, is linked to the analysis set forth under Item 1 above. In this regard, we also note that section 3(a)(5) of the '33 Act and section 12(g)(2)(C) of the '34 Act each provide exemptions for securities issued by "savings and loan associations" or "similar institutions" supervised and examined by state or federal authorities. Thus, from time to time the Securities and Exchange Commission ("SEC") has been called upon to consider whether a particular entity that is closely associated with a savings and loan association or an integral part of the operations of a savings and loan association should be deemed to be a "saviangs and loan association" or "similar institution" within the meaning of the '33 Act and '34 Act. As a general rule, the SEC has not responded favorably to such arguments. *E.g., Central West End Savings & Loan Association*, '84–85 Fed. Sec. L. Rep. (CCH), Para. 77,802 (1984) (securities issued by a pooled fund of tax exempt state and municipal bonds organized and operated by an S&L as a service to the S&L's customers do not constitute securities issued by an S&L or "similar institution"); *Commercial Credit Co.*, '71–72 Fed. Sec. L. Rep. (CCH), Para. 78,544 (1971) (an industrial loan subsidiary of a thrift institution is not a "similar institution" and, hence, passbook accounts issued by the subsidiary are not exempt securities); *Equitable Savings & Loan Association*, '71–72 Fed. Sec. L. Rep. (CCH), Para. 78,721 (1972) (an entity will be deemed to be a savings and loan association or "similar institution" only if it is deemed to be a thrift institution under applicable financial institutions laws). There is, however, an obvious difference between mutual holding companies and the entities that were scrutinized in the aforementioned cases: mutual holding companies are chartered under the laws providing for the establishment of thrift institutions. *See* Item 1 above. Under the principles articulated in *Equitable*, this could be a decisive difference.

If the Board were to conclude that the membership interests to be issued by mutual holding companies are securities under Part I of the definition set forth above and that such securities should be deemed to be securities issued by insured institutions, the Board would, as a third matter, have to consider whether such membership interests nevertheless qualify for the exemption set forth in Part II of the above definition for interests issued in connection with insured deposit accounts. On the one hand, it could be argued that the rights being received by persons who place deposits in an insured institution subsidiary of a mutual holding company go beyond the rights received by depositors in a typical insured institution in that the rights of the former include, at least in theory, the right to benefit from income generated at the holding company level. Thus, it could be argued that the normal exemption from Part 563g for rights issued in connection with insured deposit accounts should not apply to the interests issued by mutual holding companies. On the other hand, there would be a certain tension between a conclusion that the rights being issued by mutual holding companies constitute securities issued by an "insured institution" (pursuant to the arguments set forth above and in Item 1) and a conclusion that those rights nevertheless differ in some fundamental respect from the rights issued to depositors in typical insured institutions, particularly when, as here, the rights issued by the mutual holding company are derived from, and intended to replicate, the interests of accountholders in a mutual insured institution.

Finally, if the Board were to conclude that the membership interests to be issued by mutual holding companies constitute securities under Part I of the definition set forth above, that such securities should be deemed to be securities issued by insured institutions, and that such securities do not qualify for the exemption set forth in Part II of the above definition, then the Board would, as a fourth matter, have to consider whether such securities are being offered or sold "for value." 12 CFR 563g.1(a)(9) and 563g.2(a). The Board's securities offering regulations, like the '33 Act, do not apply to transactions which lack the element of an offer or sale of securities "for value." *See generally*, L. Loss, Fundamentals of Securities Regulation, at 247–248 (2nd ed. 1988). In the context of mutual holding companies, the "for value" standard can be argued both ways. On the one hand, it could be contended that a mutual accountholder gives value when he or she, in effect, exchanges his or her interest in a mutual insured institution, with the potential to undertake a "standard" conversion, for an interest in a mutual holding company. On the other hand, it could be argued that the interest in the mutual holding company received by the mutual accountholder differs in no significant respect from the interest he or she formerly had in the mutual insured institution, that the accountholder's former interest in the mutual insured institution was not received "for value," and that, therefore, no offer or sale "for value" could have occurred at the time the accountholder's former interest was exchanged for an interest in the mutual holding company. Further complications, and arguments on both sides, would appear to be presented in analyzing the interests of persons that become accountholders *after* a mutual holding company reorganization.

Although none of the cases cited above where courts have considered whether interests issued in connection with the establishment of deposit accounts constitute securities expressly discusses the question of whether such issuances also constitute offers and sales "for value," the Supreme Court in *Tcherepnin* appears to have assumed the occurrence of an offer and sale "for value" under the circumstances of that case. *Tcherepnin, supra*, at 340–341 and 346.

b. Issuance of Debt Securities

The analysis of the applicability of 12 CFR Part 563g to the issuance of debt securities by mutual holding companies is much simpler than the analysis required in connection with membership interests. When a mutual holding company undertakes a traditional debt offering (*i.e.*, notes offered to members of the public at a specified price per note), there will be no question: (i) That "securities" are being offered; (ii) that the "securities" are not being offered in connection with insured deposit accounts; and (iii) that offers and sales "for value" are taking place. The only significant issue that will be presented

by this type of offering is whether the securities are being offered by an "insured institution." The arguments for and against viewing a mutual holding company as an "insured institution" for securities law purposes are already set forth above in the discussion of membership interests. If, pursuant to these arguments, a mutual holding company is deemed to be an "insured institution," then the offer and sale of debt securities by mutual holding companies will be subject to 12 CFR Part 563g.[2]

3. Should third parties be permitted to acquire minority blocks of stock of insured institution subsidiaries of mutual holding companies?

NHA section 408(s) does not specify whether third parties, *i.e.*, persons or entities other than mutual holding companies, may acquire minority blocks of stock of insured institution subsidiaries of mutual holding companies. In the absence of express guidance from the statute, arguments can be made on both sides of the issue.

On the one hand, it can be argued that the ability to raise capital from outside sources is one of the chief benefits that could flow from mutual holding company reorganizations and that, therefore, in the absence of any express statutory prohibition, the Board should exercise its regulatory discretion to permit the practice. This argument is reinforced by the fact that most states that have considered the issue in the context of state-chartered mutual holding companies have opted in favor of permitting third parties to acquire minority blocks of stock of thrift subsidiaries of mutual holding companies. *E.g.*, Connecticut Public Act No. 85–330, sections 4(e) and 5(d); and New Jersey Act No. 2042 (1987), sections 11(b), 20(f), and 31(a).

On the other hand, it can be argued that although NHA section 408(s) does not expressly prohibit the acquisition of minority blocks of stock by third parties, such a prohibition may be inferred from various provisions in the Section. *See, e.g.*, NHA section 408(s)(1)(A) (providing that the stock of the interim insured institution that is formed as a part of the reorganization process to become the operating thrift subsidiary of the mutual holding company must be "wholly owned" by the mutual holding company); and NHA section 408(s)(4) (providing that members of a reorganizing mutual insured institution must possess the same ownership rights at the end of the reorganization process as they possessed at the outset). In addition, it can be noted that although some states do permit third parties to acquire minority blocks of stock of thrifts owned by state-chartered mutual holding companies, the statutes of those states, unlike NHA section 408(s), contain provisions expressly authorizing such acquisitions. *See* state statutory provisions cited above. The absence of any similar explicit authorization in section 408(s) could be taken as an indication that Congress did not envision that third parties would be permitted to acquire minority blocks of stock of insured institution subsidiaries of federally-chartered mutual holding companies.[3] [4]

If the Board were to conclude that third parties may acquire minority blocks of stock of insured institution subsidiaries of mutual holding companies, it would also have to consider whether such stock may be in the form of preferred stock and/or nonvoting common stock, in addition to ordinary common stock. The Board would also have to decide whether acquisitions of the stock of the insured institution subsidiaries would be limited to purchases of newly-issued stock from the subsidiaries or could also include purchases of already outstanding stock from the mutual holding companies.[5] The Board notes that the latter form of acquisition could conceivably be utilized by mutual holding companies as a way of avoiding rules the Board might adopt limiting the amount of capital that mutual holding companies may derive from their insured institution subsidiaries. *See* Item 6 below. Such acquisitions would also raise difficult questions regarding the types of procedural safeguards that might be necessary to protect the rights and interests of the members of the mutual holding company. *See* Item 4 below.

4. Should the Board apply comparable procedures to the process of establishing mutual holding companies as now apply to mutual-to-stock conversions?

Because the formation of a mutual holding company would constitute a major corporate reorganization, an argument can be made that insured institutions proposing to form mutual holding companies should be subject to a full range of corporate and regulatory procedural safeguards. The Board's regulations governing mutual-to-stock conversions may provide an apt example of the type of procedures that would be appropriate. Institutions proposing to convert to the stock form are required, *inter alia*, (i) to submit a conversion application to the FSLIC providing information regarding the proposed plan of conversion; (ii) to submit the conversion proposal to shareholders pursuant to a proxy statement that has been reviewed and approved by the FSLIC and conforms to Form PS, as set forth at 12 CFR 563b.101; and (iii) to comply with other regulatory provisions designed to insure that the issuance of stock by the institution is done in a fair and lawful manner. 12 CFR Part 563b.

Of course, the amount and type of safeguards that will be required will vary significantly depending upon whether third parties are permitted to acquire minority blocks of stock of insured institution subsidiaries of mutual holding companies. *See* Item 3 above. If the Board were eventually to

[2] It should be noted that the focus of the above discussion is on whether membership interests and debt securities issued by mutual holding companies should be deemed to be subject to the Board's securities offering regulations. If it is ultimately concluded that mutual holding companies should not be viewed as "insured institutions" for securities law purposes, then any debt securities issued by mutual holding companies will, in the absence of an applicable exemption, be subject to the registration requirements of the '33 Act. Moreover, if mutual holding companies are not properly viewed as "insured institutions," consideration will also have to be given to whether membership interests issued by mutual holding companies will be subject to the '33 Act. Any such conclusion would appear to require the following findings: (i) Mutual holding companies are not properly viewed as "savings and loan associations" or "similar institutions," (ii) the membership rights issued by mutual holding companies constitute "securities," and (iii) such "securities" are being offered or sold "for value."

[3] To date, the Federal Reserve Board has processed one mutual bank holding company application pursuant to CEBA section 107(b) and, in connection with that application, authorized the subsidiary savings bank of Peoples Mutual Holdings, Bridgeport, Connecticut, to offer minority blocks of stock to accountholders and the general public. *See* Order of Board of Governors of Federal Reserve Board, Sept. 21, 1987. Since the mutual bank holding company provisions applicable to FDIC insured savings banks differ substantially from those applicable to FSLIC insured institutions, the Board does not consider the Federal Reserve Board's approval of People's application to be precedential for the decision the Board must make. *Compare* CEBA section 107(a) *with* CEBA section 107(b).

[4] Legislation has recently been introduced in Congress that would amend NHA section 408(s) to specify that third parties may acquire minority blocks of stock of insured institution subsidiaries of mutual holding companies. S. 2073, 101st Cong., 1st Sess., 134 Cong. Rec. 958–961 (1988).

[5] Some state mutual holding company statutes appear to limit third parties to the purchase of newly-issued stock from subsidiary thrifts (*e.g.*, New Jersey, see above citations), whereas others do not (*e.g.*, Connecticut, see above citations). The legislation referred to in Footnote 4, which would amend NHA section 408(s), would authorize third parties to purchase, newly-issued stock from subsidiary insured institutions, but not to purchase already outstanding subsidiary stock from mutual holding companies.

conclude that minority blocks of stock may be acquired by third parties, that could argue in favor of mutual holding company reorganizations being treated in a manner similar to mutual-to-stock conversions (*e.g.*, subscription offerings, liquidation accounts, dividend limitations, restrictions on the purchase of stock by directors and officers, and so forth). *See* 12 CFR 563b.3(c). Consideration would also have to be given to the tax consequences of such acquisitions. *See* sections 368(a)(1)(B) and (c), 382, and 1504(a)(2) of the Internal Revenue Code; and 12 CFR 563b.3(b)(3). The Board would also have to decide whether to require subsidiary insured institutions of mutual holding companies that sell their stock to third parties (i) to register their stock pursuant to the Securities Exchange Act of 1934, 12 U.S.C. 78a *et seq.*, regardless of their number of shareholders; (ii) to assist a market maker in establishing and maintaining a market in their stock; and (iii) to attempt to list their stock on a national or regional securities exchange or on the NASDAQ quotation system. *See* 12 CFR 563b.3(c)(19) (which imposes these requirements in connection with ordinary mutual-to-stock conversions).

5. Should mutual holding companies be permitted to acquire control of insured institutions that are already in the stock form and "other corporations," as defined below?

As noted above, NHA section 408(s)(5), which specifies the authorized activities of mutual holding companies, uses different terminology to describe the authority of mutual holding companies to engage in transactions with respect to mutual insured institutions and savings and loan holding companies, on the one hand, and stock insured institutions and other corporations the capital stock of which is available for purchase by an insured institution under federal law or under the law of any state where the subsidiary insured institution or institutions of the mutual holding company have their home offices (hereafter, "Other Corporations"), on the other hand. Clauses (B) and (C) of section 408(s)(5) permit mutual holding companies to "acquire * * * through merger" additional mutual insured institutions, and, subject to certain limitations, to "merge with" or "acquire" other savings and loan holding companies. Clauses (A) and (D) thereof permit mutual holding companies to "invest" in the stock of insured institutions and other Corporations.

The Board must determine whether Congess intended any significance to be attributed to this difference in terminology. One way to interpret the difference would be to conclude that Congress intended to limit mutual holding companies to passive, non-controlling investments in stock insured institutions and Other Corporations. Such an interpretation would be consistent with the familiar maxim of statutory interpretation that "where different language is used in the same connection in different parts of a statute, it is presumed that the legislature intended a different meaning." 82 C.J.S. "Statutes", section 316b (1953). The problem with the foregoing interpretation is that it would directly contradict NHA section 408(e)(1)(A)(iii), which prohibits non-controlling investments in insured institutions by savings and loan holding companies. In order to reconcile section 408(s)(5) with section 408(e)(1)(A)(iii), it may, therefore, be necessary to interpret the term "invest" as used in section 408(s)(5), or at least as used in clause (A) thereof, as being synonymous with "acquire," *i.e.*, as referring to controlling investments.

If the Board concludes that mutual holding companies may acquire control of insured institutions in the stock form and/or Other Corporations, two additional issues will have to be confronted. First, the Board will have to consider whether stock purchases are the sole form of transaction pursuant to which insured institutions in the stock form and Other Corporations may be acquired by mutual holding companies. Although it might be presumed that mutual holding companies would prefer to structure their acquisitions of stock institutions and Other Corporations as cash-out mergers, it is not clear that such mergers would fall within the language of section 408(s)(5) (A) and (D). Second, the Board will have to consider whether the accountholders of stock institutions acquired by mutual holding companies will be entitled to receive membership rights in the mutual holding company. On the one hand, it could be argued that the issuance of such rights would amount to a windfall for such accountholders at the expense of the existing members of the mutual holding company since all membership rights that such accountholders may have once had in their insured institution as a result of their deposits would already have been exchanged by those accountholders for subscription rights and rights inthe institution's liquidation account at the time the institution converted to the stock form. On the other hand, it could be argued that attempting to maintain a distinction between accountholders within the same mutual holding company structure would be futile and burdensome and would be inconsistent with the result that would occur in an acquisition of a stock insured institution by a mutual insured institution in a more typical transaction. *See, e.g.*, 12 CFR 552.13(c)(1).

6. What standards should guide the Board in reviewing the proposed capitalization of mutual holding companies?

As noted above, NHA section 408(s)(3)(D) provides that an insured institution that reorganizes into a mutual holding company "may, *subject to the approval of the [FSLIC]*, retain capital assets at the holding company level to the extent * * * such capital exceeds" the requirements of 12 CFR 563.13. The highlighted language indicates that Congress did not intend for section 408(s)(3)(D) to be read as an automatic entitlement for each organizing mutual holding company to retain all assets in excess of those required for its insured institution subsidiary to meet its regulatory capital requirement, but rather as a statutory floor or irreducible minimum past which the capital of insured institutions may not fall in the course of a mutual holding company reorganization. The fact that the statutory language authorizes the FSLIC to review and approve or disapprove capitalization proposals even in those cases where the subsidiary insured institution would meet its minimum regulatory capital requirement indicates that Congress intended for the FSLIC to play an active role in assessing the appropriateness of the proposed division of capital in each mutual holding company reorganization. This conclusion is reinforced by the fact that the FSLIC is also required to review the specific facts of each mutual holding company reorganization proposal and to disapprove any such reorganization if the FSLIC concludes that the insured institution presenting the proposal does not have adequate financial or managerial resources to support the reorganization or that the reorganization would otherwise negatively affect the safety and soundness of the insured institution. NHA section 408(s)(3)(C).

Accordingly, the Board is considering what standards should govern its review of mutual holding company capitalization proposals. The Board intends to examine the capitalization issue from both a supervisory perspective (*i.e.*, what amount or percentage of capital in excess of the minimum capital required by regulation

may be safely retained at the holding company level and what impact will that have on the insured institution's ability to provide economical home financing?) and from a fairness perspective (*i.e.*, should insured institutions that are reorganizing into a mutual holding company be able to transfer more capital to their holding companies than insured institutions that are converting to the stock form and simultaneously forming a stock holding company or institutions that are already in the stock form and elect to form a stock holding company?). With respect to the supervisory point, it should be noted that the Board recognizes that well-conceived, prudent attempts to diversify the business activities of insured institutions via transfers of capital to their affiliates can enhance the financial soundness of those institutions and their ability to compete, but the Board has also found, as a matter of experience, that insured institutions with broad diversification authority (*e.g.*, state-chartered institutions located in states that provide broad service corporation investment authority) tend to experience a disproportionately high rate of insolvencies and such insolvencies are frequently due to overly ambitious attempts at diversification.[6] With respect to the fairness point, it should be noted that traditionally the Board has restricted the amount of capital that may be transferred to a holding company during the course of a mutual-to-stock conversion. The amount of capital that may be transferred to a holding company formed by an institution already in the stock form has also traditionally been limited by various measures tied to the amount of post-conversion net income that could have, but has not, been paid out as dividends by the insured institution under Board regulations and policies.

7. Should mutual holding companies be required to enter into "net worth maintenance" or "pre-nuptial" type agreements with respect to their subsidiary insured institutions?

The Board generally conditions any approval of an application to acquire an insured institution upon the acquiror's execution of a "net worth maintenance" or "prenuptial" agreement. *See* 53 FR 31,761 (August 19, 1988). In a "net worth maintenance" agreement, the acquiror agrees that, at the Board's request, it will infuse additional equity capital (up to a specified maximum) into the institution being acquired if at any time during the term of the agreement the institution fails to meet its regulatory capital requirement or the institution's regulatory capital declines below a predetermined amount. In a "prenuptial" agreement, the acquiror agrees that if at any time during the term of the agreement the acquired institution's regulatory capital declines below a specified percentage of the institution's liabilities or assets, an officer of the FSLIC shall have the right to vote the stock of the institution with respect to certain shareholder matters, including removal and replacement of the board of directors and sale of the institution.

These agreements are required so as to ensure that acquirors will have "sufficient incentive to prudently manage" acquired institutions and to "provide the FSLIC with a reasonable amount of protection against adverse events and uncertainty and time lags inherent in a regulatory capital and accounting system based on historical costs." *Id.* The Board is considering whether, for similar reasons, mutual holding companies should be required to execute "net worth maintenance" or "prenuptial" agreements with respect to their subsidiary insured institutions.

8. Should an insured institution that is acquired by an existing mutual holding company be permitted to make a capital contribution to the holding company at the time of the acquisition?

Although, as noted above, NHA section 408(s) specifically authorizes an organizing mutual holding company to retain such capital assets as may be approved by the Board (within certain limits), there is no indication whether Congress intended to permit capital contributions to the holding company by subsequently acquired insured institutions. Such contributions are rarely, if ever, proposed in connection with acquisitions of insured institutions by stock savings and loan holding companies.

Moreover, the Board has traditionally conditioned approvals of acquisitions of insured institutions by stock holding companies upon agreement by the holding companies that any post-acquisition capital contributions to the holding companies by the acquired institutions (in the form of dividends) will not exceed certain specified levels of the institutions' post-acquisition net income. The Board is considering whether this approach should be used in connection with acquisitions of insured institutions by mutual holding companies.

In addition, if the Board concludes that minority blocks of stock of insured institution subsidiaries of mutual holding companies may be acquired by third parties and if, as would likely be the case, the pool of permissible third party acquirors includes directors and officers of the mutual holding companies and their subsidiary insured institutions, the Board will have to consider whether special rules will be needed to prevent insider abuse of dividends. Because of the absence of shareholders at the holding company level to scrutinize the activities of the directors and officers of the holding company, it is conceivable that dividends of the insured institution subsidiary could be channeled to insiders of the institution who have become the minority shareholders of the institution. This could be accomplished, for example, by (i) causing the insured institution subsidiary to declare large dividends; and (ii) causing the holding company to waive its right to receive such dividends.

9. Should mutual holding companies be permitted to pledge the stock of their subsidiary insured institutions as collateral to secure notes or other debt instruments of the mutual holding company?

The Board is aware that bank holding companies and savings and loan holding companies occassionally raise capital by pledging the stock of their subsidiary financial institutions as collateral to secure borrowings. The Board is considering whether mutual holding companies should also be permitted to use this financing technique. Use of this technique by mutual holding companies would raise novel questions. It is uncertain, for example, what the status of a mutual holding company would be if the stock of its subsidiary insured institution(s) were seized by a lender upon default on an obligation by the mutual holding company. Once a mutual holding company is divorced from its subsidiary insured institution(s), it is unclear whether the mutual holding company would have authority to continue to operate (and, if so, how its membership would be determined) or would be required to liquidate and distribute its remaining assets to its members.

One possible solution to the above difficulties would be to prohibit unitary mutual holding companies from pledging the stock of their subsidiary insured institutions, while allowing multiple mutual holding companies to pledge the stock of all but one of their insured

[6] The Board also notes that a substantial percentage of some insured institutions' regulatory capital consists of goodwill. In reviewing mutual holding company capitalization proposals, the Board may take account of the extent to which the capital proposed to be placed in subsidiary insured institutions will be composed of goodwill.

subsidiaries. Alternatively, if the Board concludes that minority blocks of stock of insured institution subsidiaries of mutual holding companies can be acquired by third parties, then the above difficulties could also be avoided by providing that each mutual holding company must, at all times, hold at least 51% of the stock of at least one of its insured institution subsidiaries free of any pledges or other encumbrances.

10. Should mutual holding companies be permitted to terminate their affiliation with their subsidiary insured institutions and how do mutual holding companies convert to stock form?

A holding company in the stock form is, of course, able to divest itself of one or more of its institutions by selling the institution's stock. The Board is considering whether, and under what circumstances, a mutual holding company should be permitted to terminate its affiliation with one or more of its insured institution subsidiaries. One approach would be to provide that a mutual holding company may terminate its affiliation with a subsidiary insured institution pursuant to either of two forms of transaction described below, *provided that* any such transaction is first approved by the holding company's directors and members and by the FSLIC, and *provided that* the holding company, subsequent to the transaction, would still control at least one insured institution. The two forms of transaction are as follows:

a. Transfer from One Mutual Holding Company to Another.

In this form of transaction, one mutual holding company would transfer all the stock of a subsidiary insured institution to another mutual holding company, with the accountholders of that insured institution receiving ownership rights in the acquiring mutual holding company in exchange for their former rights in the selling mutual holding company.

b. Spin Off of a Free Standing Mutual Insured Institution

In this form of transaction, a mutual holding company would be permitted to spin off a subsidiary insured institution in a transaction in which the subsidiary insured institution converts back into a free-standing mutual owned by its accountholders.

If the Board were to authorize mutual holding companies to engage in the above types of transactions, it is anticipated that from time to time the Board might find it necessary to condition its approval of such transactions upon a pre-transaction capital contribution from the holding company to the insured institution being disposed of, so as to ensure the capital adequacy of the institution being disposed of and, perhaps, to ensure that the accountholders of that institution would not be stripped of capital previously contributed to the mutual holding company.

It is contemplated that a unitary mutual holding company would not be permitted to dispose of its subsidiary insured institution. It appears that the only feasible way for such a company to terminate its mutual holding company status would be to convert the mutual holding company to the stock form in a transaction similar to that described in 12 CFR 563b.9, or, in the alternative, to merge the subsidiary insured institution with and into the mutual holding company in a transaction that would reestablish the mutual holding company as a traditional mutual insured institution.

If the Board concludes that minority blocks of stock of insured institution subsidiaries of mutual holding companies can be acquired by third parties, it will also have to consider how these minority blocks of stock are to be handled when a mutual holding company elects to convert to the stock form or to merge back into a subsidiary insured institution. *See* previous paragraph. In the context of a conversion, there would appear to be three options. One option would be to permit the outstanding minority shares of the subsidiary insured institution to be exchanged for shares in the holding company. A second option would be to permit the insured institution to redeem the minority shares as a part of the conversion. Of course, a third option would be to allow the minority shares to remain outstanding, unaffected by the conversion.

11. Do NHA Section 402(j) and 408(s) preempt state laws providing for, or prohibiting the formation of, mutual holding companies by state-chartered insured institutions?

NHA section 402(j) specifies that "* * * no insured institution may convert to the stock form except in accordance with the rules and regulations of the [FSLIC]." This language is notable both for what it does and does not say. On the one hand, section 402(j) constitutes an affirmative statement that mutual-to-stock conversions of all insured institutions, including state chartered institutions, must comply in all respects with the Board's conversion regulations. On the other hand, section 402(j) does not say that conversions of state-chartered insured institutions need comply only with the Board's conversion regulations. As crafted, the language seems to contemplate a dual regulatory scheme in which the conversions of state-chartered insured institutions must comply with both federal and state law—the practical result being that the more restrictive rules govern. This is the position that the Board has traditionally taken in its conversion program.

The Board is considering how section 402(j) should be read when overlaid against state mutual holding company statutes that purport to authorize insured institutions, as part of the holding company reorganization process, to issue blocks of stock to persons other than their mutual holding companies. *See* Item 3 above. Such transactions could be characterized as partial conversions. Since the Board's conversion regulations, 12 CFR 563b, currently do not allow partial conversions, it could be argued that section 402(j) prohibits the issuance of minority blocks of stock to third parties, even where state statutes would otherwise permit such issuances, until such time as the Board's regulations may be amended to permit this practice. *See Item* 3 above. On the other hand, it could be said that no conversion occurs unless and until the mutual holding company itself converts to stock form.

Section 408(s) presents an even broader preemption question: Should NHA section 408(s) be deemed to preclude state chartered insured institutions from reorganizing into the mutual holding company form pursuant to state mutual holding company statutes, and, conversely, should NHA section 408(s) be deemed to authorize state-chartered insured institutions to form mutual holding companies under section 408(s) notwithstanding the absence of state law authorizing such transactions? The relevant statutory language is as follows:
"Notwithstanding any provisions of federal law other than this subchapter, an insured institution operating in mutual form may reorganize so as to become a holding company by * * * *" NHA section 408(s)(1). This language seems to suggest an approach similar to that taken in the Board's conversion program, *i.e.*, state-chartered insured institutions wishing to form mutual holding companies must comply with both state and federal law. Pursuant to this approach, state-chartered insured institutions would have to satisfy all the provisions and restrictions of section 408(s) and the Board's implementing regulations in addition to the relevant laws and regulations promulgated by

their respective states. Under this approach, it would also follow that section 408(s) would be insufficient alone to authorize mutual holding company reorganizations by state chartered insured institutions in the absence of some form of state approval for such transactions.

By the Federal Home Loan Bank Board.

John F. Ghizzoni,

Assistant Secretary.

[FR Doc. 88-24273 Filed 10-20-88; 8:45 am]

BILLING CODE 6720-01-M

SMALL BUSINESS ADMINISTRATION

13 CFR Part 108

Loans to State and Local Development Companies

AGENCY: Small Business Administation.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The rule proposed here would: (1) Clarify that the board of directors of a 503 company may vote on a loan approval or servicing action in the absence of a person with commercial lending experience if such person has made a positive or negative recommendation concerning such action; (2) limit the small concern's participation in its own financing to an amount not to exceed either the amount of the 504 debenture or the total amount of third-party financing; (3) make clear that the 503 company may inject, apart from cash, only real property into a project; (4) make clear that the borrower under a Section 503 loan may inject only land without improvements into a project; and (5) permit SBA to shift a debenture financing from a 503 company subject to disciplinary action, to another 503 company which is in good standing.

DATE: Comments must be received on or before November 21, 1988.

ADDRESS: Written comments, in duplicate, may be sent to the Office of Economic Development, Small Business Administration, Room 720, 1441 L Street NW., Washington, DC 20416.

FOR FURTHER INFORMATION CONTACT: LeAnn M. Oliver, Financial Analysis, Office of Economic Development, (202) 653-6986.

SUPPLEMENTARY INFORMATION: Section 108.503-1(b)(2) would be revised to make clear that the board of directors of a 503 company may vote on a proposed loan approval or servicing action even if no person with commercial lending experience is present at the meeting, if such a person has made a recommendation concerning such proposed action. At present there is doubt whether the board can proceed if the absentee vote is negative.

Section 108.503-10 would be revised to limit a 503 company's injection into a 503 project to cash or real property (as distinguished from real and personal property, as is now the case), and to limit the valuation of such real estate to the lower of cost or market, unless held more than two years, in which event the valuation may be determined by appraisal, subject to certain conditions (see §108.503-5(d)(2)).

Similarly, the borrower's contribution to the 503 company's injection would be limited in two ways. First, the value of the contribution could not exceed either the amount of the 503 debenture or the value of the third-party contribution. Second, the borrower could contribute only land, valued in the manner described above. SBA has not heretofore permitted the small concern's contribution to exceed either of the two other elements of a 503 project financing. However, this policy was not published as a regulation, but only as part of SBA's relevant Standard Operating Procedure, SOP 50 22 1, ¶103. While this SOP is widely known within the development company industry, it does not have the force and effect of law, as does a regulation. The policy underlying the proposed regulation addresses the question of need for SBA-guaranteed financing if the small concern itself furnishes a major portion of the total financing package (compare section 503(b)(2) of the Small Business Investment Act of 1958, as amended, 15 U.S.C. 697(b)(2)).

Finally, another section of this proposed rule would authorize SBA to transfer an existing or a pending 503 financing from a development company under temporary or other sanction, to a 503 company in good standing. The purpose of this proposal is to insulate a small business applicant from the effect of sanctions imposed on the related 503 company, since such sanctions may include a refusal to guarantee such company's debentures. SBA would arrange a division of the fees between the two 503 companies according to the services performed by each.

Compliance With Executive Order 12291, the Regulatory Flexibility Act and the Paparwork Reduction Act

SBA has determined that this proposal, taken as a whole, would not constitute a major rule for the purposes of Executive Order 12291. The annual effect of this rule on the national economy would not attain $100 million, since the regulatory proposals have no financial impact on the economy. Also, these proposed rules, if promulgated as final, would not result in a major increase in costs or price to consumers, individual industries, Federal, state and local government agencies or geographic regions, and will not have significant adverse effects on competition, employment, investment, productivity or innovation.

For the purpose of compliance with the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., the provisions of this proposal, if promulgated in final form, would not have a significant economic impact on a substantial number of small entities. The following analysis of the provisions is provided within the context of the review prescribed in the Regulatory Flexibility Act (5 U.S.C. 603).

The reason why we propose to revise § 108.503-1(b)(2) is that the present wording would seem to permit an absentee ballot by the person whose vote is required for a loan approval or servicing action only if the vote is negative. This would result in permitting one person to control board action, a result which SBA does not intend. Accordingly, the proposal would permit the board to proceed, whether the absentee vote is positive or negative.

The reasons for proposing the changes in § 108.503-10 are: (1) That if the contribution by the small concern to the development company is to be used as the 503 company's injection and its exceeds either the amount of the 503 debenture or the amount of the third-party financing, then the need for federal assistance appears to be negated, and (2) that it was never SBA's intention that the 503 company's contribution to the project (injection) could be personal property other than cash. The valuation of personal property would create difficulties. Accordingly, the present word "property" would be qualified by the word "real" and such real property would be subjected to the valuation rule, § 108.503-5(d), which applies to land. (3) The contribution by the small concern may include, or consist of, land without improvements, valued pursuant to § 108.503-5(d). SBA proposed to limit the small concern's contribution to land only because the valuation of existing buildings owned by the borrower would give rise to controversy.

The purpose of the proposal permitting the shift of an economic development project from a development company facing sanction to another in good standing is to insulate a small business application from the consequences of such sanction (*e.g.*, SBA's refusal to guarantee the resulting debenture).

The legal basis of these proposed rule changes is § 503(a)(2) of the Small Business Investment Act, 15 U.S.C. 697(a)(2).

There are no additional reporting, recordkeeping and other compliance requirements inherent in these proposed rules. There are no Federal rules which duplicate, overlap or conflict with these proposed rules. There are no significant alternate means to accomplish the objectives of these proposals.

List of Subjects in 13 CFR Part 108

Loan programs/business, Small Business Administration, Small businesses.

For the reasons set out in the preamble, Part 108 of the Code of Federal Regulations is proposed to be amended as follows:

PART 108—[AMENDED]

1. The authority citation for Part 108 continues to read as follows:

Authority: 15 U.S.C. 687(c), 695, 696, 697, 697a, 697b.

2. Section 108.503–1(b)(2) would be amended by revising the last sentence thereof to read as follows:

§ 108.503–1 [Amended]

* * * * *

(b) * * *

(2) * * * If loan approval or servicing actions are put to a vote, the quorum shall include at least one director with commercial lending experience, unless the 503 Company can document that such director or another person approved by SBA as possessing commercial lending experience has made a recommendation on such loan or servicing actions.

* * * * *

3. Section 108.503–10 would be revised to read as follows:

§ 108.503–10 503 Company injection.

(a) *Contributions to 503 Company injection.* The 503 Company shall be required to inject into each project an amount equal to at least ten percent (10%) of the project cost exclusive of administrative cost (see § 108.503–5 (a) and (b)). Subject to § 108.503–4(c)(4) and paragraph (b) below, such injection may come from any source and may consist of cash, or real property if the project requires such real estate. Any such contribution or loan to the 503 Company may not be conditioned on the granting of voting rights, stock options or any other actual or potential voting interest in the 503 Company or the Small Concern, but the 503 Company may issue shares of nonvoting stock in exchange therefor. The interest on such injection shall not exceed a rate which is legal and reasonable. Such injection shall be subordinate to the 503 Debenture and shall not be repaid at a faster rate than the 503 Loan.

(b) *Contribution by borrower.* The Small Concern may contribute part or all of such injection, but the value of such contribution may not exceed either the amount of the related 503 Debenture or the aggregate amount of third-party financing pursuant to § 108.503–8 of this part. If the project involves new construction, the Small Concern may contribute land without improvements, valued pursuant to § 108.503–5(d)(2) of this part.

(c) *Contributions by others.* The injection into a project involving new construction may include, or consist of, real property if not contributed pursuant to subsection (b) of this section. Such real property shall be valued pursuant to the same methods and requirements, and subject to the same limitations as apply to land under § 108.503–5(d)(2).

4. Section 108.503–15 *Oversight and evaluation, suspension and revocation* is proposed to be amended by revising paragraph (e)(1) to read as follows:

§ 108.503–15 [Amended]

* * * * *

(e) *Revocation, suspension and other corrective actions.—(1) Corrective Actions.* SBA reserves the right to revoke the certification of any 503 Company, to suspend temporarily the eligibility of any 503 Company, or to require any other corrective action (including, but not limited to, the transfer of existing or pending financings to a 503 Company in good standing) for a violation of law or SBA regulation, of the terms of a debenture or any agreement with SBA, or any inability to meet the operational requirements set forth in this Part; but such action shall not invalidate any guarantee previously issued by SBA. Where a pending financing is completed pursuant to transfer, any deposit pursuant to § 108.503–6(b) of this part shall also be transferred. Other charges and fees shall be apportioned by SBA among the two 503 Companies is proportion to services performed.

* * * * *

(Catalog of Federal Domestic Assistance 59.036 Certified Development Company Loans (503 Loans); 59.041 Certified Development Company Loans (504 loans))

Dated: September 29, 1988.

James Abdnor,

Administrator.

[FR Doc. 88–24366 Filed 10–20–88; 8:45 am]

BILLING CODE 8025–01–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 88–ASW–38]

Proposed Revision of Transition Area: McAllen, TX

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice proposes to revise the transition area located at McAllen, TX. The development of a new RNAV RWY 13 standard instrument approach procedure (SIAP) to the Mid Valley Airport, Weslaco, TX, has made this proposed revision necessary. The intended effect of this proposal is to provide adequate controlled airspace for aircraft executing this new SIAP to the Mid Valley Airport. Coincident with this action will be the changing of the status of the Mid Valley Airport from visual flight rules (VFR) to instrument flight rules (IFR).

DATE: Comments must be received on or before November 28, 1988.

ADDRESSES: Send comments on the proposal in triplicate to: Management, Airspace and Procedures Branch, Air Traffic Division, Southwest Region, Docket No. 88–ASW–38, Department of Transportation, Federal Aviation Administration, Fort Worth, TX 76193–0530.

The official docket may be examined in the Office of the Regional Counsel, Southwest Region, Federal Aviation Administration, 4400 Blue Mound Road, Fort Worth, TX.

FOR FURTHER INFORMATION CONTACT: Bruce C. Beard, Airspace and Procedures Branch, Department of Transportation, Federal Aviation Administration, Fort Worth, TX 76193–0530; telephone: (817) 624–5561.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposal. Communications should identify the airspace docket and be submitted in

triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Airspace Docket No. 88–ASW–38." The postcard will be date/time stamped and returned to the commenter. All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in the light of comments received. All comments submitted will be available for examination in the Office of the Regional Counsel, 4400 Blue Mound Road, Fort Worth, TX, both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personel concerned with this rulemaking will be filed in the docket.

Availability of NPRM'S

Any person may obtain a copy of this notice of proposed rulemaking (NPRM) by submitting a request to the Manager, Airspace and Procedures Branch, Department of Transportation, Federal Aviation Administration, Fort Worth, TX 76193–0530. Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for future NPRM's should also request a copy of Advisory Circular No. 11–2 which describes the application procedure.

The Proposal

The FAA is considering an amendment to § 71.181 of the Federal Aviation Regulations (14 CFR Part 71) by revising the transition area located at McAllen, TX. The development of a new RNAV RWY 13 SIAP to the Mid Valley Airport, Weslaco, TX, has necessitated this proposed revision. The intended effect of this proposal is to provide adequate controlled airspace for aircraft executing this new SIAP. Coincident with this action will be the changing of the status of the Mid Valley Airport from VFR to IFR. Section 71.181 of Part 71 of the Federal Aviation Regulations was republished in Handbook 7400.6D dated January 1, 1988.

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

List of Subjects in 14 CFR Part 71

Aviation safety, Transition areas.

The Proposed Amendment

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

PART 71—DESIGNATION OF FEDERAL AIRWAYS, AREA LOW ROUTES, CONTROLLED AIRSPACE, AND REPORTING POINTS

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

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

§ 71.181 [Amended]

2. Section 71.181 is amended as follows:

McAllen, TX [Amended]

By adding to the end of the legal description: "and within a 6.5-mile radius of the Mid Valley Airport (latitude 26°10'37" N., longitude 97°58'20" W.)."

Issued in Fort Worth, TX on October 10, 1988.

Larry L. Craig,

Manager, Air Traffic Division, Southwest Region.

[FR Doc. 88–24427 Filed 10–20–88; 8:45 am]

BILLING CODE 4910–13–M

Office of the Secretary

14 CFR Part 399

[OST Docket No. 45884; Notice 88–15]

RIN: 2105–AB39

Statement of Enforcement Policy on Rebating

AGENCY: Department of Transportation (DOT), Office of the Secretary.

ACTION: Notice of proposed rulemaking.

SUMMARY: In response to concerns raised by travel agents, the Department is proposing to adopt its current enforcement policy concerning the rebating of international airline prices as a Policy Statement in the regulations on Aviation Proceedings. No change in the substance of that policy is intended. The Department also proposes to revoke an existing Policy Statement on the advertising of rebates that is contrary to the Department's enforcement policy.

DATE: Comments should be received by December 20, 1988.

ADDRESSES: Comments should be sent to Docket Clerk, C–55, Docket 45884, Department of Transportation, Room 4107, 400 7th Street SW., Washington, DC 20590. Comments will be available for review by the public at this address from 9:00 a.m. through 5:00 p.m., Monday through Friday. Persons wishing acknowledgement of their comments should include a stamped, self-addressed postcard with their comments. The docket clerk will time and date-stamp the card and return it to the commenter.

FOR FURTHER INFORMATION CONTACT: Samuel Podberesky, Assistant General Counsel for Aviation Enforcement and Proceedings, C–70, Department of Transportation, 400 7th Street, SW., Room 4116, Washington, DC 20590, (202) 366–9342, or Betsy Wolf, a Senior Trial Attorney in his office.

SUPPLEMENTARY INFORMATION: Airlines are required by section 403(a) of the Federal Aviation Act to file tariffs with the Department that state their passenger fares, cargo rates, and associated charges in foreign air transportation. Under section 403(b), it is unlawful for a carrier or ticket agent to charge a purchaser of foreign air transportation any amount other than that stated in the applicable tariff. The section also prohibits cargo shippers from paying any other amount. Ticket agents as defined in the Act include travel agents and cargo agents, as well as any other intermediaries providing for the carriage of passengers or cargo. The prohibition applies not only to overcharges, but also to undercharges, including what are commonly known as rebates. Thus, for example, the statute has been construed to prohibit a travel agent from sharing its commission on international tickets with the purchaser.

After the passage of the Airline Deregulation Act of 1978 and the International Air Transportation Competition Act of 1979, many of the traditional tariff-adherence rules were recast or repealed to accommodate the procompetitive policies of these statutes. Tariffs were eliminated altogether for domestic transportation. Many of the rules have been altered by exemption, some by legal interpretation. As a consequence, many payments and services provided to consumers in foreign air transportation are no longer

considered to be proscribed rebates. Moreover, those arrangements that still technically constitute rebates are subject to a restricted enforcement policy. Since 1978, both the Department and its predecessor, the Civil Aeronautics Board, have declined to prosecute alleged instances of rebating unless there is clear evidence of: (1) A pattern of direct consumer fraud or deception, (2) invidious discrimination, or (3) violations of the antitrust laws. Technical rebating, without more, will not trigger enforcement action, as the Board emphasized in 1980 (Order 80–5–215) and thereafter in orders, testimony, speeches and informal responses to enforcement requests. The Department has continued the CAB's policy, which is based on prosecutorial discretion, noting consistently in its correspondence with travel agents that neither the Department nor the Board has brought an enforcement case based solely on the discounting of published tariffs since 1978.

In the last few years, this enforcement policy has been criticized by the American Society of Travel Agents (ASTA) and some of its individual members. A number of travel agents have complained that they are in a dilemma, not knowing whether to disregard the broad language of the statute and thereby risk prosecution, or to follow traditioanl rules and thereby be unable to match the prices or services of their more aggressive competitors. They assert that the Department's insistence on a case-by-case evalaution of complaints fosters uncertainty as to the scope of permitted conduct.

On November 30, 1987, ASTA's President, Mr. Francis Goranin, sent the Department an informal proposal for regulatory action. A copy of this proposal has been placed in Docket 45884. First, he noted that an existing policy statement (14 CFR 399.80(h), adopted by the CAB in 1965) considers rebating and the advertisement thereof to be an unfair or deceptive practice in violation of section 411 of the Act. He suggested that it is confusing to have such a statement on the books while current enforcement policy stated elsewhere is quite different. Second, he proposed rulemaking language that would "set out the Department's position on enforcement of the rebating law as an official policy" in Part 399. According to Mr. Goranin,

> [T]he Department's approach to enforcement has been set out only in speeches and letters. While these announcements have received some attention in the trade press, many members of the travel agent community and the public remain concerned that no official policy exists that will bind the Department until the policy is changed following proper notice and procedures. Part 399 of the Department's regulations contains explicit policy statements on other aspects of the Department's jurisdiction that enable the industry to rely upon policies with reasonable confidence that they will not be abruptly changed without sufficient notice and opportunity to adjust.

We have decided to amend our regulations to include a new policy statement along the lines suggested by ASTA. While there are difficulties in attempting to codify an enforcement policy, particularly in an area as complex as tariff-adherence, we agree with ASTA that the general scope of acceptable conduct in this area should be stated formally. We have already taken similar action in Part 399 for certain enforcement policies regarding unfair and deceptive practices under section 411 of the Act. Moreover, we are persuaded that it is possible to cast the substance of our enforcement policy on rebating in a format that gives essential guidance to those who sell air transportation, while at the same time maintaining both necessary flexibility and a regulatory climate conducive to the many forms of competitive marketing behavior which we have found to be of substantial direct and indirect benefit to airline consumers. We emphasize that changes in the substance of our enforcement policy are not at issue in this proceeding.

Both the format and the language we propose are similar to ASTA's proposal. In particular, we agree with ASTA that it is important to emphasize at the outset that the statement is one of enforcement policy, and that allegations of illegal rebating in foreign air transportation will therefore continue to be reviewed by the Department on a case-by-case basis.

The second paragraph, which outlines the scope of acceptable conduct, is the heart of the proposed policy statement, and here again we accept ASTA's suggested language with one important change. ASTA's formulation that enforcement action "will ordinarily be undertaken" under the circumstances it has defined implies that other rebating activities could also be subject to enforcement action. Such a formulation would be unnecessarily vague and lacking in guidance for the industry. More importantly, it would be inconsistent with our policy, which is that technical rebating by itself, without competitive or consumer abuses amounting to violations of other provisions or legal standards, will not result in enforcement action. A clearer and more accurate statement of the policy is that enforcement action may be undertaken only when the stated conditions are met. All other conduct may be presumed to be acceptable under the policy.

As for the conditions themselves, ASTA's language properly notes that, in all cases, there must first be clear evidence of illegal rebating, as defined under U.S. law, and such rebating must be adversely affecting a substantial number of persons. Normally, such conduct must be part of a pattern or practice for enforcement action to be warranted. The reference to conduct in violation of section 403(b) of course excludes conduct which, by regulation, order or interpretation, has been exempted from the tariff requirements or deemed not be a proscribed rebate under those requirements.

As noted, the statutory changes in 1978 and 1979 have prompted a number of changes in what is considered to be a proscribed rebate.

Exemptions from or under section 403 which have eliminated categories of potential rebates include those set forth in 14 CFR 221.3(d), Part 288 (contracts for military transportation), Parts 296 and 297 (indirect cargo carriers), Part 223 (free and reduced-rate transportation), Orders 80–11–24 and 81–7–109 (bulk contractors), and Orders 78–12–49 and 79–2–23 (resolution of consumer disputes and claims). Incentives and opportunities for technical rebating were reduced in the case of passengers and minimized in the case of cargo by a series of exemptions and rulings establishing the principle that carriers should be free to charge customers in relation to the costs of the individual transaction, and hence can compensate customers for cost-saving services performed by them, including commissions, whether or not the transportation is for the customer's own purposes. See, *e.g.*, ER–1335/1336, 48 FR 22703, May 20, 1983 (Parts 296 and 297); Orders 79–2–92 and 80–6–40; Order 82–12–85 (*Competitive Marketing Investigation*) at 80, 91. Other determinations have recognized the right of carriers and agents to engage in joint ventures with others providing benefits to transportation users, and the right of agents to provide customer services in their role as independent businesses. See, *e.g.*, Order 81–8–31; ER–1371, 48 FR 57115, December 28, 1983. These and other changes in the definition of a proscribed rebate have been so substantial that it would be difficult and unwieldy to define which forms of pricing conduct are not now subject to enforcement action. It is far

more feasible to identify those that still may be subject to such action.

We also agree with ASTA's statement of the substantive areas in which enforcement action regarding rebating may be considered: fraudulent or deceptive practices, invidious discrimination, and anticompetitive conduct. Fraudulent or deceptive practices generally encompass conduct which violates section 411 of the Act, the subject of substantial CAB and Department precedent. We have added the term "rates" to ASTA's language to make it clear that the enforcement policy also covers cargo rebating. The nature of invidious discrimination is illustrated to make it clear that economic discrimination is not encompassed. Finally, the statement specifies that anticompetitive conduct is tied to the more specific and predictable standard of conduct amounting to violation of the antitrust laws, which are defined in section 414 of the Act as those set forth in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12). ASTA's further suggestion that specific reference be made to section 2 of the Sherman Act appears to be unduly restrictive and potentially confusing.

ASTA has suggested that, for purposes of this Policy Statement, "fraudulent and deceptive practices" should be illustrated with two examples. The first, where a rebate is offered in connection with a "bait-and-switch" scheme, is a good example of the intended function of the policy and is a situation in which the Department and the CAB have taken action in the past. ASTA's language, however, suggests possible enforcement action whenever an "attempt" is made to sell a higher-priced ticket to a customer attracted by a rebate offer. That could have a chilling effect on legitimate discussions of fare options as well as on price advertising generally, a result contrary to our purpose. We therefore propose to limit this example to situations where the customer is "pressured" to purchase a higher-fare ticket. In evaluating such situations, evidence that the offered rebate is in fact unavailable or is too restricted to be of value to most customers may be considered, as in any case when allegations of unfair or deceptive practices are received.

ASTA's second example, citing a rebate offered in conjunction with land accommodations or other services at "artificially inflated prices," would be inappropriate. We have long declined to police the level of prices for non-transportation services even when offered as part of a transportation package. Our regulatory interest in this area has focussed on insuring that the prices and other material terms of air/non-air packages are fairly disclosed, so that consumers can make their own determination of value. Thus, it has been an explicit policy for nearly a decade to disregard the cost of hotels, car rentals and other travel package components in evaluating allegations of "indirect" rebating. We do not consider a rebate to have occurred if the package price at least covers the tariff air fare. Any other approach would inhibit competition by frustrating the ability of carriers and agents to match competitors' prices.

Finally, we agree with ASTA that the policy statement should make very clear that a rebate offer will not be found to affect competition adversely when the only effect of the offer is to divert passengers from one airline or ticket agent to another. In the past, individual travel agents have exhibited confusion on this point. As the Board emphasized in the *Competitive Marketing Investigation*, the Act protects competition but not individual competitors.

While numerous other examples of what the policy does or does not cover could no doubt be devised, we are reluctant to make the policy statement more detailed. We believe that ASTA's suggestions, with our modifications, convey the substance of our policy clearly without encouraging conduct or complaints that are inconsistent with our overall policy objectives.

ASTA has correctly pointed out that at least one statement of policy regarding the application of section 411 of the Act to ticket agents is inconsistent with our enforcement policy on rebating. Adopted in 1965, § 399.80(h) of the Policy Statements lists the following as a violation of section 411:

> Advertising or otherwise offering for sale or selling air transportation or services in connection therewith at less than the rates, fares, and charges specified in the currently effective tariffs of the air carrier or air carriers who are engaged to perform such air transportation or services, or offering or giving rebates or other concessions thereon, or assisting, suffering or permitting persons to obtain such air transportation or services at less than such lawful rates, fares and charges.

The statement in effect makes a technical violation of section 403 a *per se* violation of section 411, whereas our policy since 1978 has been to undertake enforcement action only if the offering or advertising of rebates is accompanied by independent violations of section 411, such as fraud, discrimination, or violation of the antitrust laws. Section 399.80(h) should have been revoked by the CAB as part of its general overhaul of the regulations following the statutory changes in 1978 and 1979, but it was apparently overlooked. We therefore propose to revoke it now.

We also propose to revoke § 399.80(g) for the same reason. That section considers "misrepresentation that special discounts or reductions are available, when such discounts or reductions are not specific in the lawful tariffs of the air carrier which is to perform the transportation" to be a violation of section 411. The section is at least misleading in that it appears to presume that rebate offers are themselves a "misrepresentation." On its face the statement appears to have no other significance, since misrepresentations of fares generally by ticket agents are covered by § 399.80(f).

This proposed action has been reviewed under Executive Order 12291, and it has been determined that this is not a major rule. It will not result in an annual effect on the economy of $100 million or more. There will be no increase in production costs or prices for consumers, individual industries, Federal, State or local governments, agencies, or geographic regions. Furthermore, this proposed rule would not adversely affect competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

This proposed regulation is significant under the Department's Regulatory Policies and Procedures, dated February 26, 1979, because it involves important Departmental policies and substantial industry interest.

We have determined that the economic effects of the proposal would be so minimal that preparation of a full regulatory evaluation is unnecessary. The proposal merely reiterates an existing enforcement policy known throughout the industry and revokes obsolete policy statements. The proposed rule does not contain any information collection requirements that require approval under the Paperwork Reduction Act of 1980.

I certify that this rule will not have a significant economic impact on a substantial number of small entities. Since the proposal simply states an existing enforcement policy, the ability of such entities to engage in operations essentially will be unaffected by the proposed regulation.

This rulemaking action has been analyzed in accordance with the principles and criteria contained in

Executive Order 12612, and it has been determined not to have any federalism implication that warrants the preparation of a federalism assessment.

List of Subjects in 14 CFR Part 399

Applicability and effects, Operating authority, Rates and tariffs; Accounts and reports, Hearing matters, Rulemaking prosecutions, Enforcement, Other policies, Disclosure of information, Federal preemption.

Accordingly, the Department of Transportation (DOT) proposes to amend 14 CFR Part 399 as follows:

PART 399—STATEMENT OF GENERAL POLICY

1. The authority citation for Part 399 would continue to read as follows:

Authority: 101, 102, 105, 204, 401, 402, 403, 404, 405, 406, 407, 408, 411, 412, 414, 416, 801, 1001, 1002, 1102, 1104, Pub. L. 85–726, as amended, 72 Stat. 737, 740, 92 Stat. 1708, 72 Stat. 743, 754, 757, 758, 7670, 763, 766, 767, 768, 769, 770, 771, 782, 788, 7979, 49 U.S.C. 1301, 1302, 1305, 1324, 1371, 1372, 1373, 1374, 1375, 1376, 1377, 1378, 1379, 1381, 1382, 1384, 1386, 1461, 1481, 1482, 1502, 1504; Pub. L. 96–354, 5 U.S.C. 601, unless otherwise noted.

2. Add a new § 399.85 to Subpart G to read as follows:

§ 399.85 Enforcement policy regarding illegal rebating in foreign air transportation.

(a) It is the policy of the Department to review complaints alleging illegal rebating in foreign air transportation on a case-by-case basis to determine whether it is in the public interest and consistent with the Department's transportation policy goals to initiate an investigation or to bring enforcement action on the Department's behalf.

(b) An investigation or other enforcement action may be undertaken only when clear evidence is presented that rebating in violation of section 403(b) of the Act has occurred and that such rebating is adversely affecting a substantial number of persons and is:

(1) Occurring in connection with fraudulent or deceptive practices associated with the holding out or sale of fares or rates involving a rebate, or

(2) Offered on an invidiously discriminatory basis such as rebates limited on the basis of race, creed, color, sex, religious or political affiliation, or national origin, or

(3) Adversely affecting competition because the rebates are associated with activities that violate the antitrust laws.

(c) For purposes of this policy, a rebate may be found to be connected with fraudulent or deceptive practices where, for example, a rebate is offered in connection with a "bait-and-switch" scheme whereby the seller uses the rebate offer to attract a client and then pressures the customer to purchase a higher-fare ticket.

(d) For purposes of this policy a rebate offer will not be found to affect competition adversely when the only effect of the offer is to divert passengers from one airline or ticket seller to another.

§ 399.80 [Amended]

3. Remove and reserve paragraph 399.80(g) in its entirety.

4. Remove and reserve paragraph 399.80(h) in its entirety.

Issued in Washington, DC, on October 17, 1988.

Jim Burnley,

Secretary of Transportation.

[FR Doc. 88–24241 Filed 10–20–88; 8:45 am]

BILLING CODE 4910–62–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 435

[FRL–3463–7]

Oil and Gas Extraction Point Source Category, Offshore Subcategory; Effluent Limitations Guidelines and New Source Performance Standards; New Information and Request for Comments

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of data availability and request for comments.

SUMMARY: EPA is announcing today the availability for public comment of new technical, economic and environmental assessment information relating to the development of BAT and NSPS regulations under the Clean Water Act governing the discharge of drilling fluids and drill cuttings in the oil and gas extraction point source category, offshore subcategory. EPA requests comment on this new information. This notice is part of a rulemaking process that commenced formally on August 26, 1985 with EPA's proposal of effluent limitations guidelines and new source performance standards for the offshore subcategory (50 FR 34592). The comment period for the original proposal closed on March 15, 1986.

DATE: Comments on this new information must be submitted by December 5, 1988.

ADDRESSES: Comments should be sent to Mr. Dennis Ruddy, Industrial Technology Division (WH–552), Environmental Protection Agency, 401 M Street SW., Washington, DC 20460.

The supporting information and data described in this notice will be available for inspection and copying at the EPA Public Information Reference Unit, Room 2402 (Rear of EPA Library) PM–231, 401 M Street SW., Washington, DC 20460. The EPA public information regulation (40 CFR Part 2) provides that a reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Technical information may be obtained from Mr. Dennis Ruddy at the above address, or call (202) 382–7131. Economic information may be obtained from Ms. Ann Watkins, Economic Analysis Branch (WH–586), at the above address or call (202) 382–5387. Environmental assessment information may be obtained from Ms. Alexandra Tarnay, Monitoring and Data Support Division (WH–553), at the above address or call (202) 382–7036.

SUPPLEMENTARY INFORMATION: On August 26, 1985, EPA proposed effluent limitations guidelines and new source performance standards for the oil and gas extraction point source category, offshore subcategory, 50 FR 34592. The proposal included BAT, BCT, and NSPS regulations covering produced water, drilling fluids, drill cuttings, produced sand, deck drainage, well treatment fluids and sanitary and domestic waste discharges from offshore oil and gas facilities. Since issuing the August 26, 1985 proposal, the Agency has received comments and collected additional data on numerous aspects of this rulemaking.

Today's notice relates to the development of BAT and NSPS regulations governing the discharge of drilling fluids and drill cuttings. EPA is announcing today the availability for public comment of new technical, economic and environmental assessment information relating to the regulation of those waste streams. This notice presents a variation on the originally proposed BAT and NSPS limitations on the mercury and cadmium content of discharged drilling fluids. It also describes EPA's initial investigation of an oil content limitation that could be applied to drilling waste streams at the BAT and NSPS levels of control.

The Agency has determined that it will promulgate the final regulations for the offshore subcategory in phases. Discharge regulations for drilling fluids and drill cuttings are scheduled for promulgation first. Regulations governing the other waste streams that were included in the August 26, 1985 proposal will be addressed in separate **Federal Register** notices. The Agency intends, in the next several months, to

issue an additional **Federal Register** notice reproposing BCT effluent limitations guidelines for drilling fluids and drill cuttings.

Today's notice is organized as follows:

Summary of Part 1

Summary of Part 2

Part 1

I. Summary of Proposed Regulations
A. Drilling Fluids
B. Drill Cuttings
II. New Technical Information Related to the Proposed BAT/NSPS Regualtions
A. Drilling Fluid Toxicity Test
B. Discharge of Oil in Water-Based Drilling Fluids
C. Analytical Method for Diesel Oil Detection
D. Metals Limitations
III. Changes to Costing Data and Assumptions for Estimates of Economic Impacts
A. Toxicity Failure Rate for Water-Based Drilling Fluids
B. Annual Rate of Development
C. Model Well Characteristics
D. Transportation and Disposal
E. Use of Oil-Based and Water-Based Drilling Fluids
F. Cost Differential Between Diesel and Mineral Oils
G. Pollutant Reduction Estimates
H. Failure Rate for "No Discharge of Free Oil" Limitation
I. Monitoring Costs
IV. Revised Industry Profile and Economic Analyses
A. Industry Profile
B. Economic Impacts
C. Cost-Effectiveness
V. Environmental Assessment Information
A. Mercury and Cadmium in Barite and Environmental Consequences on Aquatic Life
B. Analysis of Shallow Water Dispersion Models

Part 2

I. Summary
II. Background
III. Description of Technologies for Controlling Oil Content of Drilling Wastes
IV. Applicability of Thermal and Solvent Extraction Technologies for Treating Drilling Wastes
A. Drill Cuttings
B. Drilling Fluids
V. Pollutant Reduction and Cost Estimates
A. Pollutant Reduction
B. Operating Costs
C. Drill Cuttings from Oil- and Water-Based Drilling Fluids
D. Water-Based Drilling Fluids
E. Comparison of Onsite Treatment Costs with Onshore Disposal Costs for Drilling Wastes
VI. Performance Data
A. Field Sampling
B. Observations and Sampling Results
VII. Oil Content of Untreated Drilling Wastes
A. Drill Cuttings
B. Water-Based Drilling Fluids
VIII. Analytical Method for Total Oil Content
IX. Request for Comments
Appendix A—Proposed Method 1651, Oil Content and Diesel Oil in Drilling Muds and Drill Cuttings by Retort Gravimetry and GCFID

Summary of Part 1

Part 1 of today's notice announces the availability of additional information and presents discussion and preliminary conclusions on new data concerning BAT and NSPS controls on the drilling fluids and drill cuttings waste streams. It also discusses the potential applicability of several computer models to analyze the dispersion of drilling fluids and produced water waste streams.

Part 1 begins, in Section I, with a summary of the portions of the August 26, 1985 proposal that are pertinent to material presented in today's notice. The discussion that follows in Sections II, III, IV and V deals first with technical issues, then with economic and cost issues, and finally with environmental assessment issues relating to BAT and NSPS controls on drilling fluids and drill cuttings.

Subpart A of Section III ("Drilling Fluid Toxicity Test") discusses the proposed analytical method for determining the toxicity of drilling fluids. The discussion summarizes major industry comments on reliability and variability of the proposed toxicity test method and presents the Agency's plans for further evaluation of the test method.

In Subpart B of Section II ("Discharge of Oil in Water-Based Fluids"), the Agency presents new information relating to its proposal to prohibit the discharge of detectable amounts of diesel oil in drilling fluids and drill cuttings. Industry commenters have argued that the discharge of diesel oil should not be prohibited because diesel oil is the most effective agent for use in freeing stuck drill pipe. The discussion summarizes three studies of the relative effectiveness of diesel oil and mineral oil for freeing stuck pipe (the 1983–1984 API Survey, the 1986 Offshore Operators Committee Survey and the 1986–1987 EPA/API Diesel Pill Monitoring Program). It also presents and explains the Agency's renewed determination, in light of this new data, that the proposed prohibition on the discharge of diesel oil in detectable amounts continues to be appropriate for the BAT and NSPS levels of control. Subpart C of Section II ("Analytical Method for Oil Detection") and Appendix A of this notice present a proposed modification to the originally proposed analytical method for the detection of diesel oil in drilling fluids and drill cuttings.

In Subpart D of Section II ("Metals Limitations"), the Agency is presenting two sets of mercury and cadmium effluent limitations that may be applicable to discharged drilling fluids. The Agency formulated a second set of effluent limitations for mercury and cadmium based upon information submitted by commenters in response to the set of effluent limitations presented and discussed in the proposed regulations.

Economic and costing issues are presented in Sections III and IV of Part 1. The Agency has recosted compliance with the proposed BAT and NSPS regulations governing the discharge of drilling fluids and drill cuttings based upon new technical and cost information. Section III summarizes the changes to the costing information and assumptions. Section IV presents a summary of the economic impact analysis revised according to the new information and assumptions.

Under the subpart of Section III titled "Toxicity Failure Rate for Drilling Fluids," the Agency presents new data and preliminary conclusions concerning industry's expected rate of failure of the proposed toxicity limitation (30,000 ppm suspended particulate phase basis) by drilling fluids that contain no added oil. This discussion also includes the Agency's revised estimate of the annual industry cost of compliance with the toxicity limitation for drilling fluids.

The remaining subparts of Section III present updated or refined information that affects various factors used in estimating annual compliance costs. The affected factors are the estimate of the number of wells to be drilled offshore per year, model well characteristics, transportation and disposal on shore of drilling wastes that do not comply with the proposed limitations and standards, the frequency of use of oil based muds as opposed to water based muds, the cost differential between diesel oil and mineral oil, pollutant reduction estimates, expected failure rates for the static sheen test and monitoring costs.

Utilizing the new information and assumptions presented in Section III, Section IV summarizes the revised industry profile, economic impacts and other economic information concerning the proposed BAT and NSPS controls on drilling fluids and drill cuttings. Section IV also explains the Agency's preliminary conclusion that despite overall higher costs since proposal, the revised estimates of cost are economically achievable.

Finally, Section V summarizes a literature search concerning mercury

and cadmium in barite, a constituent of drilling fluids, and the environmental consequences of the discharge of drilling fluids containing barite. Section V concludes with the Agency's evaluation of several computer models that have potential application in the prediction of dispersion of discharged drilling wastes and produced water.

Summary of Part 2

Part 2 of today's notice presents new information on the performance, costs and applicability of certain thermal technologies and solvent extraction technologies for treating drilling fluids and drill cuttings to reduce their oil content. Based on this information, the agency has begun to consider an oil content limitation of up to 1% by weight, whole sample basis, governing the discharge of drill cuttings wastes at the BAT and NSPS levels of control.

Sections I through III of Part 2 summarize the Agency's preliminary determinations regarding the applicability of an oil content limitation to drilling waste streams, discuss the regulatory background giving rise to EPA's investigation of this regulatory option, and present an overview of the thermal distillation, thermal oxidation and solvent extraction treatment technologies that are under review by the Agency.

Section IV of Part 2 describes these technologies in greater detail. Section V discusses in greater detail the potential applicability of these technologies to drill cuttings and drilling fluids, concluding that the technologies appear suitable as the basis for regulation of drill cuttings but not drilling fluids. Section VI presents preliminary estimates of pollutant reductions and the costs associated with treatment of drill cuttings and drilling fluids using these technologies. Section VII presents performance data for one variety of the thermal distillation technology. Section VIII estimates the quantities of drill cuttings and water-based drilling fluids that would not meet an oil content limitation of 1% or less. Section IX presents EPA's preliminary conclusion that the revised analytical method presented in Appendix A is appropriate for quantification of oil content of drill cuttings and drilling fluids. Section X requests comment on issues pertaining to development of BAT and NSPS oil content controls for drill cuttings.

The Agency is inviting comment only on the information presented today and regulatory approaches relevant to BAT and NSPS effluent limitations for the drilling fluids and drill cuttings waste streams, and not on other aspects of the August 26, 1985 proposed rule.

The Agency intends, in the next several months to issue an additional **Federal Register** notice related to this rulemaking for the drilling fluids and drill cuttings waste streams. The topics of the future notice are expected to include: Reproposal of BCT effluent limitations guidelines, results and conclusions from the drilling fluids toxicity test variability study (mentioned in Section II of Part I of today's notice), and other data or options that have not been addressed in **Federal Register** notices prior to that time.

Part 1

I. Summary of Proposed Regulations

On August 26, 1985, EPA proposed regulations to control the discharge of wastewater pollutants from the offshore oil and gas extraction industry, a subcategory of the oil and gas extraction category (50 FR 34592) (the "1985 proposal"). the proposed regulations included NSPS and effluent limitations guidelines based upon BAT and BCT. The proposed regulations also included an amendment to the BPT definition of "no discharge of free oil." The waste streams covered by the proposed regulations were produced water, drilling fluids, drill cuttings, deck drainage, well treatment fluids, produced sand and sanitary and domestic wastes.

The notice of proposed rulemaking and the supporting rulemaking record fully explain the proposal for all of the waste streams. For the purposes of this part of today's notice, a summary of the proposed regulations regarding only drilling fluids and drill cuttings is contained below.

A. Drilling Fluids

1. BAT. The proposed BAT regulations for drilling fluids would prohibit the discharge of free oil as measured by the static sheen test. The static sheen test would provide for a determination of the presence of free oil *prior* to discharge. The static sheen test method was included in the proposed regulations as an appendix (50 FR 34627). The pollutant parameter free oil was proposed to be regulated as a BAT "indicator" pollutant for control of the discharge of priority pollutants based upon information gathered on the concentration of priority pollutants in both drilling fluids and the specific additives used in the drilling fluid formulations. The parameter free oil is proposed to be used as an indicator pollutant for priority pollutants because it would be technologically infeasible to develop effluent limitations for all of the individual priority pollutants. The priority pollutants that would be controlled include benzene, toluene, ethylbenzene and naphthalene. The Agency has determined that the prohibition on the discharge of free oil as measured by the proposed static sheen test method would result in BAT-level control for the toxics of concern in drilling wastes.

The proposed "no discharge of free oil" limitation differs from the current 40 CFR Part 435 requirement (BPT) that is based upon the application of best practicable control technology currently available (BPT). The current BPT requirement prohibits the discharge of free oil that would "cause a film or sheen upon or a discoloration on the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines". 40 CFR 435.11(d). The compliance monitoring procedure is a visual inspection of the receiving water *after* discharge.

The BPT limitation of "no discharge of free oil" was originally intended to prohibit the discharge of drilling wastes that, when discharged, would cause a sheen on the receiving water. This limitation and the current definition were established to be consistent with the oil discharge provisions of section 311 of the Clean Water Act. The Agency did not intend that discharged drilling fluids be considered "sludge". For this reason, the Agency proposed in the August 26, 1985, notice to amend the current definition for the purposes of BPT, BAT, BCT and NSPS by excluding language that prohibits the deposition of sludge beneath the surface of the receiving water. This would allow the discharge of drilling fluids, provided that other effluent limitations are met.

The proposed regulations would also prohibit the discharge of diesel oil in detectable amounts. The analytical method for detection of diesel oil was included in the proposed regulations as an appendix (50 FR 34628). The pollutant parameter diesel oil was also proposed to be regulated as a BAT "indicator" pollutant for control of the discharge of priority pollutants contained in diesel oil.

In the preamble to the 1985 proposed regulations, the Agency recognized that diesel oil should be regulated at the BAT level because it contains toxic organic pollutants. Diesel oil was proposed to be designated an indicator pollutant for the BAT and NSPS levels to control the amounts of the individual toxic organic pollutants that it contains. The listed priority pollutants found in various diesel oils can include, benzene, toluene,

ethylbenzene, naphthalene, phenanthrene, fluorene, and phenol. Diesel oil may contain from 20 to 60 percent by volume aromatic hydrocarbons. The aromatic hydrocarbons, such as benzenes, naphthalenes, and phenanthrenes, constitute the more toxic components of petroleum products such as diesel oil. Diesel oil also contains a number of nonconventional pollutants, including polynuclear aromatic hydrocarbons such as methylnaphthalene, dimethylnaphthalene, methylphenanthrene, and other alkylated forms of each of the listed toxic pollutants.

Because "diesel oil" is neither a listed toxic pollutant nor a listed conventional pollutant it is non-conventional pollutant. The parameter diesel oil is used as an indicator for the toxic organic pollutants that it is composed of because it would be technologically infeasible to develop effluent limitations for all of the individual toxic organic pollutants. The Agency has determined that control of these toxic organic pollutants by the regulation of "diesel oil" as proposed represents BAT-level of control of the toxics of concern.

The proposed regulations would also limit the toxicity of discharged drilling fluids with a 96-hour LC50 toxicity limitation. The LC50 limitation proposed is 3.0 percent by volume of the diluted suspended particulate phase, as a minimum (no single analysis to exceed). The analytical method for determining the 96-hour LC50 toxicity is a bioassay method that was also included in the proposed regulations as an appendix (50 FR 34631). The purpose of the LC50 limitation is to reduce the levels of toxic constituents in drilling fluid discharges, including additives such as oil or lubricity agents and some of the numerous specialty additives that may contribute significantly to the toxicity of the drilling fluids.

The proposed regulations would also prohibit the discharge of oil-based drilling fluids. This limitation continues the effective prohibition on the discharge of oil-based drilling fluids that results from the BPT requirement of "no discharge of free oil". The oil present in such fluids would serve as an "indicator" pollutant to control the discharge of priority pollutants contained in the oils added to or present in oil-based drilling fluids at the BAT level of control. The priority pollutants that would be controlled include benzene, toluene, ethylbenzene and naphthalene. The Agency has determined that the prohibition on the discharge of oil-based drilling fluids would result in BAT-level control for the toxics of concern in these drilling wastes.

The proposed regulations would also limit the amounts of mercury and cadmium that are in discharged drilling fluids. The proposed effluent limitations for mercury and cadmium are 1 mg/kg each, dry weight basis in the whole drilling fluid, as a maximum limitation (*i.e.*, no single analysis to exceed). These limitations would apply to the discharged drilling fluid. Compliance with these limitations would likely be accomplished by control of these priority pollutants in the barite component of the drilling fluid.

2. BCT. As stated previously, today's notice presents information for the purpose of promulating BAT and NSPS regulations from drilling fluids and drill cuttings. The August 26, 1985, proposal did include a BCT limitation which would prohibit the discharge of free oil in these wastes as measured by the static sheen test. The static sheen test method was included in the proposed regulations as an appendix (50 FR 34627). The pollutant parameter free oil was proposed to be regulated at the BCT level of control. However, with the exception of free oil, BCT requirements for drilling fluids were reserved for future rulemaking until after the promulgation of the general BCT methodology. The general BCT methodology was subsequently promulgated by EPA on July 9, 1986 (51 FR 24974). The Agency intends to issue a separate **Federal Register** notice to propose BCT for drilling fluids (and drill cuttings). Subsequently, the Agency will issue final BAT, BCT and NSPS regulations for drilling fluids and drill cuttings.

3. NSPS. The proposed regulations would establish NSPS limitations for free oil, oil-based drilling fluids, diesel oil, toxicity, mercury and cadmium as described above for the BAT level of control.

The proposed regulations included definitions for certain terms used to classify a "new source" for the offshore subcategory. These definitions would facilitate the application of the term "new source" to activities covered in this subcategory, including mobile and fixed exploratory and development drilling operations as well as production operations. Refer to the 1985 proposal notice for a detailed discussion of the Agency's intent in applying the new source designation. Comments were received regarding the proposed new source definition, but the Agency is not presenting any changes to the proposed definition at this time.

B. Drill Cuttings

1. BAT. The proposed BAT regulations for drill cuttings would prohibit the discharge of free oil as measured by the static sheen test. The pollutant parameter free oil was proposed to be regulated as an "indicator" pollutant at the BAT level for control of the discharge of priority pollutants in the oil contained in drill cutttings. Free oil is proposed to be used as an indicator pollutant for the priority pollutants contained in the oil because it would be technologically infeasible to develop effluent limitations for each of the individual priority pollutants contained in free oil. The priority pollutants that would be controlled include benzene, toluene, ethylbenzene and naphthalene. The Agency has determined that the prohibition on the discharge of free oil would result in BAT-level control for the toxics of concern in drilling wastes.

In addition, the proposed regulations would prohibit the discharge of diesel oil in detectable amounts. The pollutant parameter diesel oil was also proposed to be regulated as an "indicator" pollutant at the BAT level for control of the discharge of priority pollutants in diesel oil contained in drill cuttings. Diesel oil is proposed to be used as an indicator pollutant for the priority pollutants contained in diesel oil because it would be technologically infeasible to develop effluent limitations for all of the individual priority pollutants. The priority and non-conventional pollutants to be controlled by the use of diesel oil as an indicator pollutant are the same as that discussed above for the BAT-level of control for drilling fluids.

The proposed regulations would also prohibit the discharge of drill cuttings containing oil-based drilling fluids. As noted previously, such fluids would serve as "indicator" pollutants to control, at the BAT level, the discharge of priority pollutants contained in the oils added to or present in oil-based drilling fluids and transferred to drill cuttings.

2. BCT. The August 26, 1985 proposed BCT regulations for drill cuttings would prohibit the discharge of free oil as measured by the static sheen test. The pollutant parameter free oil was proposed to be regulated at the BCT level for control of the discharge of oil contained in drill cuttings.

With the exception of free oil, BCT requirements for drill cuttings were reserved for future rulemaking until after the promulgation of the general BCT methodology. The general BCT methodology was subsequently

promulgated by EPA on July 9, 1986 (51 FR 24974). The Agency intends to propose BCT in a separate Federal Register notice for drill cuttings (and drilling fluids).

3. NSPS. The proposed regulations would establish NSPS limitations for the discharge of drill cuttings containing free oil, drill cuttings associated with oil-based drilling fluids, and drill cuttings that contain diesel oil as described above.

II. New Technical Information Related To the Proposed BAT/NSPS regulations

A. Drilling Fluid Toxicity Test

The proposed BAT and NSPS regulations would regulate drilling fluids by specifying a limit on the toxicity of the discharged fluid as determined through laboratory testing of samples of the fluids. The testing would consist of exposing test organisms to solutions containing different concentrations of the fluids. The test results would be used to determine concentration values lethal to 50% of the test organisms, *i.e.*, LC50 values. These LC50 values would be used to determine compliance with the toxicity limitation. The proposed BAT and NSPS regulations contain a limitation on the LC50 of discharged drilling fluids of 3.0 percent by volume of the diluted suspended particulate phase ("SPP basis") of the drilling fluids wastestream.

EPA accounted for variation in drilling fluid toxicity testing during the process of establishing the proposed toxicity limitation. The Agency proposed a limitation equal to the measured toxicity of the most toxic of the eight generic water-based drilling fluids. (The eight generic drilling fluids are identified in Appendix B of the August 26, 1985 proposal; 40 FR 34632.) Test method variability and analytical variability were accounted for in the proposed limitation because they were inherent components of the procedures used by the Agency in performing the toxicity testing and subsequent calculations. No explicit additional allowances for variation in the test method (intra- or inter-laboratory variability) or variation in "batches" of discharged waste material were used in establishing the proposed toxicity limitation. Moreover, the Agency has not historically provided for such additional allowances in the development of effluent limitations.

EPA has received numerous comments on the proposed toxicity limitation. In particular, industry commented that the toxicity limits may be failed as a result of intra- and inter-laboratory variability in test results.

One existing source of data for use in evaluating inter-laboratory variability is the study that was performed to aid the Agency in the selection of laboratories to conduct toxicity tests for EPA under contract. This data collection effort was part of an Agency "invitation for bid" (IFB) contracting process to provide acute toxicity test method performance information by laboratories attempting to qualify for contract analytical services to the Agency.

A detailed description of the statistical analysis on the IFB data is described in a paper titled "Toxicity Testing of Drilling Fluids: Assessing Laboratory Performance and Variability" (R.C. Bailey, B.P. Eynon), which is available in the record for this rulemaking. The Bailey-Eynon assessment also evaluates intra-laboratory variability using additional data from the EPA Gulf Breeze Laboratory. The American Petroleum Institute (API) has criticized the Bailey-Eynon assessment in a paper titled "Variability in Drilling Fluid Toxicity Tests" (J.E. O'Reilly, L.R. LaMotte). This paper also is included in the rulemaking record.

In order to draw final conclusions concerning variability of toxicity test results, the Agency is currently conducting a further evaluation of the drilling fluid toxicity test. This study will estimate intra- and inter-laboratory variability in the test results. It will also assess differences in intra- and inter-laboratory variation of estimated toxicity between a drilling mud and that same batch of drilling mud with oil added. The study will require each laboratory to conduct individual range-finding tests and to calculate LC50's. An intra-laboratory variability analysis will be based upon data from laboratories with levels of experience ranging from some experience to highly experienced. The study will not include estimates of variability resulting from repeated measurements on different "batches" of the same mud since this information is not needed to evaluate the drilling fluid toxicity test.

B. Discharge of Oil in Water-Based Drilling Fluids

Water-based drilling fluids used in offshore drilling operations sometimes have oil, either diesel oil or mineral oil, added to them. Drilling fluids may also contain entained formation hydrocarbons. (The discharge of oil-based drilling fluids would be prohibited under the proposed regulation).

Oil can be used to improve the lubricating properties of a water-based mud system and as an aid in freeing drill pipe that has become stuck downhole during the drilling operation. Although diesel oil is often the most readily available oil at a drilling site, mineral oils have had a great deal of use recently for these purposes. When oil is used an an aid in freeing stuck drill pipe, a standard technique is to pump a slug or "pill" of oil or oil-based fluid down the drill string and "spot" it in the annulus area where the pipe is stuck. After use, the pill may be removed from the bulk mud system and disposed of separately. Even if the pill is recovered, residual oil from the pill can mix with the remainder of the mud system.

In recent years, research sponsored by both industry and government has shown that the presence of petroleum hydrocarbons in drilling fluid contributes significantly to its toxicidy. Diesel oil is a complex mixture of petroleum hydrocarbons. It is known to be highly toxic to marine organisms and to contain toxic and nonconventional pollutants. There is evidence that diesel oil contributes significantly to the toxicity of drilling fluids that contain it. Toxicity data collected to date have shown that water-based muds containing diesel oil are substantially more toxic than muds without diesel. Mineral oil, which is available to serve the same operational requirements as diesel oil, has been shown to be a less toxic alternative to diesel oil. As a result, EPA has proposed a prohibition on the discharge of water-based drilling muds containing diesel oil and has encouraged the substitution of mineral oil for diesel oil

The use of mineral oil instead of diesel oil as an additive in water-based drilling fluids will reduce the quantity of toxic and nonconventional organic pollutants that are present in a drilling fluid, as compared to the quantity of these pollutants present when using diesel oil as an additive. Mineral oils, with their lower aromatic hydrocarbon content and lower toxicity, contain lower concentrations of toxic pollutants than do diesel oils.

The proposed regulations would prohibit the discharge of diesel oil in detectable amounts in drilling fluid waste streams. The Agency selected the pollutant "diesel oil" as an "indicator" of the listed toxic pollutants present in diesel oil that are controlled through compliance with the effluent limitation, *i.e.*, no discharge. The technology basis for this limitation is product substitution of less toxic mineral oil for diesel oil.

As discussed in the preamble to the proposed regulations, the reason for prohibiting diesel discharges is to reduce the discharge of priority toxic and nonconventional organic pollutants

known to be present in diesel oils. The types and levels of these pollutants present in diesel oils have recently been documented in a study sponsored by the Offshore Operators Committee OOC). The laboratory study was conducted to examine the chemical characteristics of selected diesel and mineral oils. The findings are presented in two comprehensive reports prepared by Battelle New England Marine Research Laboratory. These studies were made available to the Agency by the industry and are available in the rulemaking record.

Some typical methods for compliance with the diesel oil limitation are: (1) Use of product substitutes such as low toxicity mineral oils for spotting and lubricity purposes; and (2) use of diesel oil for spotting and/or lubricity purposes and transporting the used mud system to shore for proper treatment, disposal or reuse.

The industry commenters on the proposed regulations argued that diesel oil is the most effective agent for use in spotting fluids and that the use and discharge of diesel oil for this purpose should be allowed by the regulations. The industry attempted to demonstrate this preference for diesel oil in spotting fluids by providing EPA with the results of the industry-sponsored surveys discussed below. The industry also proposed to EPA that a program of limited duration be undertaken to determine the efficiency of recovering a diesel pill so that the discharge of diesel oil would be minimized, if not eliminated, when the used mud system is discharged to the ocean.

1. American Petroleum Institute Drilling Fluids Survey. In 1984 the American Petroleum Institute (API) conducted a survey among sixteen offshore oil operators in the Guld of Mexico to obtain information on the use of diesel and mineral oils in water-based drilling fluids for the year 1983. Because the number of mineral oil applications in 1983 was small, API conducted a limited additional survey to obtain more data on experience with mineral oil pills in 1984.

These survey data presented by API indicate that mineral oil is more commonly used as a lubricant, while diesel oil is more commonly used for spotting purposes. Hydrocarbons (diesel or mineral oil) were added for lubricity to 12% of the 548 wells included in the survey. For 8% of the wells (44 wells), mineral oil was added, while for 4% of the wells (21 wells), diesel oil was added. For those drilling muds to which lubricity hydorcarbon was added, typically 3 percent (by volume) of the mud formulation was composed of hydrocarbon additive.

2. Offshore Operators Committee Spotting Fluid Survey. Most industry representatives consider mineral oil to be adequate for use as a lubricity agent but believe diesel oil to be a superior materials for freeing stuck pipe. In support of this position, industry has provided the Agency with the results of a retrospective survey comparing the success rates of diesel oil and mineral oil in freeing stuck pipe. This project was conducted in 1986 by the Offshore Operator's Committee (OOC) and covered the years 1983 to 1986.

The study examined information from 2,287 wells drilled in the Gulf of Mexico during that time period. Survey forms were distributed to operators who were asked to specify the number of wells drilled with water-based mud for each year covered by the survey and to supply certain information on each stuck pipe event where an oil-based spotting fluid was used. The API survey form asked for the data the event took place, the time interval between sticking and spotting activities, the depth at which the stuck pipe incident occurred, the based oil used in the spotting fluid, whether the hole was straight or directional, and whether the pill was successful in freeing the pipe.

Participants included twelve major oil companies and accounted for more than half of the offshore wells drilled during this period. Since some of these companies have more than one operating division, a total of sixteen survey response were received.

Of 2,287 wells surveyed that were drilled with water-based mud, 506 stuck pipe incidents were identified in which the operator chose to use an oil additive to attempt to free stuck pipe. Diesel oil pills were reportedly successful 52.7% of the time and mineral oil pills were successful 32.7% of the time in freeing stuck pipe, as shown in the following table:

OOC SPOTTING FLUID SURVEY RESULTS

Spotting fluid	Number incidents fluid used	Number incidents pipe freed	Success rate (percent)
Diesel	298	157	52.7
Mineral	208	68	32.7

Numerous other factors could impact the success of a pill in addition to the base oil. For example, Love (1983) determined that the chance of freeing stuck pipe in 113 documented cases and the potential success of such operations were related to specific conditions at each well. Success decreased with increasing well angle, mud weight, amount of open hole, API fluid loss of the mud, and bottom-hole-assembly length. The chances of success dropped off substantially when a numeric index calculated from the above factors exceeded a certain level.

In addition to the above factors, Love found that pill additive packages (*e.g.*, surfactants, emulsifiers, etc.), rheological properties of the mud, time until spotting, site-specific geological characteristics, and operator experience were likely to affect the success of a spotting operation.

The OOC examined four of these factors in their study: base oil, time until spotting, depth of spot, and type of well (straight or deviated). Results indicated that reducing the length of time until the spot was applied improved the chance of success dramatically for diesel pills. A similar but apparently less dramatic trend was observed for mineral oil pills. The diesel oil success rate was 61% if the pill was spotted in less than 5 hours. The rate dropped of 41% if the spotting time until spot exceeded 10 hours. The mineral oil success rate was 35% if the pill was spotting in less than 5 hours; the rate dropped to 31% if the time until the spot exceeded 10 hours.

Other factors examined by OOC appeared to have less impact on success for freeing stuck drill pipe. Both diesel and mineral oil showed higher success rates in straight rather than in directional or deviated wells, with diesel oil maintaining its reported edge over mineral oil by about the same percentage in each type of well. No trend was observed between depth of spot and success rates for diesel or mineral oil pills.

The OOC survey data showed that success rate with mineral oil pills varied considerably among operators. The data seemed to indicate that greater experience with mineral oil usage leads to considerably higher success rates than the reported average. The five operators that reported using mineral oil pills for more than 90% of their stuck pipe incidents experienced an average 42% success rate with such pills.

Some of the operators with greater mineral pill usage rates achieved extremely high success rates, which were comparable to the highest diesel pill success rates. The three highest success rates among operators using mineral pills were 58%, 60%, 75%. The three highest success rates among operators using diesel pills were 60%, 60%, and 64%.

Despite the industry's claim that diesel pills are more effective than

mineral pills, the study did show that mineral oil was used by operators in 41% of the stuck pipe incidents. Of the 506 incidents in the OOC study, 298 (or 59%) were treated with a diesel pill, while 208 (41%) were treated with a mineral pill. For some operators, mineral oil was the material of choice. Three operators (out of 16) used mineral pills exclusively. The Agency concludes that during the period of this study: (1) Mineral oil was in common use by operators in the Gulf of Mexico; (2) mineral oil is an available alternative to the use of diesel oil; and (3) success rates comparable to those with diesel oil can be achieved with mineral oil.

3. EPA/API Diesel Pill Monitoring Program (DPMP). In response to the proposed prohibition on the discharge of diesel oil, the industry requested that the discharge of diesel oil be allowed when diesel oil is the residual oil left in the bulk mud system following the use of a diesel pill and subsequent pill recovery techniques. Since neither the industry nor the Agency had sufficient information on the effectiveness of pill recovery, the Agency decided to participate with the industry in a test program to determine whether diesel oil can be effectively removed from a mud system after use of diesel-based pills.

In an effort to evaluate the effectiveness of diesel pill recovery techniques and to gather information on the extent to which any residual diesel oil contaminates the bulk mud system, EPA's Industrial Technology Division, EPA Regions IV and VI, and EPA's Environmental Research Laboratory in Gulf Breeze, FL conducted the Diesel Pill Monitoring Program (DPMP) in cooperation with the API. The program involved the collection and analysis of samples from active mud systems prior to use and after recovery of a diesel oil based pill.

a. DPMP Objectives. The objectives of the DPMP were to evaluate the efficiency of diesel pill recovery and to determine the effectiveness of the recovery practice by measuring the toxicity and diesel content of the mud system before and after pill recovery.

The major parameters used to establish the efficiency of diesel oil recovery included the toxicity and diesel content of muds both before and after a pill is spotted, the volume of material added and removed from the mud system (recovered pill and buffer material), the location and type of well being drilled, and the type and rheological properties of the mud and pill being used. This information was to be analyzed and used to determine the efficiency of diesel recovery and the acceptability of the remainder of the mud system for discharge.

b. Program Description. The DPMP required an operator who used a diesel pill and intended to discharge the drilling muds to recover the diesel pill plus at least 50 barrels of mud that surfaced from downhole both before and after the pill, or as much as necessary until no visible oil was detected. The recovered pill and buffer material could not be discharged and had to be transported to shore for either disposal or reuse.

The federal waters of the Gulf of Mexico were chosen for this study because of the large number and diversity of drilling operations. The DPMP was implemented as part of the Agency's general NPDES permit for oil and gas operations in the Gulf of Mexico (Permit No. GMG 280000). The permit, which was published by EPA Regions IV and VI in the **Federal Register** on July 9, 1986 (51 FR 24897), prohibited the discharge of water-based drilling muds containing diesel oil unless: (1) The diesel oil was added only for the purpose of attempting to free stuck pipe, (2) the diesel pill and contaminated mud (buffer) were recovered and not discharged, and (3) the permittee participated in and complied with the written instructions of the DPMP. The program officially started in July 1986 with the issuance of the general permit, but some operators began participating in November 1985. The program ended as part of the permit requirement on September 30, 1987.

Some permittees elected not to participate in the DPMP on a well-by-well basis. If a permittee used a diesel pill and did not participate in the program, then all waste mud and cuttings generated after introduction of the pill were to be transported to shore for disposal, as required by the general permit. If permittees used a mineral oil or non-hydrocarbon based pill instead of diesel oil to free stuck pipe, then they were allowed to discharge waste mud and cuttings without participating in the DPMP, provided that all other permit conditions (*e.g.*, toxicity limitation, no discharge of free oil) were met.

For those operators that did participate in the program, the DPMP established conditions for pill recovery, toxicity and chemical testing, and monitoring to generate data on the effectiveness of current recovery techniques. DPMP participants were required to meet all permit limitations with the exception of the prohibition on the discharge of diesel oil. Discharge of mud containing diesel oil was allowed if used only for freeing stuck pipe and if provisions of the DPMP were followed. Also, for permit purposes, compliance with the toxicity limitation was demonstrated by sampling the mud just prior to the introduction of the pill. The end-of-well toxicity test was also conducted, but was used by EPA for information only, and not to determine compliance with the permit.

The procedures for conducting the sampling and analysis program are documented in a program manual that contains detailed instructions for all participants. The program manual is included in the record for this rulemaking.

The DPMP was managed by an Oversight Committee with members representing EPA's Industrial Technology Division and Regional Offices, EPA's Environmental Research Laboratory, the Natural Resources Defense Council, and API's Committee on Environmental Conservation. The Oversight Committee carried out the planning and development of the DPMP, met periodically to review laboratory activities and the information being gathered and analyses being performed, monitor the progress of the investigations, amend certain pill recovery techniques and sampling/analytical procedures, and issue a final report on the findings and conclusion of the DPMP.

EPA's Environmental Reserach Laboratory, Office of Research and Development, in Gulf Breeze, FL acted as the quality review laboratory for the toxicity testing part of this program. The Gulf Breeze Lab has been conducting research activities since 1976 to evaluate the potential impact of drilling fluids on the marine environment. The lab is experienced in handling and testing drilling fluid samples, and was involved in developing the protocol for the proposed Drilling Fluids Toxicity Test method (50 FR 34631). Thus, the Gulf Breeze Lab reviewed toxicity analyses generated during the DPMP, advised on data quality, and conducted analyses on duplicate samples.

The participating drilling operators were required to conduct sampling activities with prepackaged sampling kits whenever a diesel pill was used to free stuck pipe. Samples were taken of the pill, the diesel oil used to formulate the pill, and the active mud system before spotting and after the pill was recovered. Samples were shipped to a designated Central Control Laboratory (CCL) which was responsible for managing the flow of samples, analyses, and information. The CCL monitored the performance of contract laboratories and transmitted results to permittees

and to EPA's Sample Control Center (SCC).

The SCC is an Agency contractor that assists the Industrial Technology Division with the tracking of samples, assignment and performance evaluation of analytical laboratories, and the compilation of analytical results for Division projects. Thus, the SCC was assigned the task of monitoring the status of the DPMP for the Agency. The SCC was also responsible for maintaining a computerized data management system for all analytical information gathered during this program for Agency access and recordkeeping purposes, and for preparing quarterly data compilations to the Oversight Committee.

c. Diesel Pill Monitoring Program Findngs. The Agency has performed analyses of the diesel pill program information received to date. This encompasses information on 119 stuck pipe incidents that occurred from November 1985 through September 1987. The Agency focused on analyses that would indicate the amount of diesel oil recovered (*i.e.*, removed from the bulk drilling fluid system) based upon known amounts introduced with the diesel pill formulation.

The Agency first examined the amount of diesel oil remaining in the bulk mud system after pill recovery and its relationship to the size of the buffer that was removed with the pill. According to the design of the pill recovery technique, it was expected that an increase in buffer size would result in higher diesel recover (*i.e.*, lower amounts of diesel oil remaining in the bulk mud system).

Diesel oil recovery was determined as the difference between the amount of diesel oil reportedly added to the mud system and the amount measured in the active system after two complete revolutions of the mud system following pill recovery. The results of the analyses indicate that, for the time period after the general NPDES permit for the Gulf of Mexico became effective in July 1986, the median diesel oil recovery level was about 80 percent. The amount of diesel oil remaining in the bulk mud systems ranged from less than one percent to more than 95 percent of the volume added, with a median level of almost 20 percent.

The amount of diesel oil remaining in the system did not appear to correlate with buffer size. Increasing the amount of buffer material collected had little effect on the median recovery level.

Next, the Agency evaluated DPMP data to determine if there were correlations between measured diesel oil content and the acute toxicity (LC50) of drilling fluids. The Agency found that a distinct and rather dramatic relationship does exist. At low diesel concentrations, acute toxicity was found to increase rapidly with increasing diesel content. The data clearly support previous findings that diesel oil is a major contributor to mud toxicity. The finding that the acute toxicity of drilling fluids is heavily influenced by the amount of diesel oil present supports the Agency's original proposal to prohibit the discharge of diesel oil in drilling wastes.

The success rates for freeing stuck pipe for the DPMP and the OOC Spotting Fluid Survey (see previous discussion) were compared. The diesel pill success rate from the DPMP was found to be 36 percent. This value was derived by considering all stuck pipe incidents that occurred during the DPMP, which included multiple pills for some sticking incidents and multiple sticking incidents for some wells. The industry analysis of the OOC survey data included consideration of multiple stuck pipe incidents per well but success rates were calculated by considering only the first pill per sticking incident.

The Agency recalcuated the diesel pill success rate from the DPMP on the same basis used by OOC in its survey. The resultant value is only a 40 percent diesel oil success rate, compared to the reported 52.7 percent diesel oil success rate from the OOC survey. It is not clear why the reported diesel pill success rates differ between these two studies. The DPMP data cast doubt upon the industry position regarding superiority of diesel oil over mineral oil in freeing stuck pipe.

It should be noted that during the course of the DPMP the use of mineral oil pills for freeing stuck pipe in the Gulf of Mexico reportedly declined. Industry has stated that the DPMP became a distincentive for the use and further development of mineral oil pills. However, industry representatives have noted that onsite recovery techniques would be essentially the same for pills formulated with either diesel or mineral oil.

Total costs for operators participating in the DPMP and transporting and disposing of the pill and buffer material onshore were reported to average about $11,000 per spotting episode. Of that total, the costs of transporting the recovered pill and buffer from the rig to the disposal site, cleaning tanks, and landfilling the waste material averaged approximately $8,000 per episode.

d. Conclusions on the Diesel Pill Monitoring Program. Based on analyses to date of information generated during the DPMP, the Agency believes that use of the pill recovery techniques implemented during the program does not result in recovery of sufficient amounts of the diesel pill and reduction of mud toxicity to acceptable levels for discharge of bulk mud systems. Mud systems for approximately one-half of all wells in the DPMP contained residual diesel levels between one and five percent by weight after introduction of a diesel pill and subsequent pill recovery efforts. In addition, mud systems for approximately 80 percent of the DPMP wells failed the proposed 30,000 ppm LC50 limitation after pill recovery. Almost half that number (40 percent of the total) of the DPMP wells had water-based mud systems that contained residual diesel following pill recovery and showed LC50 values of less than (more toxic than) 5,000 ppm.

4. Conclusion on the Discharge of Diesel Oil. For the reasons discussed above, the Agency believes that its proposed prohibition on the discharge of diesel oil in detectable amounts is appropriate for the BAT and NSPS levels of control. The technology basis for the prohibition on the discharge of detectable amounts of diesel oil in drilling fluids and drill cuttings is substitution of mineral oil for diesel oil and lubricity and spotting purposes. Alternatively, where offshore operators choose to use diesel oil in a mud system, many opeators have the option to transport used mud systems and associated cuttings to shore for proper treatment or disposal.

In comments submitted to the Agency on the August 26, 1985 proposed regulations, the American Petroleum Institute stated its agreement with EPA that satisfactory mineral oil substitutes are available for general mud lubricity applications, and that use of diesel oil for this purpose should be discontinued. API also maintained that, for use as a spotting fluid to free stuck drill pipe, mineral oil substitutes are not as effective as diesel in all cases. However, results of the surveys presented in this notice indicate that mineral oil additives are available, are being used by offshore operators, and are capable of being as effective as diesel in spotting fluid applications.

The Agency solicits comments on all aspects of this discussion and the studies used by the Agency to reconsider the proposed diesel discharge prohibition. The Agency also solicits any additional relevant data on this issue. The Agency will consider these data in the formulation of the final effluent limitations and standards for drilling fluids and drill cuttings.

C. Analytical Method for Diesel Oil Detection

The August 26, 1985 **Federal Register** notice proposed a method for detecting the presence of diesel oil in drilling fluids and drill cuttings waste streams. The method, based on retort distillation and gas chromatography, has subsequently been modified based on experience gained during the conduct of the Diesel Pill Monitoring Program. The current version of Proposed Method 1651, "Oil Content and Diesel Oil in Drilling Muds and Drill Cuttings by Retort Gravimetry and GCFID" is presented in Appendix A of this notice for review and comment.

This method for determining the identity and concentration of diesel oil in drilling wastes has an estimated detection limit of 100 mg/kg. Data on the precision and accuracy of the method have been generated and are included in the record for this rulemaking.

Today's modified version of the diesel analytical method also includes a proposed method for determining the oil content of drilling wastes. Discussion on the Agency's intended use of oil content determinations is presented in Part 2 of today's notice.

D. Metals Limitations

The proposed BAT and NSPS regulations would limit the levels of mercury and cadmium that could be present in discharged drilling fluids. The primary source of these toxic metals is the barite component of drilling fluids. The August 26, 1985 proposal included proposed effluent limitations of 1 mg/kg each of mercury and cadmium in the whole drilling fluid on a dry weight basis. The proposed effluent limitations would be maximum values (no single analysis to exceed).

Upon review and consideration of the comments and additional information received on this aspect of the proposed regulations, the Agency is considering different BAT and NSPS effluent limitations for control of mercury and cadmium levels in drilling fluids. The limitations being considered are 1.5 mg/kg of mercury and 2.5 mg/kg of cadmium in the whole drilling fluid on a dry weight basis. These effluent limitations also would be maximum (no single sample to exceed) values.

At proposal, the Agency estimated that mercury and cadmium limitations of 1 mg/kg each would result in a price increase of about 15% for barite. Industry commenters argued that the proposed mercury and cadmium limitations would result in a 65% increase in the price of barite that contains mercury and cadmium at sufficiently low levels to allow for compliance with the effluent limitations. The price increase would be due to increased demand for such "clean" barite and additional costs in segregating and transporting supplies of clean barite for offshore use. It was suggested that there also may be a question about adequate sources and stocks of such "clean" barite for use in offshore drilling. Industry commenters indicated that sufficient supplies of barite containing no more than 3 mg/kg mercury and 5 mg/kg cadmium are available for offshore use. The Agency's analysis of industry-supplied data indicates that there should be no price increase for barite if barite containing mercury and cadmium at levels no higher than 3 mg/kg and 5 mg/kg, respectively, could be used to formulate drilling fluids.

The 1.5 mg/kg mercury and 2.5 mg/kg cadmium effluent limitations being considered by the Agency are end of pipe limitations based upon the use in drilling fluids of: (1) Barite containing no more than 3 mg/kg mercury and 5 mg/kg cadmium and (2) a typical barite content in drilling fluid of 50% barite by weight. If the barite content in the whole drilling fluid is 50%, the concentration of each metal in the whole drilling fluid would be about one-half of its concentration in the stock barite.

The Agency may establish the final BAT and NSPS effluent limitations equal to 1 mg/kg each of mercury and cadmium in the whole drilling fluid or equal to 1.5 mg/kg of mercury and 2.5 mg/kg of cadmium in the whole drilling fluid. The Agency may also establish the limitations at levels in the whole drilling fluid that the Agency determines more accurately reflect the use of barite containing no more than 3 mg/kg of mercury and 5 mg/kg of cadmium. The Agency believes that either set of effluent limitations under consideration for mercury and cadmium in whole drilling fluid is potentially appropriate for the BAT and NSPS levels of control and that either set of limitations is economically achievable.

The Agency solicits comment on all aspects of the mercury and cadmium limitations discussed here. In particular, the Agency solicits: (1) Data relating to the availability of adequate supplies of barite which will provide for compliance with particular metals limitations in discharged drilling fluids; (2) information about the appropriateness of its tentative conclusion that the use in drilling fluids of barite containing no more than 3 mg/kg mercury of 5 mg/kg cadmium correlates properly with end of pipe limitations of 1.5 mg/kg for mercury and 2.5 mg/kg for cadmium at the BAT and NSPS levels of control (this includes data on the amounts and proportions of the barite component used in actual drilling fluid formulations, the proportion of drilling fluid systems and volumes of actual drilling fluids that contain barite in greater or lesser proportions than the estimate of 50% by weight that was used for the Agency's analysis, and data that would aid in the assessment of the changing proportion of the barite component of drilling fluid systems as the drilling fluid composition is modified during the drilling of a well); and (3) data that would aid in discerning differences in environmental effects between the effluent limitations under consideration.

III. Changes to Costing Data and Assumptions for Estimates of Economic Impacts

The Agency has re-costed compliance with the proposed regulatory option for drilling fluids and drill cuttings based upon additional technical and cost information provided in comments on the proposed regulation and additional information collected by the Agency since proposal. The Agency selected the year 1986 as the basis for presentation of the regulatory costs and economic analysis discussed in this notice because 1986 is the latest year for which sufficient actual costs and economic data are available.

The following discussion summarizes the major and most of the minor changes to costing items and assumptions used in developing aggregate industry compliance costs. The revised compliance costs were then used to perform a revised economic impact analysis of the amended regulatory approach presented in this section. The revised economic impact analysis is included in the rulemaking record. A summary of the economic impact analysis is presented in Section IV of this part of today's notice. The Agency solicits comment on these changes to the costing data and assumptions and on the revised economic impact analysis.

A. Toxicity Failure Rate for Water-Based Drilling Fluids

The Agency has undertaken an analysis of data on water-based drilling fluids collected by both EPA and the industry over the past two years to estimate failure rates of the proposed toxicity limitation (30,000 ppm, suspended particulate phase basis) in order to better estimate the aggregate industry compliance costs of the proposed regulatory option. These data include measured oil content and acute toxicity of field (used) muds.

The Agency has categorized the information by "data set". The data sets are identified as follows: The first data set is field mud data collected by API and presented to EPA in comments on the August 26, 1985 proposed regulations ("API 1"). The second data set is an extension of data collection by API subsequent to API 1 and submitted to the Agency in October 1986 ("API 2"). The third data set includes mud properties data, well identification information, and analytical results for field muds collected during the Diesel Pill Monitoring Program ("DPMP") from November 1985 through September 1987. The fourth data set is field mud information generated by the industry and submitted to EPA Region VI for the alternative toxicity request ("ATR") program under the NPDES permit for oil and gas operations in federal waters of the Gulf of Mexico (Permit No. GMG 280000). The fifth set of data is discharge monitoring report ("DMR") data that are being provided to EPA Region VI by the industry under the terms of the NPDES general permit for oil and gas operations in federal waters of the Gulf of Mexico.

Mud data were grouped to represent three segments of the total population of wells employing water-based mud systems. The segments included mud systems with no added oil, oil added for lubricity, and oil added for spotting purposes. Expected failure rates at the proposed LC50 limitation of 30,000 ppm were estimated for each of the three segments and thus for the total well population. Compliance costs were then estimated based on product substitution and transport of muds to shore for disposal.

Depending upon the individual data sets or combinations of data sets used to estimate toxicity failure rates based upon measured oil content, the toxicity failure rate for water-based drilling fluids which contain no added oil (original formulation, no reported lubricity or spotting fluids) range from approximately 2% to 15%. That is, between 2% and 15% of those water-based drilling fluid systems that do not contain added oil may be expected to fail the proposed toxicity limitation of 30,000 ppm SPP. If the toxicity failure rate were closer to 15% than to 2%, the industry would incur considerably higher costs for compliance with the toxicity limitation than the Agency had originally estimated. This factor, in conjunction with certain other costing elements discussed below, can add significantly to the aggregate industry compliance cost for the proposed effluent limitations.

The majority of water-based drilling fluid systems used in the Gulf of Mexico do not contain added oil. Results of the API Drilling Fluid Survey and the OOC Spotting Fluid Survey discussed previously support this conclusion. Reportedly, 88% of wells using water-based muds do not use oil for lubricity (API, 1983 data). Similarly, 78% of such wells do not use oil for spotting purposes (API, 1983–86 data). Therefore, assuming that the number of new wells that will not use oil for lubricity or spotting purposes will be uniformly distributed, a minimum of 69% (88% × 78%) of all water-based drilling fluid systems will contain no added oil. Assuming 978 new offshore wells are drilled each year (see "Annual Rate of Development", below), between 13 wells (2% × 69% × 978) and 101 wells (15% × 69% × 978) drilled each year using water-based muds with no added oil may fail the proposed 30,000 ppm SPP toxicity limitation. Thus, as shown on Table 2 in Section IV of this part, the estimated annual industry cost of complying with only the proposed toxicity limitation of 30,000 ppm SPP varies from $22 million to $48 million (1986 dollars) depending on the estimated toxicity failure rate of water-based muds to which no oil has been added.

B. Annual Rate of Development

The costing and economic analyses for the proposed regulation were based upon an annual average of 1166 offshore wells drilled per year through the year 2000. The revised costing and economics are based upon an annual average of 978 wells drilled per year through the year 2000. The revised estimate is based upon updated projections of offshore oil and gas activity developed by the Department of Interior's Minerals Management Service (MMS). MMS has published 30-year forecasts of Outer Continental Shelf oil and gas production for major regions: the Atlantic, Gulf of Mexico, Pacific, and Alaska. These projections improve upon the Department of Energy/Energy Administration forecasts used by EPA at proposal for reasons outlined in Section IV of this part of today's notice.

C. Model Well Characteristics

Model well characteristics were established for the purpose of estimating compliance costs for the regulatory approaches under consideration. The assumed characteristics of a model 10,000 foot well in the Gulf of Mexico are discussed in Part 2 of this notice and are summarized below.

Drilling a typical 10,000 foot well is assumed to take 35 calendar days with 20 days of actual drilling time. The volumes of drilling fluid and drill cuttings discharges from a 10,000 foot model well are estimated to be 6,749 and 1,430 barrels, respectively. Water-based drilling fluids with oil added for lubricity plus spotting purposes are assumed to contain 5% oil by volume. Untreated drill cuttings associated with oil-based drilling fluids are assumed to contain 20% oil by weight. Drill cuttings associated with water-based drilling fluids to which oil has been added are assumed to contain 1% oil by weight.

There are two major refinements to the model well characteristics used for evaluating the proposed regulation and those used for the revised estimates presented in today's notice. They are: (1) An additional bulk mud discharge of 1,400 barrels to account for the active mud system at the end of a drilling campaign; and (2) an assumption of 1% instead of 10% oil content (weight basis) in cuttings associated with the use of water-based muds to which oil has been added.

D. Transportation and Disposal

For drilling wastes that do not comply with the proposed effluent limitations, the method of disposal at proposal and now is assumed to be transport of the wastes to shore by vessel for reconditioning and reuse (oil muds) or land disposal (cuttings and water-based muds). Model cost scenarios for transport and disposal were based on information provided by industry sources, as presented in Part 2 of this notice. These costs include rental of supply boats at $3,000 per day, and revised costs for material containers, labor for loading, and unloading, transport, and landfill disposal at $6.50 per barrel of mud and $6.00 per barrel of cuttings.

The number or proportion of all water-based drilling fluid systems and associated cuttings that would have to be disposed of in this manner was reestimated. The estimate used for the proposed regulation was that 10% of all muds and cuttings would have to be transported to shore for disposal due to failure of one or more of the proposed effluent limitations. Revised estimates range up to 23% of all water-based muds and about 3% of all associated cuttings being transported to shore for disposal. (For oil-based muds and associated cuttings, there is no change from the 1985 proposed requirement that all such wastes would have to be transported to shore for disposal.)

E. Use of Oil-Based and Water-Based Drilling Fluids

The original and revised costing approaches assume the use of a water-based mud system in all wells down to the 10,000 foot model well depth. Oil-based muds may be used for the more difficult drilling situations (*e.g.*, deviated holes at greater depths) to improve lubricity, thereby reducing torque and increasing the rate of penetration, to improve temperature stability of the mud system, and to reduce the chances of stuck drill pipe. Oil-based muds are also used in specific geologies like shale to preclude distortion of the formation strata that could occur through the absorption of water from water-based muds. API data for 1984 indicate that the average depth of all wells drilled deeper than the model well was 14,000 feet. It was assumed for recosting purposes that oil-based muds would be used below 10,000 feet. Of all the wells accounted for in the 1984 API data base, 30.8% were deeper than 10,000 feet and were assumed to have used oil-based muds at the depth interval 10,000 to 14,000 feet.

F. Cost Differential Between Diesel and Mineral Oils

The cost of substituting mineral oil for diesel oil was established at the time of the proposed regulation at $2.10 per gallon. This differential cost included the increase in delivered purchase price of the mineral oil over diesel oil and the costs to provide and maintain separate onsite storage facilities for the mineral oil. Revised estimates presented in today's notice include a differential cost of $2.00 per gallon for calculations involving mineral oil substitution.

G. Pollutant Reduction Estimates

The issue of pollutant reduction does not directly affect the aggregate costing of the amended regulatory approach. However, pollutant reduction estimates are used in determining benefits and are used in evaluating the cost-effectiveness of the various regulatory options. The revised analysis presented in this part incorporates estimates of the reductions of specific pollutants (identified below) that would be achieved for each of the candidate regulatory approaches presented in this part of today's notice.

Determinations of the priority pollutant organics and nonconventional organics content of diesel oil and mineral oil mud additives were made in laboratory research sponsored by the industry. These data were used by the Agency to estimate potential reductions in the direct discharge of benzene, naphthalene, fluorene, phenanthrene, phenol and their alkylated homologues. Discharge reduction estimates were also made for mercury, cadmium, and several other metallic priority pollutants found in drilling fluids and associated drill cuttings.

H. Failure Rate for "No Discharge of Free Oil" Limitation (Static Sheen Test)

The approach followed by the Agency to re-cost compliance with the proposed regulation included consideration of expected failure rates for the static sheen test. As previously noted, the total population of wells employing water-based mud systems were grouped into three classes: muds with no added oil, muds with oil added for lubricity, and muds with oil added for spotting purposes. The percentage of wells with discharges that would be likely to comply with the "no discharge of free oil" limitation based on the static sheen test were estimated for each of the three classes considered. Compliance costs were then determined based on transporting the wastes to shore for land disposal.

I. Monitoring Costs

The cost of monitoring for compliance with effluent limitations is considered to be an element of the total costs of compliance with the regulation. The preamble to the proposed regulations contained a "suggested" or "typical" monitoring frequency and analytical cost for each pollutant and waste stream subject to the regulation for a facility where both development and production operations are being performed. As such, the total monitoring costs presented were considered to be conservatively high.

Changes were made to the monitoring frequencies and analytical costs presented in the August 26, 1985 proposal for the muds and cuttings waste streams. These changes involved the monitoring frequency of the static sheen test and the addition of the diesel detection analysis. A summary of suggested sampling frequencies and estimated self-monitoring costs for muds and cuttings on a per well basis follows:

SUGGESTED SELF-MONITORING FREQUENCIES AND ESTIMATED ANALYTICAL COSTS

Waste stream per well(a)	Analysis	Cost per sample for analysis and labor (dollar)	Suggested minimum sampling frequency	Cost per well (dollar)
Dril Fluids (water-based)	Bioassay (LC50)	1,000	1/mo.(b)	2,000
	Mercury, total	50	1/mo.(b)	100
	Cadmium, total	50	1/mo.(b)	100
	Diesel Detection	75	(b)	150
	Static Sheen	25	(c)	250
Drill Cuttings (from water-based drilling fluids)	Static Sheen	25	(d)	500
Total cost per well				$3,100

(a) Assumed drilling campaign of 35 calendar days with 20 days of actual drilling time.

(b) Twice per well.

(c) Each day of discharge (assumed every 2nd day of drilling).

(d) Each day of drilling.

IV. Revised Industry Profile and Economic Analysis

A. Industry Profile

Since the proposal of August 26, 1985 (50 FR 34592), the Agency has updated the forecast of offshore oil and gas activity. This updated forecast replaces the projections developed for the proposal and presented in EPA's report titled "Economic Impact Analysis of Proposed Effluent Limitations and Standards for the Offshore Oil and Gas Industry", EPA 440/2–85–003, July 1985. Those projections were based upon a 1984 Department of Energy/Energy Information Administration (DOE/EIA) production forecast.

The Agency's revised projections are presented in the Economic Impact Analysis for this notice which is

available in the record for this rulemaking. The revised projections are in response to recent changes in world oil prices and to the comments on the proposed regulations made by the Offshore Operators Committee (OOC) in February of 1986. The new Outer Continental Shelf (OCS) forecast has been developed using Department of Interior/Minerals Management Service (DOI/MMS) sophisticated production projections. Three alternative oil price scenarios have been analyzed: one at $32, one at $21, and one at $15 per barrel of oil.

EPA's updated projections of OCS offshore oil and gas activity rely on the 30-year forecasts of oil and gas production developed by the Minerals Management Service. MMS developed its forecast based upon the data used in MMS' Environmental Impact Statement for the Proposed 5-year Outer Continental Shelf Oil and Gas Leasing Program (1987–1992), MMS 86–0127. In that report, MMS estimated "conditional resources" for 21 OCS regions, assuming a market value of $32 per barrel of oil (1986 dollars). These conditional resources represent the mean amount of oil and gas reserves that are economically recoverable from the leased areas, given that exploration confirms the presence of hydrocarbon reserves. The probability of finding reserves varies from region to region. An estimate of the expected resources to be developed in each leased area can be obtained by multiplying the probability of finding reserves (estimated by MMS) by the conditional resource estimates. Using this resource estimate, and rules-of-thumb regarding the amount of time it takes to develop the resources in each area, MMS has developed a schedule of resource production for the 1987–1992 lease sales.

To develop the full 30-year projections, MMS used its estimates of the percentage of undeveloped resources to be leased during each of its subsequent leasing periods. For example, if 25 percent of Alaska's resources are expected to be leased in 1987–1992, and 25 percent of Alaska's resources are expected to be leased in 1992–1996, then the resource projections for the 1992–1996 lease would replicate the resource projections for the 1987–1992 lease, with a 5-year lag. If 50 percent of Alaska's resources were to be leased in 1992–1996, then the projections would be double those for the 1987–1992 lease, with a 5-year lag.

Based on this methodology, MMS has published 30-year projections of OCS oil and gas production for four major regions: the Atlantic, Gulf of Mexico, Pacific, and Alaska. These projections improve upon the DOE/EIA forecast used by EPA at proposal for the following reasons. First, the MMS forecast is based on a disaggregated analysis of resource potential and lease activity in each of the four regions. Second, the DOE/EIA forecast did not extend beyond 1995 while the MMS forecast extends to 2015; thus the MMS forecast increases the accuracy of the Agency's projections to 2000. Finally, the MMS forecast is easily amenable to different price scenarios. In its "Secretarial Issue Document" (1987), MMS developed alternative leasable resource estimates for various prices. Based on these resource estimates, the ratio of resources at $21 per barrel to $32 per barrel, and $15 to $32 per barrel are as follows:

Region	Ratio of $21/bbl to $32/bbl	Ratio of $15/bbl to $32/bbl
Gulf	0.965	0.858
Pacific	0.790	0.541
Atlantic	0.514	0.327
Alaska	0.098	0.0

These ratios mean, for example, that using the MMS resource estimates for the Pacific OCS at $32 per barrel as the basis (*i.e.*, MMS projections at $32 per barrel equal 100 percent), the Agency estimates that 79 percent of these Pacific resources would be developed if the price of oil fell to $21 per barrel. Similarly, if the price fell from $32 to $15 per barrel, the Agency projects that it would make economic sense for the oil and gas industry to develop 54.1 percent of those Pacific resources. These ratios were used to develop the two alternative forecasts from the $32 per barrel forecast.

The Agency has aslo developed new projections for the number of wells drilled in state offshore waters and the number and configuration of offshore platforms. The revised estimates reflect the declining role of state waters in oil and gas drilling in the Gulf of Mexico. (Between 1967 and 1985 the state-to-federal ratio dropped about 30 percent every seven years.) Drilling in the state waters of the Gulf of Mexico is projected to be 11 percent of federal production for the period 1986–1992 and 8 percent for the period 1993–2000. No state water activity is projected in the Atlantic. Based upon drilling activity in state waters between 1980 and 1985, drilling in state waters is projected to be 50 percent of the activity in federal waters in the Pacific and 300 percent of federal activity in Alaska.

In the following discussion of the economic impacts of the regulation, only the results of the Agency's analysis based on an average oil price for the years 1986-2000 of $21 per barrel are presented. At this price, an average of 978 wells are projected to be drilled each year. (If the average price of oil is $15 per barrel between now and the year 2000, 807 wells are projected to be drilled each year; if the oil price is $32 per barrel, 1,178 wells would be drilled.)

B. Economic Impacts

At proposal, the Agency estimated the total annual cost of the selected drilling fluids and cuttings option at $36.7 million (in 1986 dollars). Table 1 presents the Agency's revised estimate of the cost of the proposed regulations for drilling fluids and cuttings which now totals $76.6 million annually. The annual estimated cost of controlling drilling fluids has increased from $27.7 million at proposal to $71.1 million. The annual cost of controlling drill cuttings has decreased from $9.1 million to $5.5 million. The revised estimates for the proposed regulations have increased despite some declines in components of the estimate (*e.g.*, the number of wells drilled per year and the monitoring costs per well). The increase in the revised cost estimates for the proposed regulations is due primarily to increases in: (1) The percentage of the drilling fluids that would have to be transported to shore for disposal ("barged") and (2) the per-well cost of barging drilling fluids. Barging costs are incurred when these drilling fluids fail the limitation on toxicity or the prohibition on the discharge of free oil. As indicated in Table 1, the estimated percentage of drilling fluids that would fail effluent limitations and thus be barged has increased from 10 percent to 23 percent based upon revised estimates of effluent limitation failure rates discussed earlier in today's notice. The per-well cost of barging drilling fluids has increased primarily because the volume of the model well drilling fluid system was increased from about 5300 to about 6700 barrels as discussed earlier in Section III.

The Agency has identified four alternative approaches for controlling offshore drilling fluids and drill cuttings discharges. The term "approach" is used to refer to any one of four particular scenarios for costing purposes which are differentiated by:

(1) The differing toxicity failure rates for water-based drilling fluids to which no oil has been added, as presented in Section III.A. of this part of today's notice, and

(2) The differing sets of effluent limitations for mercury and cadmium is drilling fluids as presented in Section II.D. of this part of today's notice. The first approach, identified here as "Approach A" is the one that is most similar to the regulatory option proposed in 1985, but as explained above, that option has been recosted to incorporate comments the Agency has received and updated information the Agency has gathered since proposal in 1985. Approaches B, C, and D are variations on Approach A, reflecting the differences as explained in Section III above.

The four approaches are summarized below:

Approach	Assumptions: Failure Rate for water-based fluids (percent)	Assumptions: Failure Toxicity Limitations[2] for Hg & Cd	Total annual cost ($00, 1986 dollars)
A.[1]	15	1, 1	$76,617
B.	2	1, 1	50,662
C.	15	1.5, 2.5	66,113
D.	2	1.5, 2.5	40,158

[1] Of the four approaches, Approach A is most similar to the 1985 proposed regulatory option.

[2] 1, 1 means 1 mg/kg each mercury and cadmium in discharged drilling fluids; 1.5, 2.5 means 1.5 mg/kg mercury and 2.5 mg/kg cadmium in discharged drilling fluids.

As shown in the last column of the abqve table, the total annual costs for the four approaches range between $40.2 million and $76.6 million. Costs are given in 1986 dollars here and on Tables 1, 2, and 3 below because 1986 is the most recent year for which a consistent and complete set of data is available for use in the economic impact analysis model. (For reference, these total costs are estimated to range between $42.0 million and $80.1 million in 1988 dollars, if they are adjusted for inflation using the *Engineering News Record's* construction index for the first six months of 1988.)

The technology basis and the limitations of Approach A are similar to those of the proposed regulation. As shown on Table 2, the costs of controlling fluids are more for A than for B is based on the assumption that more drilling fluids pass the toxicity test, and thus, under Approach B, fewer wells incur the cost of barging.

Table 2 also shows that the costs of Approach C are less than the costs of Approach A (and the costs of D are less than the costs of B). Approaches A and B cost more because they include limitations on the mercury and cadmium content of discharged drilling fluids at a maximum (no single sample to exceed) concentration of 1 mg/kg each on a dry weight basis in whole drilling fluid. This limitation is estimated to increase the cost of barite by 15 percent, due to increased costs for transporting and segregating "clean" barite for use in offshore drilling. The annual cost of this barite limitation is $10.5 million (in 1986 dollars). Approaches C and D cost less because they contain less stringent limitations for mercury and cadmium. The 1.5 mg/kg mercury and 2.5 mg/kg cadmium limitations are estimated to be achievable at no additional cost, because they are based on the use of barite containing no more than 3 mg/kg of mercury and 5 mg/kg of cadmium. Thus, current supplies of barite for offshore drilling can meet these alternative limitations.

The estimated costs for approaches A, B, C, and D are all higher than the estimated cost of the proposal option. However, all four approaches presented in this notice are economically achievable. The Agency's economic impact notice are economically achievable. The Agency's economic impact analysis compares the cost of oil and gas drilling in the absence of any BAT/NSPS regulations (*i.e.*, the base case) to the cost of drilling with each of the regulatory approaches—A, B, C, and D. The results of this analysis are summarized in Table 3 for a 12-well, oil-only model platform in the Gulf of Mexico. Comparing compliance costs to the base case, drilling costs for a typical well would increase between 1.03 percent (for Approach D) to 1.95 percent (for Approach A). With the regulation, the net present value of a typical drilling project in the Gulf of Mexico would decline between 1.5 and 3.0 percent, and the cost of producing a barrel of oil would increase between four and eight cents. For a major oil company (which is the typical participant in offshore oil drilling projects), the debt incurred due to any of the four regulatory approaches represents only 0.01 percent of the company's net worth. As shown on Table 3, the cost of the regulation also has no appreciable impact on any of the financial ratios examined for these oil companies, including: the current ratio, the long term debt-to-equity ratio and the debt-to-capital ratio. The Agency's analysis shows that the economic impacts of the regulation are not substantial, and thus any of the approaches presented in this notice are economically achievable.

C. Cost-Effectiveness

In addition to the foregoing analyses, the Agency has performed a cost-effectiveness analysis of the two levels of cadmium and mercury limitations presented in today's notice. Table 4A presents the cost-effectiveness of these two levels (Approaches A and C) based on the assumption of a toxicity failure rate of 15 percent for those water-based drilling fluids to which no oil has been added. Table 4B presents the cost-effectiveness of the same levels of limitations for cadmium and mercury but with a toxicity failure rate of 2 percent for those water-based drilling fluids to which no oil has been added (Approaches B and D).

According to the Agency's standard procedures for calculating cost-effectiveness, on each of the tables the approaches have been ranked in order of increasing pound-equivalents (PE) removed. The pound equivalents removed for each approach were calculated as the number of pounds of pollutants removed by implementing each approach weighted by the relative toxicity of those pollutants. The results of these calculations are shown in the second columns of Tables 4A and 4B. (The "Cost-Effectiveness Report," which is available in the record of this rulemaking, supports this presentation, describes the cost-effectiveness procedures in detail, and presents the toxic weights used for each approach.) Cost-effectiveness is calculated as the ratio of the incremental annual cost to the incremental pound equivalents removed by the levels of control shown in the tables. So that comparisons of the cost-effectiveness among industries may be made, the annual costs are converted to 1981 dollars.

The cost-effectiveness of the regulatory approaches is shown in the last column of Tables 4A and 4B below. All approaches are cost-effective:

Assuming a failure rate of 15 percent as shown on Table 4A, Approach C is $69 and Approach A is $19 per pound equivalent removed.

Assuming a failure rate of 2 percent as shown on Table 4B, Approach D is $54 and Approach B is $16 per pound equivalent removed.

These costs are well within the range of the cost-effectiveness of new source performance standards for other industries.

TABLE 1.—COSTS AND OTHER SIGNIFICANT PARAMETERS OF PROPOSAL OPTION AND OF COMPARABLE APPROACH A, DRILLING FLUIDS AND CUTTINGS

[1986 dollars]

Parameter	At proposal 1985 for selected option	Revised estimate for comparable approach A
Number of wells drilled annually	1,166	978
Average price of oil per barrel 1985/6 to 2000	$32	$21
Percent barged:		
Drilling fluids	10%	23%
Drilling cuttings	10%	[1] 7%

TABLE 1.—COSTS AND OTHER SIGNIFICANT PARAMETERS OF PROPOSAL OPTION AND OF COMPARABLE APPROACH A, DRILLING FLUIDS AND CUTTINGS—Continued

[1986 dollars]

Parameter	At proposal 1985 for selected option	Revised estimate for comparable approach A
Average cost of barging per well where barging is required:		
Fluids	$113,000	$251,000
Cuttings	$69,000	$73,000
Total barite costs	$11,200,000	$10,504,000
Monitoring costs per well	$3,734	$3,100

TABLE 1.—COSTS AND OTHER SIGNIFICANT PARAMETERS OF PROPOSAL OPTION AND OF COMPARABLE APPROACH A, DRILLING FLUIDS AND CUTTINGS—Continued

[1986 dollars]

Parameter	At proposal 1985 for selected option	Revised estimate for comparable approach A
Total annual costs:		
Fluids	$27,664,000	$71,140,000
Cuttings	$9,072,000	$5,477,000
Total	$36,736,000	$76,617,000

[1] Includes both cuttings associated with water-based fluids (about 3%) and cuttings associated with mineral-oil based fluids.

TABLE 2.—REGULATORY COST OF ALTERNATIVE POLLUTION CONTROL APPROACHES

[$000, 1986 dollars]

Parameter	Alternative pollution control approaches			
	Approach A	Approach B	Approach C	Approach D
Drilling fluid costs	$71,140	$45,185	$60,636	$34,681
Clean barite	10,504	10,504	0	0
Mineral oil substitution for diesel oil	1,706	1,706	1,706	1,706
Static sheen test failure	8,288	8,288	8,288	8,288
Toxicity test failure	48,099	22,144	48,099	22,144
Monitoring costs	2,543	2,543	2,543	2,543
Drill cuttings costs	5,477	5,477	5,477	5,477
Static sheen test failure	1,735	1,735	1,735	1,735
No discharge with use of oil-based muds	3,253	3,253	3,253	3,253
Monitoring costs	489	489	489	489
Total annual costs [1]	76,617	50,662	66,113	40,158
Average costs per well drilled	78	52	68	41
Percent of drilling fluids barged	23.3%	12.5%	23.2%	12.5%
Percent of drill cuttings barged [2]	6.7%	6.7%	6.7%	6.7%

[1] For 978 wells per year, based upon average oil price of $21/bbl.
[2] Includes both cuttings associated with water-based fluids and cuttings associated with mineral oil-based fluids.
Source: EPA estimates.

TABLE 3.—ECONOMIC IMPACTS OF THE OFFSHORE OIL AND GAS REGULATION ON MUDS AND CUTTINGS, 1986–200 0[a]

[Selected Paramenters]

Approach [b]	Total annual cost of regulation	Change in drilling costs per well		Project Impacts; 12-well, oil-only platform in the Gulf of Mexico			Impacts for a typical major oil company [f]					
				Change in NPV w/Reg. vs. NPV w/o Reg.	Cost per barrel of oil [c]		Change in annual debt	Reg. debt compared to:		Current ratio [d]	Long term debt to equity [e]	Debt to capital [e]
								Total Assets	Net worth			
	Dollar millions	Dollar thousand	Percent	Percent	Dollar	Percent change	Dollar millions	Percent	Percent		Percent	Percent
A	76.6	78	1.95	−3.25	21.44	0.37	2.12	0.006	0.014	1.11	35.6	23.8
B	50.7	52	1.30	−2.15	21.41	0.23	1.408	0.004	0.009	1.11	35.6	23.8
C	66.1	68	1.70	−2.81	21.43	0.33	1.83	0.005	0.012	1.11	35.5	23.8
D	40.2	41	1.03	−1.71	21.40	0.19	1.11	0.003	0.007	1.11	35.6	23.8
Industry Average Baseline		$4,000 ($000)		$18,239 ($000)	$21.36			$35,893 $millions	$15,314 $ millions	1.11	35.5	23.8

NPV - net present value.
Reg. - regulation.
[a] 1986 dollars. Based on projected average oil price of $21 per barrel and 978 wells drilled per year for the years 1986–2000.
[b] Approach A is the proposed approach. It is costed assuming a 15% increase in barite costs to meet mercury and cadmium limitations in the discharged muds and a toxicity test failure rate of 15% for water-based muds with no oil added, Approach B is the same as A but assumes a toixity test failure rate of 2%. Approach C is based on an alternative metals limitation in the stock barite and an assumed toxicity test failure rate of 15%. Approach D is the same as approach C except the toxicity failure rate is 2%. (See Section II and IV of the notice for details.)
[c] Includes transfer payments such as lease payments, royalties, oil and gas taxes, corporate income taxes.
[d] Current asset/current liabilities. Assume working capital financing.
[e] Assumes debt financing

TABLE 4 A—COST-EFFECTIVENESS FOR OFFSHORE OIL AND GAS, DRILLING FLUIDS AND CUTTINGS—RANKED BY ANNUAL POUND EQUIVALENTS (PE) REMOVED

[Assuming 15% failure rate] [1]

[1981 dollars] [2]

Approach [3]	Total annual		Incremental		Incremental cost effectiveness $/PE (1981 $)
	PE Removed	Cost (1981 $) ($000)	PE removed	Cost (1981 $) ($000)	
Current	0	0			
C	787,685	54,639	787,685	54,639	$69
A	1,237,607	63,320	449,922	8,681	$19

[1] As explained in the text above and in the cost-effectiveness analysis report which supports this notice, Approaches A and C assume a 15 percent toxicity failure rate for water-based drilling fluids to which no oil is added.

[2] Factor for converting costs in 1981 dollars to 1986 dollars is: 1.21 The cost-effectiveness is standardized in 1981 dollars to facilitate comparison among numerous regulated industries.

[3] Approach A limits Hg and Cd to 1 mg/kg each in discharged drilling fluids. Approach C limits Hg to 1.5 mg/kg and Cd to 2.5 mg/kg in discharged drilling fluids.

TABLE 4 B—COST-EFFECTIVENESS FOR OFFSHORE OIL AND GAS, DRILLING FLUIDS AND CUTTINGS—RANKED BY ANNUAL POUND EQUIVALENTS (PE) REMOVED

[Assuming 2% failure rate] [1]

[1981 dollars] [2]

Approach [3]	Total annual		Incremental		Incremental cost effectiveness $/PE (1981 $)
	PE removed	Cost (1981 $) ($000)	PE removed	Cost (1981 $) ($000)	
Current	0	0			
D	610,939	33,188	610,939	33,188	$54
B	1,167,850	41,869	556,911	8,681	$16

[1] As explained in the text above and in the cost-effectiveness analysis report which supports this notice, Approaches B and D assume a 2 percent toxicity failure rate for water-based drilling fluids to which no oil is added.

[2] Factor for converting costs in 1981 dollars to 1986 dollars is: 1.21 The cost-effectiveness is standardized in 1981 dollars to facilitate comparison among numerous regulated industries.

[3] Approach B limits Hg and Cd to 1 mg/kg each in discharged drilling fluids. Approach D limits Hg to 1.5 mg/kg and Cd to 2.5 mg/kg in discharged drilling fluids.

V. Environmental Assessment Information

A. Mercury and Cadmium in Barite and Environmental Consequences on Aquatic Life

Mercury and cadmium are two potentially toxic constituents of barite-containing drilling fluids. The potential environmental impacts of the discharges of these metals in drilling fluids have been investigated by the Agency (1).

Sediment mercury and cadmium concentrations resulting from barite-containing drilling fluid discharges were estimated and evaluated to determine environmentally significant sediment alterations. Specifically, the Agency's study:

- Assesses the degree to which sediment levels of mercury and cadmium may be altered at the local level (*e.g.*, within a 500 m radius of the drilling facility);
- Assesses the degree to which sediment levels of mercury and cadmium may be altered at the regional level for three cumulative discharge scenarios;
- Evaluates environmental consequences of sediment enrichment by mercury and cadmium with regard to what is known concerning the biological availability of these metals.

All modeled levels of mercury (1 and 3 ppm) and cadmium (1 and 5 ppm) in barite showed some increase in sediments within 500 meters of the model 58-well Gulf of Mexico platform (the model size facility selected for the environmental assessment). At low background sediment levels (0.01 ppm for mercury and 0.04 ppm for cadmium) and higher assumed levels of 3 ppm for mercury and 5 ppm for cadmium in barite, the average increase were in excess of 2000% (an increase of 20 times) for mercury over 800% (an increase of 8 times for cadmium. The average increases at the lower assumed levels of 1 ppm for mercury and cadmium in barite were over 600% and over 160%, respectively at low background sediment levels. At high background sediment levels (0.04 ppm for mercury and 0.2 ppm for cadmium), the average increases in sediment were approximately 500% for mercury and 160% for cadmium at higher specified levels, and approximately 160% for mercury and 25% for cadmium at lower assumed levels (1 ppm each).

Because a large fraction of the drilling muds is expected to be transferred beyond the immediate vicinity of the platform, the cumulative impacts of multiple drilling were analyzed for three regional scenarios: the Santa Barbara Channel, a Louisiana continental shelf area, and the entire Louisiana Gulf of Mexico lease area.

The estimated increase in added barite concentrations at the sediment surface after 24 years would be 1524 ppm for the Santa Barbara Channel, 933 ppm for the Louisiana shelf area, and 272 ppm for the entire Louisiana lease area. Ther analysis assumes typical sediment mixing conditions, and that all solids stay within the regional areas modeled. At low background mercury and cadmium sediment levels (0.01 ppm

for mercury and 0.04 ppm for cadmium) and barite containing 3 ppm of mercury and 5 ppm of cadmium, the increases of mercury and cadmium in the Santa Barbara Channel sediments were estimated at 46% and 19% respectively. At high background sediment levels (0.04 ppm mercury and 0.2 ppm cadimum), the increases would be 11% and 4%, respectively. If barite controls 1 ppm of mercury and cadimum the projected regional increases are 15% and 4% respectively for low background sediment levels, and 3% for mercury and <1% for cadimum for high background sediment levels.

For the Louisiana shelf and the entire Louisiana offshore lease area the resulting projected regional increases for the same mercury and cadimum barite and background sediment levels were approximately ⅔ and ⅙ of the levels estimated for the Santa Barbara Channel due to lower estimated well density.

This analysis shows that barite could be a measurable source of mercury and cadmium near drilling platforms in sediments if present at the discharge levels used in this analysis, even if the sediment transport processes eventually remove some fraction of the barite from the shelf sediments and redeposit it in deeper offshore areas where the environmental impacts are expected to be less signifiant.

The comments received from the industry on the proposed regulation stated that the cadimum and mercury associated with drilling fluids are present as insoluble sulfides in barite and have a very low bioavailability to marine organisms.

The Agency recognizes that an incremental increase in sediment metals does not necessarily translate into a comparable increase of impacts on marine life. However, these data show that mercury and cadmium discharged with the barite containing drilling fluids have a potential to cause environmental problems in the marine environment and a potential for transport to humans through consumption of contaminated seafood, especially shellfish.

The environmental consequences of elevated local and regional concentrations of mercury and cadmium due to barite-containing drilling fluids are difficult to judge, because many aspects related to the environmental fate of these metals in marine environment are not well understood. An extensive literature review was carried out as part of this study on fate and effects of these metals on marine environments, especially with respect to bioavailability, bioaccumulation, and biomagnification in the food chain.

Based on the U.S. Congress, Office of Technology Assessment (OTA) Report (2), the ability of a metal to affect marine organisms depends primarily on its form (e.g., dissolved or particulate, bound to other substances or free), and this is greatly affected by site-specific conditions. In their particulate form, most metals tend to adsorb onto other particles that eventually settle from the water and are deposited as sediment. Once deposited in oxygen-poor sediments, the chemical form of these metals is generally stable. However, if the sediments are subsequently oxygenated, some metals, including cadmium, may dissolve and be slowly released into the water column, and may be taken up by non-benthic organisms. Sediments can be oxygenated (and also resuspended) by bioturbation, storms, and other disturbances. Metals also can be released as a result of other changes such as salinity fluctuation in estuaries. Microorganisms in sediments can modify the slightly toxic inorganic mercury and convert it to highly toxic and volatile methyl mercury.

OTA's report (2) identified a significant potential for transport of both mercury and cadmium to humans through consumption of contaminated seafood. Marine organisms can ingest metals that are dissolved in the water or they can ingest particulate matter onto which metals are adsorbed. Once ingested, some metals can pass through the gut and be excreted, while others cross the gut membrane and accumulate in organismal tissue. Both cadmium and mercury tend to bioaccumulate in marine organisms. Mercury in its methylated form is the only metal known to biomagnify in successive levels of the aquatic food chain. Even when bioaccumulation is not a factor, significant quantities of metals can concentrate in the gut and gills of marine organisms without actual absorption into the tissues. This is especially true for shellfish that filter large quantities of seawater and ingest solid matter during feeding (*e.g.*, oysters, clams, mussels).

Because people generally eat these organisms in their entirety, toxic substances can be passed to humans even in the absence of bioaccumulation. This mechanism probably accounts for most instances of shellfish contamination involving metals that do not bioaccumulate.

Results of investigation of sources, fates, and effects of metals near municipal wastewater outfalls in southern California coastal waters indicate that: (1) The largest portion of metals entering the system is in particulate form, but a large portion may be released into the dissolved phase upon mixing with seawater and may be carried out of the region by prevailing currents; (2) despite these losses of the solubilized fraction, the particulate and sediment concentrations of metals in the vicinity of municipal wastewater outfalls are highly elevated; (3) filter feeders (*e.g.*, scallops, mussels) have exhibited higher metal levels near sources of contamination as compared to "control" areas; (4) there is evidence of bioaccumulation of metals in filter-feeding bivalves in the vicinity of marine outfalls; (5) concentrations of cadmium in muscle tissue of dimersal fish tend to be less than in sediments, but the concentrations in the liver or hepatopancreas of animals could exceed that of the sediments.

Analysis conducted by Trefrey et al. (3), investigating trace metals in barite indicates that mercury is tightly bound in barite and not easily released. Cadmium, however, is more easily leached from the barite than many other metals.

None of the above data, however, provide conclusive evidence relative to the stability or bioavailability of mercury and cadmium in barite-containing drilling fluids. Work is currently underway within EPA and NOAA to define the equilibrium partitioning of metals in sediments, pore water, and organisms. Results of these efforts are expected to aid in the evaluation of potential impacts of mercury and cadmium and other metals in barite-containing drilling fluids on aquatic organisms. However, the partitioning of these metals from barite may be quite different from the partitioning from other discharges (*e.g.*, sewage particles) or from ambient sediments.

As discussed in previous sections of this notice, the Agency has found that as the levels of mercury and cadmium in barite are decreased, the other toxic metals in barite are also found to generally decrease. Arsenic, lead, zinc and other toxic metals may also be released into the marine environment as a result of barite discharges. In addition, the levels of cadmium and mercury that can be expected to occur in sediments as a result of potential offshore drilling activities will be dependent on the level of drilling activity that will occur, the energenics of the region, and the background levels of these metals in the sediment. All of these factors will vary from one region of the country to another.

The Agency is continuing to evaluate the environmental fate of mercury, cadmium and other toxic metals

associated with barite to determine the impacts of these discharges in the marine environment. The Agency is, therefore, soliciting new information related to the occurrence, bioavailability, release, bioaccumulation, and other related data on mercury, cadmium and other toxic metals in barite and in drilling fluids.

B. Analysis of Shallow Water Dispersion Models

As part of the ongoing evaluation of potential impacts from offshore oil and gas discharges, discharge dispersion models were being examined as a component in an assessment of the fate and transport of drilling muds and produced water in the marine environment. For the most part, models have been applied to discharge situations in relatively deep waters (greater than 40 meters in depth); their appropriateness and reliability in more shallow waters (40 meters to mean high tide) is much less well known.

In addition to discharges occurring in the deeper waters of the Outer Continental Shelf (OCS), produced waters, drilling fluids, and other oil and gas discharges are released in a geographic zone that extends from the high tide line out to the OCS. In the Gulf of Mexico, where over 90% of all offshore production takes place, this geographic zone includes the offshore area extending 9 miles off the coast of Texas and 3 miles off the coast of Louisiana. Of all offshore wells drilled in State waters off the coasts of Texas and Louisiana, approximately 11% are in water depths of greater than 20 meters, some 43% are in water depths of 10 to 20 meters, and about 46% are in water depths of less than 10 meters.

Appropriate dispersion models for discharges occurring in these shallow waters need to be identified. In response to this need, the Agency has analyzed existing dispersion models to identify the limitations of their shallow water utility (4). Several potentially relevant dispersion models were identified and reviewed by the Agency to determine their applicability to shallow water, offshore oil and gas discharges (Table A). Of the models reviewed, some were rejected as not being appropriate for the type and/or methods of discharge or receiving waters. Although under other circumstances these models have utility, they were judged to have limited, general application with regard to shallow water marine discharges, oil and gas discharges, or the type of data presently available either for these areas or types of discharges.

The remaining models were divided into three categories and analyzed in more detail. The first category includes models concentrating primarily on the fate of discharged solids. These models may also predict the fate of the liquid phase. However, in these models the liquid phase was considered as a secondary objective. The second category includes models that deal primarily with the liquid phase of discharges; often, these models address thermal effects. The third category includes models designed primarily to address discharges of toxics.

Table A. Models Reviewed for Shallow Water Dispersion Applicability

I. Models that were reviewed, but were not found relevant for these receiving water areas, discharge types, or available data:

DIFHD (Army Corps of Engineers, 1987)
UPLUME and ULINE (EPA, 1985)
DYNTOX (EPA, 1983)
HSPF (EPA, 1985)
MINTEQ (EPA, 1984)
PRZM (EPA, 1984)
QUAL2E and QUAL2E–UNCAS (EPA, 1987)
SWMM (EPA, 1987).

II. Models that were reviewed and considered for further study:

Category 1: Primarily Solid Phase Models
OFFSHARE OPERATORS COMMITTEE (OOC) MUD DISCHARGE MODEL (M.G. Brandsma et al., 1983)
A TIME-DEPENDENT, TWO-DIMENSIONAL MODEL FOR PREDICTING THE DISTRIBUTION OF DRILLING MUDS DISCHARGED TO SHALLOW WATER (EPA–2D) (Yearsley, 1984)
DIFID and DIFCD (Army Corps of Engineers, 1987)
DRIFT MODEL (Runchal, 1983).
Category 2: Primarily Liquid Phase Models
PDS MODEL (Pritch, Davis, and Shirazi, 1974)
UOUTPLM, UMERGE, and UDKHDEN (EPA, 1985)
(MODEN) Motts-Benedict.
Category 3: Primarily Toxic Discharge Models
EXAM 2 (EPA, 1985)
WASP 3, EUTRWASP, and TOXIWASP (EPA, 1986).

1. Evaluation of Potentially Appropriate Models

Those models considered to be potentially appropriate for dispersion of drilling fluids and produced water were evaluated. Below, the major characteristics and limitations of each model are summarized and a recommendation as to the potential applicability of each for modeling shallow water dispersion of drilling fluids and produced water is provided.

1.1 Primarily Solid Phase Models (Mud Discharge Models)

1.1.1 Mud Discharge (OOC) Model

Characterization:

—Time-dependent three-dimensional model.
—Calculates nearfield initial development of dynamic plume.
—LaGrangian treatment of diffusion phase; tracks individual clouds.
—Material settling out of dynamic plume acts as source of Gaussian distributed clouds.
—Concentrations in water column found by superposition of contributions from nearby clouds.
—Concentration throughout water column and on the bottom are provided at any time.
—Developed specifically for drilling muds.
—Allows for variable topography, time-variant density and velocity profiles, and wide range of discharge conditions.
—Diffusion coefficient calculation is dependent on surface and bottom conditions.

Limitations:

—Highly dependent on diffusion coefficient.
—The model does not account for the effects of flocculation of mud in water column.
—The algorithm used in the model to cause the early separation of fine material near the discharge source (during the jet phase) has no theoretical basis.
—The model cannot simulate the situation where the plume descends exactly vertically in shallow water or combined with a much higher vertical to horizontal velocity ratio.
—Probably not appropriate when surface waves induce significant variations in water depth (10–20%).
—Current version does not cover produced water; a revised model, not yet released, covers produced water.

Recommendation:

—Applicable at depths greater than 5 meters.
—Not applicable at depths less than 2 meters.
—Uncertain applicability from 2 to 5 meters.

1.1.2 EPA2–D model

Characterization:

—Time-dependent, two-dimensional model.
—Assumes plume is vertically mixed.

—Conservative in the nearfield in shallow water (assumes complete mixing); may not be conservative in deeper water (*i.e.*, where complete vertical mixing is progressively less valid).
—More applicable to the farfield.
Limitations:
—Does not include initial mixing.
—Highly dependent on turbulent diffusion.
—Not conservative for extremely short time scales or deeper water (see above).
Recommendation:
—Appropriate, especially for very shallow water (2 meters or less), but needs to be qualified.
1.1.3 DIFID and DIFCD models
Characterization:
—Cover instantaneous and continuous discharge. Modified to include concentration profiles with depth. Developed for dredge muds.
Limitations:
—Only consider bottom deposition and horizontal distribution.
—Need to know how deep the plume is.
Recommendation:
—Not appropriate because superseded by other models (OOC model for example).
1.1.4 DRIFT model
Characterization:
—Joint probabilistic trajectory model for current speed and direction.
—Focuses on bottom deposition.
Limitations:
—Calculation does not depend on diffusion coefficients.
—Covers only low rate of cuttings discharge.
Recommendation:
—May be appropriate, but has limited utility.
1.2 Primarily Liquid Phase Models
1.2.1 PDS model
Characterization:
—The only model that considers surface plumes.
—Covers surface discharge and assumes plume floats on surface and there is no interaction with bottom.
—Perhaps useful with low salinity and high temperature.
Limitations:
—Does not apply if drilling material is negatively buoyant.
—Model does not include sediment or boundary effects.
Recommendation:
—Appropriate for surface plumes.
1.2.2 OUTPLM and UMERGE models
Characterization:
—UMERGE is a revised version of OUTPLM model.
—Two-dimensional, multiple port version of OUTPLM model.
—Discharges from several ports merge together in a "top-hat" profile.
—Current speed and direction are constant with time.
Limitations:
—Does not include development zone.
—Current must be normal to line of diffuser.
—Assumes no interaction with surface or bottom boundaries.
—Does not account for settling of solids or ambient stratification.
1.2.3 UDKHDEN model
Characterization:
—Three-dimensional model.
—No restrictions on discharge direction with respect to ambient current.
—Diffuser, single or multiple port.
—Allows for variable density stratification and variable current.
Limitations:
—Assumes currents and ambient density are constant with time.
Recommendation:
—Appropriate for negatively buoyant liquid phase discharges until plume reaches to within one-half to one plume width of the bottom.
1.2.4 MOBEN model
Characterization:
—Two-dimensional model.
—Liquid phase, vertically integrated discharge over shallow depth.
—Assumes constant depth.
—Discharge from rectangular trough.
Recommendation:
—May be useful in shallow water.
1.3 Primarily Toxic Discharge Models
1.3.1 EXAM 2 model
—May have some applicability because of eutrophication and dissolved oxygen components.
—Probably is concentration-dependent.
—Need to convert measured effluent BOD to theoretical values.
—Input data availability is questionable.
1.3.2 WASP 3, EUTRWASP, and TOXIWASP
Characterization:
—Includes hydrodynamics, conservative mass transport, eutrophication-dissolved oxygen kinetics, and toxic chemical-sediment dynamics.
—Multidimensional and time variable capabilities.
—Simulates conventional and toxic pollution.
Limitations:
—User must write applicable kinetic equations for a given problem.
—Simulates transport and transformation of a single chemical.
—Chemical concentration must be near trace levels.
—Requires user to specify flow fields.
Recommendation:
—Limited utility for a multi-constituent effluent, such as drilling fluids.

2. Recommended Modeling Approach

The OOC model, which was developed principally for drilling muds, appears to be potentially applicable for shallow water dispersion of drilling fluids at depths greater than 5 meters, and possibly to 2 meters. At any depth below the fixed depth to which the OOC model is found to be inappropriate, the EPA Time-Dependent, Two-Dimensional Model for Predicting Distribution of Drilling Muds Discharged to Shallow Water (EPA2–D) should be used. While this model is appropriate at a depth of 2 meters, it may require additional field verification for shallower water.

The EPA liquid phase models, particularly UMERGE and UDKHDEN, are potentially applicable for modeling nonsurface or vertically downward discharge of produced water. For surface discharge, the PDS model may be appropriate; it is the only model that considers surface plumes. When the plume reaches to within one-half to one plume width from the surface or bottom, (the point at which UMERGE and UDKHDEN are no longer appropriate), a two-dimensional model such as the Motts-Benedict (MOBEN) model or the EPA2–D model should be used.

As a part of this notice, the Agency is requesting comments on the list of models reviewed, the models selected as being appropriate for shallow water discharges of drilling fluids and produced water, and the model scenarios used to assess both models behavior and effluent behavior. The discharge, operational, and ambient conditions that were used as input to the selected models and the results of model runs are presented in the draft report titled "Analysis of Effluent Dispersion Models Potentially Applicable to Shallow Water Discharges from Oil and Gas Activities" (4), which is available in the record of this rulemaking.

References for Section V

(1) U.S. EPA, 1987, Estimates of Degree of Sediment Alteration Associated with Various Levels of Mercury and Cadmium in Barite.

(2) U.S. Congress, Office of Technology Assessment, Wastes in Marine Environments, OTA–0–334 (Washington, DC.: U.S. Government Printing Office, April 1987).

(3) Trefrey, J.H., et al., 1986, "Draft and Final Report to the Offshore Operators Committee: Forms, Reactivity, and Availability of Trace Metals in Barite."

(4) U.S. EPA, 1988, "Analysis of Effluent Dispersion Models Potentially Applicable to

Shallow Water Discharges from Oil and Gas Activities."

Part 2

I. Summary

EPA is currently reconsidering the prohibition on the discharge of drill cuttings that contain oil-based drilling fluid, as proposed in the August 26, 1985 proposal and is considering as an alternative the development of an oil content limitation for drilling waste streams. "Oil content" would be used as a non-conventional indicator pollutant for the BAT and NSPS levels to control the discharge of priority and non-conventional organic pollutants present in the hydrocarbons that are added to drilling fluids, both as a lubricity agent and for spotting purposes, and in the hydrocarbons from formation fluids that are entrained in the drilling fluid. These same priority and non-conventional pollutants are present in the associated drill cuttings waste stream and may be similarly controlled by an oil content limitation. An oil content limitation would apply to the discharged drilling waste and would not differentiate between diesel oil or mineral oil. The oil content measurement would be performed according to the "retort-gravimetric" procedure discussed in section IX of this part and is presented in Appendix A of this notice.

Specifically, the Agency is now considering the establishment of an oil content limitation of up to 1.0% by weight (whole sample basis) for drill cuttings based upon application of thermal distillation, thermal oxidation, or solvent extraction technologies. An oil content limitation would apply to drill cuttings associated with both water-based and oil-based drilling fluids and would apply as a maximum value (no single sample to exceed). The Agency believes that the technologies discussed below are technologically feasible to implement for the treatment of drill cuttings to reduce oil content.

The Agency also has considered the establishment of an oil content limitation for oil-based drilling fluids. The Agency has tentatively rejected this approach because existing regulations (BPT) effectively prohibit the discharge of oil-based drilling fluids.

Finally, the Agency has considered the establishment of an oil content limitation for waste-based drilling fluids that contain added or entrained oil. The Agency believes that processing rate and storage limitations may make it impracticable to implement an oil content limitation for water-based drilling fluids based on using any of these technologies to treat water-based drilling fluids at offshore drilling sites. These factors are discussed in Section V of this part of today's notice.

The technologies discussed in this part of the notice would achieve a residual oil content in the processed cuttings which would be lower than those achieved using cutting washer (*i.e.*, BPT) technology. The current regulation prohibits the discharge of "free oil" as evidenced by the presence of a visible sheen upon the receiving water after discharge of the drilling waste.

The BAT and NSPS regulations for drill cuttings proposed on August 26, 1985 would prohibit the discharge of drill cuttings associated with the use of an oil-based drilling fluid. Several commenters on the proposed regulations argued that the discharge of cuttings associated with oil-based fluids should be allowed if the oil content were controlled to acceptable levels, *i.e.*, the discharged cutting did not violate the sheen test used to detect free oil. The Agency proposed to prohibit unconditionally the discharge of such cuttings because of substantial historical experience with the seepage of oil from such cuttings after they were discharged. Though such cuttings may comply with the BPT "free oil" limitation upon discharge, they could release substantial amounts of oil from their location on the ocean floor long after the original discharge occurred.

Allowing the discharge of treated drill cuttings associated with oil-based drilling fluids, as opposed to a prohibition on their discharge, could lead to the continued development of control/treatment technologies, reduced regulatory compliance costs for the offshore segment of the industry, and alleviation of potential problems with land disposal of drilling wastes in coastal areas.

The remainder of this part of today's notice presents more detailed information and discussion on oil content limitations for drilling wastes. After consideration of the comments and any additional data received during the comment period on this notice in addition to information in the existing rulemaking record, the Agency may decide to propose effluent limitations guidelines and standards for the control of oil content in drilling wastes.

II. Background

As stated elsewhere in this notice, on July 2, 1986 EPA Regions IV and VI issued a general National Pollutant Discharge Elimination System permit (the General Permit) regulating oil and gas exploration, development, and production activities in federal waters of the Gulf of Mexico. One of the requirements of the general permit is a prohibition on the discharge of drill cuttings associated with the use of oil-based or inverse emulsion fluids.

During the comment period on the draft general permit, SEDSCO, Inc. (now Thermal Dynamics, Inc.) commented that it had developed a treatment technology which would be more effective in removing residual oil from drill cuttings than the previously available treatment methods. However, at that time, EPA decided that sufficient data were not available on the new technology to justify an alternative effluent limitation. The general permit implemented the "no discharge of free oil" requirement by prohibiting the discharge of any drill cuttings associated with oil-based muds. The final general permit for the federal waters of the Gulf of Mexico was issued on July 9, 1986.

On August 15, 1986, Thermal Dynamics, Inc. (TDI) sought to stay the general permit limitation for the drill cuttings waste stream. TDI argued that, in view of its newly developed technology, prohibiting the discharge of drill cuttings associated with an oil-based drilling fluid was unnecessarily stringent as an implementation of the "no discharge of free oil" limitation. TDI stated that sufficient data were available to EPA to demonstrate that substantial reductions in the oil content of cuttings could be achieved by termal distillation. TDI stated that this new technology could reduce the oil content of drill cuttings to a level equivalent to the "no discharge of free oil" limitation.

At the time Thermal Dynamics sought to stay the general permit limitation, only limited information was available on the efficiency of those technologies in actual use. EPA Region VI issued a "demonstration" permit to an oil company to allow for field data to be generated on the operation of a thermal distillation treatment system. A vendor-supplied thermal distillation unit was used to treat drill cuttings produced during actual drilling operations with oil-based drilling fluid. The cutting waste stream, processed cuttings, and associated by-product waste streams were characterized for oil content, solids content, priority pollutant organics and metals, RCRA (Resource Conseration and Recovery Act) ICR characteristics (ingnitability, corrosivity, reactivity) and acute toxicity (LC50).

In view of the additional information obtained on this and other technologies for treating drilling wastes, EPA is reconsidering the proposed prohibition on the discharge of drill cuttings that

contain oil-based drilling fluid. EPA is now considering alternatives to the proposed discharge prohibition.

One alternative being considered would allow the discharge of treated drill cuttings that meet a specified oil content limitation. Drill cuttings discharges would still have to achieve the BPT limitation of 'no discharge of free oil'.

III. Description of Technologies for Controlling Oil Content of Drilling Wastes

The preamble to the 1985 proposed regulations include a discussion of cuttings washer technology and its effectiveness for reducing the oil centent of drill cuttings. The Agency found that cuttings washer systems that were studied were reported to reduce the oil content of drill cuttings to approximately 10% by weight. However, the Agency rejected the use of cuttings washer technology as a basis for an oil content limitation because it believed that the cuttings washer technology did not achieve a reduction in oil content of the drill cuttings sufficient to meet the BPT requirement of 'no discharge of oil'. Since 1985 the development and use of cuttings washer technology appears to have diminished, possibly due to the relatively high residual oil content of the processed cuttings and problems with proper disposal of by-product water/oil/detergent wastes.

After the proposed regulations were published, the Agency investigated other technologies for reducing the oil content of drilling wastes. These technologies fall into two general classes. In one class are thermal processes (thermal distillation or thermal oxidation). In the other class are solvent extration processes. All of the technical and cost information provided by the vendors of these technologies and additional information collected by the Agency is available in the public record for this rulemaking.

The Agency has evaluated vendor technical information and collected performance data on the treatment of drilling wastes, specifically drill cuttings associated with the use of oil-based drilling fluids, by thermal distillation. This technology appears to be technologically feasible to implement for the reduction of oil contained in drilling wastes. Based on data obtained on these technologies, the costs on a per well basis of onsite treatment using thermal distillation or solvent extration appear to be in line with the cost estimates for transport to shore and land disposal of drilling wastes.

The basic thermal distillation process has been adapted in variations by several vendors. The process removes hydrocarbons and water from drilling fluids and drill cuttings. There are three types of thermal systems known to the Agency that are available for the treatment of drill cuttings.

T–1 Process

One type of system to treat drilling wastes consists of electrically heated chambers in which the drilling wastes are exposed to controlled heat sufficient to volatilize the residual oil and water in the wastes. (This will be referred to as the "T–1" process). The electrical energy required by the process is provided by generators at the treatment site.

The processed wastes in the form of a granular material are cooled and slurried by mixing with seawater and are then discharged to the ocean. The water and hydrocarbon vapors of driven from the wastes are condensed and then separated in an oil/water separator. The hydrocarbons recovered can potentially be recycled and reused in active mud system, subject to meeting the specifications for oil additives to the mud. Alternatives to recycling the recovered hydrocarbons would be to dispose of them separately or to market them for other purposes (*e.g.*, heating fuel). If the revovered water meets effluent limitations for produced water, if could be suitable for discharge. It the recovered water does not meet these effluent limitations if may be appropriate to introduce it to the produced water treatment system. If there are no production facilities at the site the recovered water may need to be transported to another facility for adequate treatment or handling. Exhaust gases from the heating chambers in the thermal distillation unit and from the condenser would be treated to achieve appropriate air emissions standards.

These units are mobile and can be installed and operated on a rig to process wastes onsite. Full-size units have been field tested to treat drill cuttings. The T–1 process has been used to treat drill cuttings at an offshore facility in the Gulf of Mexco, in the North Sea, onshore in Alaska, and at onshore drilling sites in the Netherlands. At these locations, full-size units were used to treat drill cuttings for oil content reduction. The results of sampling performed by the vendor and by EPA indicate that the process can achieve significant reduction in the oil content of drill cuttings. Observations to date indicate that this technology is capable of reducing oil content levels to 1% or less by weight in processed cuttings (associated with oil-based muds) and that geographic location is not a factor or restriction in locating and operating this technology. (Source: Vendor and EPA sampling data).

A thermal distillation unit of this type was tested under the demonstration permit issued by EPA. Performance data on this unit is presented and discussed in Section VII of this part of the notice.

T–2 Process

Another variation of the thermal distillation process has been developed for the reduction of hydrocarbons in drilling fluids and drill cuttings. (This will be referred to as the "T–2" process). The drilling wastes are routed to the drying section of the process where hydrocarbons and water are driven from the wastes. The water and hydrocarbons driven off the cuttings are passed through condensers and the resultant liquid is processed to separate the oil from the water. The oil is placed in storage for further purification and the water is processed to effect additional separation of oil from the water. If the recovered water meets effluent limitations for produced water, it could be suitable for discharge. The unit has been used for offshore operations on mobile drill units, platforms or barges.

A prototype "demonstrator" unit has been used to process drill cuttings. An oil content of less than 0.5% by weight was reportedly achieved in test with this unit. (Source: Vendor-supplied information). A full-scale unit has not yet been tested under actual filed conditions.

T–3 Process

A third variation on the thermal distillation technology has been developed. This process uses indirect heating to vaporize water and hydrocarbons adhering to drilling wastes. (This will be referred to as the "T–3" process). In this process, drilling wates are fed to a blender which maintains a homogeneous slurry feed to the process unit. A closed heat transfer system around the processing unit provides the heat required to vaporize the water and hydrocarbons from the drilling waste. The proposed source of heat is exhaust gases from the rig electricity generator. The processed wastes are dry and granular in nature. The vaporized water and hydrocarbons are condensed for their recovery. The condensed hydrocarbons and water can be separated with potential for the hydrocarbons to be reused in the active mud system subject to meeting the specifications for oil additives to the mud. If the recovered water from the separator meets effluent limitations for

produced water, if could be suitable for discharge.

The process is implemented using a skid-mounted mobile unit which is reportedly suitable for use either offshore or onshore. This version of distillation technology has been tested on a pilot scale basis but not on a full-scale basis. Pilot-scale tests on drilling wastes are reported to have produced cuttings consistently with an oil content of 6% or less by weight. (Source: Vendor-supplied information).

T–4 Process

A thermal oxidation process has also been developed which can be used to treat drilling wastes. (This will be referred to as the "T–4" process). The process consists of a direct fired, countercurrent rotary kiln where the wastes are thermally oxidized at temperatures typically in the range of 1600 F to 2500 F. The kilns can be over 200 feet in length. The dried solids produced in this process are reportedly suitable for use as aggregates or fill materials. The hydrocarbons driven from the wastes are partially oxidized in the kiln, while virtually complete combustion is achieved in an oxidation chamber and afterburner. At least two of these facilities are known to be currently operating on the Gulf of Mexico coast. However, due to the scale of the equipment as currently demonstrated, this process can not be implemented offshore or moved from site-to-site. However, drilling wastes could be transported to such land-based facilities for processing.

SE Process

In addition to the thermal technologies described above, a process based on solvent extraction technology has been developed to treat drilling wastes for the reduction of oil content. (This will be referred to as the "SE" process). In this process, the drilling wastes are directed to an extraction column and contacted with solvent to extract the oil. The oil-laden solvent flows from the extractor column to an evaporator, a separation column and a separator where the oil and solvent are separated. The oil phase flows to the fluidizing oil holding tank and the solvent is recycled to the process. Oil levels as low as 0.3% by weight in the processed wastes are reportedly achieved using this process. (Source: vendor-supplied information). When used to process used drilling fluids, one vendor reports that the resultant mud solids can be recovered for reuse.

The types of solvents have been used in the solvent extraction processes investigated by the Agency—chlorofluorocarbons and carbon dioxide. Either type of solvent reportedly will serve the operational needs of the process. Although the solvents are used and recovered in a closed-type system, there is potential for some solvent loss to the atmosphere. The Agency does not have quantitative information on the amount of such solvent losses from these processes. The Agency is particularly concerned about the potential for losses of chlorofluorocarbon-type solvents from these processes to the atmosphere because they contribute to depletion of the stratospheric ozone layer, and the Agency has recently limited their production. (53 FR 30566) The Agency is therefore soliciting comment and additional information to assess this potential, to quantify the rate and amounts of such losses, and to determine whether there are acceptable alternatives to use of chlorofluorocarbon-type solvents in these processes.

IV. Applicability of Thermal and Solvent Extraction Technologies for Treating Drilling Wastes

A. Drill Cutting

Hydrocarbons can be present in the drill cuttings as a result of the introduction of oil additives to the drilling fluid system for lubricity and spotting purposes and the entrainment of formation hydrocarbons in the drilling fluid system. When the drill cuttings are separated from the drilling fluid system, they contain some of the drilling fluids and drilling fluid system additives (*e.g.*, oil). The drilling fluids and oil additives that are carried into the drill cuttings wastes after their removal from the bulk mud system by rig shale shakers and other separation equipment are considered to be part of the drill cuttings waste stream.

Based upon performance and cost information provided by several vendors of thermal and solvent extraction technologies, it appears to be technologically feasible to implement one or more of these technologies at offshore drilling sites for the reduction of oil content in drill cuttings. The costs (on a per well basis) of onsite treatment using thermal distillation or solvent extraction appear to be in line with the cost estimates for transport to shore and land disposal of the same wastes. This applies to drill cuttings associated with the use of either water- or oil-based drilling fluids. These technologies appear to be well-suited and efficient for the reduction of oil content of such wastes over a broad range of hydrocarbon content.

There appear to be no insurmountable technical difficulties associated with the placement of such equipment at offshore drilling sites, operation of the equipment, intermediate handling of raw cuttings wastes to be processed, and handling of processed cuttings wastes and by-product streams. These technologies are effective in achieving substantial reduction in the amount of hydrocarbons adhering to the drill cuttings. Specific levels of oil content in drill cuttings wastes processed by these technologies are presented in later sections of this notice.

B. Drilling Fluids

Oil-Based Drilling Fluids. Thermal distillation/oxidation and solvent extraction technologies appear to be suitable for processing materials with variable hydrocarbon content. Oil-based drilling fluids (*i.e.*, invert emulsion) can typically contain 30% or more oil by volume (approx. 15% oil by weight). The high oil content (and low water content) of oil-based fluids should result in highly efficient removal and recovery of the oil by these technologies.

However, the existing BPT requirement of "no discharge of free oil" effectively prohibits the discharge of oil-based drilling fluids to surface waters of the U.S. An oil content limitation for oil-based drilling fluids that is based upon these technologies would be less stringent than the effective prohibition on the discharge of any of these wastes based upon the BPT requirement of no discharge of free oil. Because the Agency's interpretation of the Clean Water Act precludes the establishment of BAT, BCT, or NSPS limitations that are less stringent than BPT, it is not appropriate to consider such a limitation or standard that would allow a discharge of oil-based drilling fluids to surface waters.

Water-Based Drilling Fluids. Water-based drilling fluids to which oil has been added for lubricity or spotting purposes or such drilling fluids that contain entrained formation hydrocarbons are subject to the existing BPT requirement of "no discharge of free oil". However, the amount or concentration of oil contained in water-based drilling fluids for any of these reasons is at considerably lower levels that that in oil-based drilling fluids. Oil levels in such water-based drilling fluids typically range from nil to about 5% by volume (2.5% by weight). In many cases, water-based drilling fluids containing oil at levels in this range would not exhibit a visible sheen (BPT "no discharge of free oil") upon their discharge. This following discussion applies to the use

of thermal and solvent extraction technologies for treating such drilling fluids for the reduction of oil content.

Three major factors make the use of the technologies under consideration less practicable for treating water-based drilling fluids at an offshore drilling facility than for treating drill cuttings.

First, for a given well, the volume of drilling fluids to be handled is much greater than the volume of drill cuttings. Depending upon the capacity and processing rate capability of the treatment unit, the time to process waste drilling fluid generated during the drilling of a well could make it impractical to conduct the treatment operation at the offshore facility due to space restrictions for storing the material and extended time requirements for treatment if temporary storage of the raw wastes was available.

Second, even assuming that the waste drilling fluid generated during the drilling of the well can be processed effectively, there remains a substanial volume of drilling fluid to be disposed at the end of drilling. At the end of the drilling period, when the bulk drilling fluid system is ready to be disposed of, there is suddenly a large volume of drilling fluid that needs to be temporarily stored for subsequent processing (1400 bbl in the model case). Space for storing drilling fluids on an offshore oil facility is limited. Again, the length of time required to process the large volume of drilling fluids at the end of drilling may make it infeasible to store the drilling fluids on an offshore drilling facility prior to processing.

Third, in the case of the thermal technologies, the much higher relative water content of water-based drilling fluids requires a considerably higher input of thermal energy to the process in order to vaporize the water present. (The water must be vaporized in order to remove the oil). This directly increases the costs for treating the drilling fluid. In cases where the thermal process is operating at or near its maximum capacity, the high energy requirement (per unit of waste treated) may mean that the rate at which the drilling fluids can be processed will be substantially reduced. This in turn would require increased storage capacity for temporary onsite storage of the raw waste prior to treatment. (This factor would be of negligible consideration for the land-based thermal oxidation technology.)

One alternative might be to transport the bulk drilling fluid system to shore for subsequent treatment by one of the technologies under discussion. However, the cost for transportation to shore for processing would add considerably to the total cost of treatment. It may also require either the expense of duplicate equipment on shore to process the bulk mud system or else the cost and disruption associated with relocation of the processing equipment from the offshore facility to shore. This additional expense could make the use of these technologies for treating the drilling fluid less attractive to industry than, for example, land disposal.

V. Pollutant Reduction and Cost Estimates

The Agency has evaluated the technological feasibility and costs of applying thermal technologies and solvent extraction technologies to: (1) Drill cuttings associated with oil-based drilling fluids; (2) drill cuttings associated with water-based drilling fluids which contain oil that has been added for lubricity purposes, spotting purposes, or which contain entrained formation hydrocarbons; and (3) water-based drilling fluids to which oil has been added for lubricity purposes, spotting purposes, or which contain formation hydrocarbons.

This third scenario was evaluted to obtain estimates of increased energy requirements and processing time for treating water-based drilling fluids with a high water content. As discussed earlier, the Agency concluded from this analysis that the thermal distillation and solvent extraction technologies under consideration may not be appropriate as a basis for an oil content limitation for water-based drilling fluids at an offshore drilling site.

A. Pollutant Reduction Estimates

This subsection presents a summary of the model drilling scenario which is then used to establish estimates of oil content reduction in drill cuttings and water-based drilling fluids wastes by the technologies described earlier in this part of today's notice. Then the resultant oil content reduction estimates are presented for drill cuttings and water based-drilling fluids. Although the Agency has tentatively concluded that the reduction of oil content in water-based drilling fluids may be impractical to implement at offshore drilling sites by these technologies, oil content reduction estimates are presented below to provide the reader with an indication of the potential of the technologies for treating such wastes.

The Agency's analyses of applying thermal processes and solvent extraction processes are based on a model 10,000 foot well in the Gulf of Mexico, as presented in Section II of Part 1 of today's notice.

Drilling a "typical" 10,000 foot well is estimated to take 35 calendar days with 20 days of actual drilling time. The volume of drilling fluid to be handled from a 10,000 foot model well is 5349 barrels plus an additional 1400 barrel active mud system. The volume of drill cuttings to be handled from the 10,000 foot model well is 1430 barrels. These model well characteristics used in these analyses are based on the Agency's evaluation of recent industry surveys. (Sources: 10,000 ft. model well—"1984 Joint Association Survey on Drilling Costs", Dec 1985, API; Drilling waste volumes and drilling times—"Alternate Disposal Methods for Mud and Cuttings, Gulf of Mexico and Georges Bank:, Dec. 1981, Offshore Operators Committee).

The untreated drill cuttings associated with oil-based drilling fluids are estimated to contain 20% oil by weight (approx. 55% oil by volume). Untreated drill cuttings associated with water-based drilling fluid to which oil has been added, as a spot, as a lubricity agent or from entrained formation hydrocarbon, are estimated to contain 1% oil by weight (approx. 2.8% oil by volume). Water-based drilling fluids with oil added for lubricity and spotting purposes are estimated to typically contain 5% oil by volume (approx. 2.5% oil by weight) and 58% water by volume (approx. 30% water by weight). This 5% oil content by volume (approx. 2.5% oil by weight) is for a model situation where oil is added to the mud system for lubricity and spotting purposes, or is present due to entrained formation hydrocarbons. (Sources: EPA estimates; industry estimates)

After treatment, the oil content of the drill cuttings from oil-based muds was estimated to be reduced to 1% by weight (approx. 2.8% by volume) when using thermal distillation and to 0.3% by weight (approx. 0.8% by volume) when using solvent extraction. (Sources: EPA and T–1, T–2 and SE vendor sampling data.)

Since the oil content of untreated drill cuttings from water-based muds in the model case is 1% (weight), there would be little or no expected reduction of oil content in such wastes when subject to thermal distillation. The oil content of drill cuttings from water-based muds is estimated to be reduced to 0.3% by weight (approx. 0.8% by volume) when using solvent extraction technology. (Sources: EPA and T–1, T–2, and SE vendor sampling data).

After treatment, the oil content of the water-based drilling fluids was estimated to be reduced to 1% by weight

(approx. 2% by volume) when using thermal distillation and to 0.3% by weight (approx. 0.5% by volume) when using solvent extraction (Sources: EPA estimates).

The volumes and weights of oil present in the drilling wastes before and after treatment are shown on Table 5.

TABLE 5.—OIL CONTENT REDUCTION OF DRILLING WASTES BY VARIOUS TREATMENT PROCESSES

Waste type	Total quantity of drilling waste [1]		Oil present before treatment [2]		Oil removed	
	bbls.	lbs.	bbls.	lbs.	bbls.	lbs.
OIL-BASED Drill Cuttings (20% oil by weight) TD-1 & 2 Process Removal to 1% by wgt	1,430	1,330,000	792	266,000	752	252,000
OIL-BASED Drill Cuttings (20% oil by weight) SE Process Removal to .3% by wgt	1,430	1,330,000	792	266,00	780	261,500
WATER-BASED Drill Cuttings (1% oil by weight) TD-1 & 2 Process Removal to 1% by wgt	1,430	1,330,000	40	13,300	0	0
WATER-BASED Drill Cuttings (1% oil by weight) SE Process Removal to .3% by wgt	1,430	1,330,000	40	13,300	28	700
WATER-BASED Drilling Fluid (5% oil by volume) TD-1 & 2 Process Removal to 1% wgt	5,349	3,584,000	267	113,400	161	54,000
WATER-BASED Drilling Fluid (5% oil by volume) SE Process Removal to .3% wgt	5,349	3,584,000	276	113,400	235	79,100

Sources:
[1] "Alternate Disposal Methods for Mud and Cuttings Gulf of Mexico and Georges Bank", Dec. 1981, Offshore Operators Committee.
[2] EPA Estimates.

b. Operating Costs

The Agency prepared treatment cost estimates based of information provided by vendors and by using standing engineering estimating procedures. These estimates have been prepared for two types of distillation processes (T–1 Process and T–2 Process) and for one solvent extraction (SE–Process) process applied to drill cuttings and water-based drilling fluids.

The costs for leasing and operating these treatment processes differ from vendor to vendor. Two vendors had one lease rate for actual drilling days and a lower rate for standby days. The other vendor had a fixed lease rate for both drilling and standby days.

A monetary value was assigned to the oil recovered by the treatment process. The model scenario assumes that all of the oil removed from the drilling wastes by a given treatment process will be recovered. However, in practice the amount of recovered oil will be less than 100% of that removed from the wastes, due to losses by fugitive emissions, vapor condensation losses and oil/water separation efficiency for distillation processes and due to solvent recovery efficiencies for the extraction process. This loss is assumed to be small and not to significantly affect the cost of using a particular technology. The value of the recovered hydrocarbon is estimated to be $26.50 per barrel (source: vendor-supplied information). This full value of the recovered oil would be realized only if the oil is suitable for reuse in drilling fluid. While it is reported that the recovered oil can be reused in mud systems, the Agency is not aware that this practice has been tested yet on a full-scale basis.

The cost estimates include equipment rental costs, personnel costs, energy costs, and transportation costs. The equipment rental and energy costs are based upon whether the unit is in operating mode or standby mode. As an example, a breakdown of the cost estimate for treatment of drill cuttings by one of the thermal distillation processes (T–1) operating for 20 days and on standby for 15 days is shown in Table 6. In this example, the estimated energy cost is the cost of fuel for the generator used to provide electrical energy to operate the treatment equipment and to provide thermal energy for processing the waste. (source: cost information from vendors, EPA estimates).

The cost presented in Table 6 were developed with the conservative assumption that four wells are drilled consecutively. Mobilization and demobilization costs for drilling multiple wells at a given site are allocated among the number of wells (in this case four) assumed to be drilled during a given campaign. Thus, each well is allocated only a part of the total mobilization and demobilization costs for the treatment unit.

TABLE 6.—COMPONENT TREATMENT UNIT LEASE AND OPERATING COSTS, THERMAL DISTILLATION (T–1 PROCESS)

[Drill cuttings from oil-based or water-based drilling fluids]

Rental for 20 day actual operating period ($4,000 per day)	=$80,000
Rental for 15 day standby period ($1,500 per day)	=22,500
Energy costs for unit during operation ($180 per day, 20 days)	=3,600
Personnel living on rig (2 men×35 days× $35 per day)	=2,450
Transportation to rig (one boat for one day)*	=750
Set-up on rig (including use of crane)*	=2,500
Tear down (including crane use)*	=1,250
Transportation to shore (one boat for one day)*	=750
Shore support	=3,000
Transporting personnel to and from rig weekly (5×$600)	=3,000
Total	=119,800

Note.—(1) Costs treating for drill cuttings assume the unit will be operating for 20 days and on standby for 15 days.
(2) Costs marked * are based on mobilization and demobilization costs being apportioned between 4 wells drilled consecutively at the same facility.
(3) Cost of deck space usage is not included.
Source: Vendor-supplied information; EPA estimates.

The operating costs in Table 7 were estimated in a similar manner for the other two processes being considered.

C. Drill Cuttings from Oil- and Water-Based Drilling Fluids

Cost estimates were developed for the treatment of drill cuttings. The costs for

leasing and operating two types of thermal distillation units (T–1 and T–2) and the solvent extraction unit (SE) over a 35 day drilling period, including auxiliary costs, were estimated. In this scenario where the systems are used to treat only drill cuttings, it is assumed that the unit will be operating only during the 20 days of actual drilling. The equipment lease and energy costs are calculated accordingly. The costs for operating these processes are essentially the same whether they are used to treat drill cuttings associated with oil-based drilling fluids or water-based drilling fluids. These costs are summarized in Table 7.

As described previously, a value of $26.50 per barrel is assigned to the oil recovered by the treatment process assuming recovered oil is suitable for reuse in the drilling fluid system. These costing examples include the assumption that all of the oil removed from the drilling wastes is recovered for reuse.

Oil-Based Cuttings.

The drill cuttings from an oil-based mud are estimated to have a 20% oil content by weight (approx. 55% by volume); the volume of oil on the cuttings would therefore be 792 barrels. The volume of oil remaining on the cuttings after treatment by thermal distillation to reduce the oil content to 1% by weight (approx. 2.8% by volume) would be 40 barrels. The value of the recovered oil would therefore be $19,900 (752 bblx$26.50). The volume of oil remaining on the cuttings after treatment by solvent extraction when reducing the oil content to 0.3% by weight (approx. 0.8% by volume) would be 12 barrels. The value of the recovered oil would therefore be $20,700 (780 bblx$26.50). Water-based Cuttings.

The cuttings from a water-based mud are extimated to have a 1% oil content by weight (approx. 2.8% by volume) and the volume of oil on the cuttings would therefore be 40 barrels. There would be little, if any, expected reduction in oil content where these wastes are subjected to treatment by thermal distillation. The volume of oil remaining on the cuttings after treatment by solvent extraction when reducing the oil content to 0.3% by weight (approx. 0.8% by volume) would be 12 barrels. The value of the recovered oil would therefore be $740 (28 bblx$26.50).

TABLE 7.—COSTS OF TREATMENT FOR DRILL CUTTINGS [1]

Procedure	Thermal distillation TD–1 process			Thermal distillation TD–2 Process			Solvent extraction SE process		
	Cost/unit	Unit No.	Total cost	Cost/unit	Unit No.	Total cost	Cost/unit	Unit No.	Total cost
Cuttings From Oil-Based Drilling Fluids									
Rental-drilling	4,000	Day 20	=$80,000	1,550	Day 20	=$31,000	4,200	Day 20	=$84,000
Rental-no drill	1,500	Day 15	=22,500	1,500	Day 15	=23,250	2,000	Day 15	=30,000
Energy cost	180	Day 20	=3,600	180	Day 20	=3,600	Included	Day 20	=0
Living cost	70	Day 35	=2,450	70	Day 35	=2,450	70	Day 35	=2,450
Trans. to rig	750	Each 1	=750	750	Each 1	=750	750	Each 1	=750
Rig set-up	2,500	Each 1	=2,500	2,500	Each 1	=2,500	2,500	Each 1	=2,500
Rig tear-down	1,250	Each 1	=1,250	1,250	Each 1	=1,250	1,250	Each 1	=1,250
Shore support	3,000	Each 1	=3,000	3,000	Each 1	=3,000	3,000	Each 1	=3,000
Trans. to shore	750	Each 1	=750	750	Each 1	=750	750	Each 1	=750
Weekly Trans	600	Each 5	=3,000	600	Each 5	=3,000	600	Each 5	=3,000
Total			119,800			71,550			127,700
FOR OIL BASED DRILLING FLUID									
1,430 bbls drill cuttings treated:									
Cost of treatment			=119,800			71,550			127,700
Cost of treatment per barrel			=84			50			89
Value of recovered oil			=19,900			19,900			20,600
Net cost of treatment			=99,900			51,650			107,100
Net cost of treatment per barrel			=70			36			75
Cost of onshore disposal			=66,400			66,400			66,400
Onshore disposal cost [2] per barrel			=46			46			46

[1] All three treatment units are assumed to take 20 days to process 1,430 barrels of drill cuttings.
[2] Onshore disposal costs assume rigs are retrofitted for cuttings storage.

D. Water-Based Drilling Fluids

Cost estimates were prepared for the treatment of water-based drilling fluids in order to assess increased energy costs and processing times for the treatment of drilling fluids as compared to drill cuttings. (The factors which may make the use of this technology to treat water-based fluids at an offshore oil facility less practicable than for treating drill cuttings are described in Section V of this part of today's notice.)

The costs of renting and operating the thermal distillation unit and the solvent extraction unit over a 35 day drilling period, including auxiliary costs, were estimated. It was assumed that in order to treat the larger volume of drilling fluids the unit will be required to process drilling fluids every day during the entire 35 day drilling period. The equipment rental and energy costs were calculated accordingly.

The average oil content of water-based drilling fluid is estimated to be 5% oil by volume (approx. 2.5% by weight), when oil is added to the mud either as a spotting fluid, a lubricity agent, and/or contains entrained formation oil. The volume of oil in the 5349 barrels of drilling fluid (not including the active mud system) to be treated would therefore be 267 barrels. The volume of oil remaining on the drilling fluids, after treatment by thermal distillation when reducing the oil content to 1% by weight (approx. 2% by volume), is 107 barrels. The value of the recovered oil would therefore be $4300 (160 bbl×$26.50). The volume of oil remaining on the drilling fluids after treatment by solvent extraction when reducing the oil content to 0.3% by weight (approx. 0.6% by volume) is 32 barrels. The value of the recovered oil would therefore be $6,200 (235 bbl×$26.50).

E. Comparison of Onsite Treatment Costs with Onshore Disposal Costs for Drilling Wastes

The detailed costs are presented in the EPA report titled "Costs, Energy Requirements and Processing Rates for Treating Drilling Fluids and Drill Cuttings using Thermal Distillation and Solvent and Solvent Extraction

Processes" which is available in the record of this rulemaking. These costs are summarized on a "per barrel of raw waste" basis in Table 8 below and are compared with transport to shore and land disposal costs of the wastes. The thermal distillation and solvent extraction technology costs in Table 8 include a credit for recovered oil at an estimated economic value of $26.50 per barrel of oil.

The transport/land disposal option costs are presented for three scenarios. These three scenarios are presented on the basis of the ability to store the wastes during high seas or offload these wastes for transport to shore as follows:

1. For rigs with no storage space for drilling wastes, but designed for loading boats in seas with wave heights of up to 6 feet. If wave heights exceeded 6 feet, drilling would have to cease for the period that the wave heights were in excess of 6 feet and supply boats were unable to tie up at the facility.

2. For rigs with no storage space for drilling wastes, but designed for loading boats in seas with wave heights of up to 10 feet. If wave heights exceeded 10 feet, drilling would have to cease for the period that the wave heights were in excess of 10 feet and supply boats were unable to tie up at the facility.

3. For rigs retrofitted for drilling wastes storage. These rigs could continue to drill even when supply boats were unable to tie-up at the facility.

The costs for land disposal in Table 8 include onshore disposal costs, handling costs, container rental costs, transportation costs, and downtime costs for rigs with no storage space or retrofit costs for rigs fitted with storage space. Capital costs associated with retrofitting an offshore rig with sufficient storage capacity and deck space to accommodate storage of drilling wastes were estimated. These retrofit costs were apportioned among the estimated number of wells drilled from a rig during a 5-year estimated life of the rig equipment. These scenarios are based upon prior industry-sponsored work submitted during the proposed comment period. The Agency has reviewed the industry study documentation and found the information to be reasonable for the purpose of establishing these scenarios. (Source: "Water-Based Drilling Fluids and Cuttings Disposal Options Survey", Feb. 1986, Walk Haydel and Associates).

The transportation costs were based upon daily rental costs for supply boats. These costs were not sensitive to the distance between the offshore facility and the onshore transfer facility and disposal site. The rigs with no storage capacity were assumed to require two dedicated supply boats throughout the entire 35 day drilling period. The rigs retrofitted with storage capacity were assumed to require two dedicated supply boats for the first 18 days of the drilling period and one dedicated supply boat for the remaining 17 days of the drilling period. (source: "Water-Based Drilling Fluids and Cuttings Disposal Option Survey", Feb. 1986, Walk Haydel and Associates).

The majority of operators would, in all probability, decide to retrofit rigs for drilling fluid storage since this would result in an overall lower cost for the disposal of drilling fluids. (source: "Water-Based Drilling Fluids and Cuttings Disposal Option Survey", Feb. 1986, Walk Haydel and Associates). The costs are lowered because supply boats would not be dedicated solely to drilling waste disposal. It was therefore estimated that 80% of the rigs would be retrofitted, 10% would operate using a maximum permissible wave height of 10 feet and 10% would operate using a maximum permissible wave height of 6 feet. (EPA estimate).

TABLE 8.—COST OF ONSITE TREATMENT V. ONSHORE DISPOSAL DRILL CUTTINGS AND WATER-BASED DRILLING FLUIDS—THERMAL DISTILLATION, SOLVENT EXTRACTION, ONSHORE DISPOSAL—MODEL 10,000-FOOT WELL

[Dollar per barrel]

	Drill cuttings associated with oil-based drilling fluids	Drill cuttings associated with water-based drilling fluids	Water-based drilling fluids
Onsite treatment using thermal distillation T-1 process	70	(*)	32
Onsite treatment using thermal distillation T-2 process	36	(*)	16
Onsite treatment using solvent extraction SE process	75	89	29
Transport to shore for disposal—no storage, max. 6 ft. waves	78	78	58
Transport to shore for disposal—no storage, max. 10 ft. waves	61	61	45
Transport to shore for disposal—rig retrofitted for storage	46	46	33

* No expected reduction in oil content.

Notes to Table 8:

(1) Costs are in dollars per barrel of raw waste rounded to the nearest whole dollar.

(2) Costs for drill cuttings are based upon handling 1430 bbl of drill cuttings from the model size well. (1)

(3) Costs for drilling fluids treatment by thremal and solvent extraction are based upon handling 5349 bbl of water-based drilling fluids. This excludes the active mud system volume of 1400 bbl. It is uncertain whether onsite treatment is feasible for the active mud system (1400 bbl). (1/2)

(4) Costs for onsite treatment consist of equipment rental costs, energy costs, personnel costs and mobilization and demobilization costs. (3)

(5) Costs for onshore disposal consist of land disposal costs, handling costs, container rental costs, transportation costs and retrofit costs for rigs fitted with storage space for drilling wastes or downtime costs for rigs with no storage space. (4)

Sources:

(1) "Alternate Disposal Methods for Mud and Cuttings, Gulf of Mexico and Georges Bank:, Dec. 1981, Offshore Operators Committee).

(2) EPA estimate.

(3) Vendor-supplied information; EPA estimates.

(4) "Water-Based Drilling Fluids and Cuttings Disposal Option Survey"; Feb. 1986, Walk Haydel and Assoc.

VI. Performance Data

A. Field Sampling

During the period September 14 to 17, 1987, the Agency performed sampling of feed, waste and by-product streams associated with a thermal distillation unit (T-1 process) that was operating in the South Pass Block of the Gulf of Mexico. The thermal distillation unit was used to process cuttings generated from a well drilled at an offshore facility in the Gulf of Mexico. Oil-based muds were utilized at the well from a depth of 4,900 feet to the bottom of the well at 13,944 feet. The diameter of the hole was

12.25 inches and the well was being drilled at a rate of 140 feet per hour. Only a portion of the drill cuttings generated at this well were processed by the thermal distillation unit. Due to the existing configuration of the rig cuttings collection system, the raw cuttings feed was composed only of the cuttings from the primary shale shaker.

The following waste and by-product streams were generated by the particular thermal distillation unit that was tested: processed cuttings, condensed hydrocarbon, condensed water, air emissions. The processed cuttings were mixed with seawater and sluiced to discharge from the facility. The condensed vapors (oil/water) were directed to an oil/water separator which had two discharge streams—a condensed hydrocarbon stream and a condensed water stream. The treatment system also had a stack for air emissions.

Samples were collected by EPS from the test unit over a four day sampling period. Samples were taken of the raw cuttings, the processed cuttings and the combined processed cuttings/seawater stream. The oil content of both the raw cuttings feed and the processed cuttings was analyzed using retort-gravimetric and soxhlet exrtaction methods. The oil content of the combined seawater/cuttings stream was analyzed prior to discharge, using the gravimetric extraction method. The raw cuttings feed and the processed cuttings were analyzed for metals, priority organics, percentage solids and for ICR/RCRA components (ICR tests are for ingnitability, corrosivity and reactivity; RCRA is the Resource Conservation and Recovery Act). The combined treated cuttings/seawater stream to be discharged was analyzed for total suspended solids. Bioassay tests were performed on samples of the raw cuttings and the processed cuttings. Samples were also taken of the condensed hydrocarbon and water streams. These samples were analyzed for oil content using the gravimetric extraction method, and for priority organics. Samples of the condensed water discharge stream were also analyzed for total suspended solids.

Temperature measurements and pH readings were taken of the selected raw waste, treated waste and by-product streams. Tests for settleable solids in the raw cuttings, the condensed water stream, the combined treated cuttings/seawater stream and in background seawater were conducted at the facility. Air sampling of the thermal unit emissions was not possible due to the unavailability of air sampling personnel during the sampling effort.

B. Observations and Sampling Results

During the sampling program, the vendor demonstrated the ability to set up and run a thermal distillation unit on an offshore development facility to treat drill cuttings associated with oil-based muds.

The average oil content of the raw cuttings was found to be 7.11% by weight using soxhlet extraction analysis and 5.82% by weight using the retort-gravimetric method. The raw cuttings were considerably lower in oil content than expected for the type of mud being used. This was probably because the only source of cuttings used as feed to the test unit was the primary shale shaker. The cuttings from the primary shale shaker are physically the largest cuttings in the entire cuttings recovery system. The smaller, finer cuttings from the secondary shaker, the desilter and the contrifuge sections of the cuttings recovery system would have the higher oil content due to their higher surface area. A composite sample of all of the cuttings generated at the well would be expected to have an oil content of 15% to 20% by weight (source: EPA estimate; Conoco, Inc. estimate).

The thermal distillation unit was shown, when operating properly, to be able to consistently reduce the oil content of drill cuttings, separated from an oil-based mud at the primary shale shaker, to less than 1% by weight (less than 2.8% by volume). The processed cuttings were dry and granular in appearance. The results from the sampling episode therefore indicate that the thermal distillation unit tested could achieve a significant reduction in the oil content of drill cuttings.

The results of oil analyses of samples of raw and treated wastes and by-product streams are presented in Table 9.

TABLE 9.—THERMAL DISTILLATION OF DRILL CUTTINGS (OIL-BASED MUD), AVERAGE OIL CONTENT, PERCENT BY WEIGHT

	Soxhlet method [1]	Retort-gravimetric method [2]	Gravimetric method [3]
Raw cuttings	7.11	5.82	Not appr.
Proc. cuttings	0.06	0.53	Not appr.
Combined seawater/cuttings	Not appr.	Not appr.	0.06.
Condensed hydrocarbons	Not appr.	Not appr.	97.4.
Condensed water	Not appr.	Not appr.	0.06.
Sea water	Not appr.	Not appr.	0.003.

Notes:
"Not Appr." indicates that a particular analytical method was not an appropriate analytical method for type of waste stream sampled.
[1] Method 503D, Oil & Grease, Extraction Method for Sludge Samples. Standard Method for the Examination of Water and Wastewaters; APHA, AWWA, WPCF; 16th Edition, 1985.
[2] Proposed Method 1651, Total Oil and Diesel Oil in Drilling Fluids and Drill Cuttings by Retort Gravimetry and GCFID. Appendix A of this notice. This is the Agency's preferred method for oil content determinations for drilling wastes with relatively high solids content.
[3] Method 413.1, Oil & Grease, Gravimetric (extraction). Methods for Chemical Analysis of Water and Waste, EPA-600/4-79-020, U.S. EPA, March 1979.

Acute toxicity was measured by conducting static, 96-hour toxicity tests with mysids on the suspended particulate phase (SPP) of raw and processed drill cuttings. The SPP was prepared by mixing the drill cuttings with seawater (1:9 by volume), allowing the mixture to settle for 1 hour, and decanting the SPP. Three subsamples of one sample of raw cuttings were tested. The 96-hour LC50s were 3.2%, 8.5% and 1.5% SPP. Two samples of processed cuttings were tested; the 96-hour LC50s were 28.7% and 27.9% SPP.

Samples of the raw cuttings, processed cuttings, condensed hydrocarbons and condensed water were analyzed for organics. A total of ten (10) samples—one raw cuttings, four processed cuttings, one condensed hydrocarbon and four condensed water—were each analyzed for two hundred and thirty-four (234) organics.

Twenty-eight organic compounds were detected at concentrations above their detection limits in some or all of the samples. The remaining two hundred six organics compounds were either not detected or were quantified at a level below the method detection limit.

Detailed discussion and results of this sampling program are presented in the

EPA document titled "Report on the Results of Field Sampling or Thermal Dynamics Inc. Treatment of Drill Cuttings on Conoco South Pass 75 Platform September 14–17th, 1987". This report is part of the record of this rulemaking and is available for inspection as described in the "addresses" section of this notice.

VII. Oil Content or Untreated Drilling Wastes

This section presents a summary of the Agency's estimates of the quantities of untreated drill cuttings and water-based drilling fluids that would not meet an oil content effluent limitation of 1% or less (weight basis). These estimated quantities of drilling wastes would either require treatment to comply with an oil content limitation or, alternatively, the wastes could be disposed of in another manner such as by transport to shore for land disposal at an acceptable waste disposal site.

A. Drill Cuttings

Oil-Based Cuttings. All drill cuttings associated with oil-based drilling fluids would require treatment or land disposal to comply with an oil content limitation of 1% or less (weight basis).
Water-based Cuttings.

Based upon the waste characteristics described above for the model situation, little if any of drill cuttings associated with water-based drilling fluids which contain oil added either as a lubricity agent or as a spotting fluid would likely require treatment to comply with an oil content limitation.

Some portion of drill cuttings associated with water-based drilling fluids to which no oil has been added (lubricity, spotting) may require treatment or land disposal to comply with an oil content limitation. This would be due to entrained formation oils in the drilling fluid system which in turn could adhere to the drill cuttings wastes. The Agency has no estimate of drilling waste volumes that would fall into this scenario (drilling wastes or drill cuttings). For the purposes of this analysis, the Agency assumed a zero quantity of drilling wastes in this scenario. The Agency solicits specific information which would allow for a reasonable estimate to be made of these drilling waste volumes.

The results of an industry survey indicate that approximately 12% of all wells drilled with water-based muds have oil added to the mud system for lubricity purposes. (source: Shell Oil, Burgbacher, 1985). As discussed previously, the drill cuttings generated under these circumstances are estimated to contain 1% oil by weight. (EPA estimate). For this analysis then, most if not all drill cuttings from wells drilled with water-based muds are estimated to have a oil content of 1% by weight and thus would not require treatment or land disposal to meet an oil content limitation of 1% by weight.

In summary, drill cuttings from water-based muds to which (mineral) oil has been added for lubricity and/or spotting purposes would likely not require treatment or land disposal to comply with an oil content limitation of 1% by weight.

B. Water-Based Drilling Fluids

Water-based drilling fluids which contain oil added either as a lubricity agent or as a spotting fluid, or containing formation hydrocarbons in appreciable amounts would likely require treatment to comply with an oil content limitation in the range of 1% or less (weight basis).

Historical information supplied by the industry indicates that approximately 12% of all wells drilled with water-based muds can be expected to use oil as a lubricity agent (source: API). The amount of lubricity oil used varies from about 1% to 12% (volume basis), with an estimated average of 3%. This, all drillings fluids generated from such wells would require either treatment to reduce the oil content prior to discharge or transport to shore for land disposal to comply with an oil content limitation. (Source: 1986 API Drilling Fluids Survey.)

The results of a recent survey conducted by the Offshore Operators Committee indicate that approximately 22% of wells drilled with water-based muds can be expected to use oil as a spotting fluid (1986 Offshore Operators Committee Spotting Fluid Survey). Water-based drilling fluid to which oil is added as a spotting fluid at depths below 8,000 feet would likely contain oil in excess of 1% by weight, and thus would either have to be processed for removal of oil and then discharged or transported to shore for disposal. (The EPA model case use of oil added as a spotting fluid below a depth of 8,000 feet was estimated for model well characteristics.)

The total volume of drilling fluid to be handled from a 10,000 foot well is estimated to be 6749 barrels (including the active mud system), of which approximately 2076 barrels (including the active mud system) are generated between 8,000 feet and 10,000 feet (source: "Alternate Disposal Methods for Mud and Cutting for the Gulf of Mexico and Georges Bank", Dec. 1981, Offshore Operators Committee). Thus, the percentage of all water-based drilling fluids used which would contain oil as a spotting fluid is estimated to be 6.8% (22% x 2076 bbl/6749 bbl).

Assuming, conservatively for aggregate costing purposes, that there is no overlap in the population of wells using oil as a lubricity agent and those using oil as a spotting fluid, an estimated total of 18.8% by volume of all water-based drilling fluids would require onsite treatment of onshore disposal to comply with an oil content limitation as discussed above.

VIII. Analytical Method for Total Oil Content

A method for retort distillation and gravimetry for determining the total oil content of drilling fluid and drill cuttings waste streams is published as part of today's notice for review and comment. The Agency has determined that existing approved analytical methods for measuring oil are not appropriate for drilling wastes and that the oil content method appearing in Appendix A of this notice is the appropriate test procedure.

This same method (Proposed Method 1651, "Total Oil and Diesel Oil in Drilling Muds and Drill Cuttings by Retort Gravimetry and GCFID") includes additional steps for determining the identity and concentration of diesel oil, and is presented in its entirety in Appendix A of this notice.

The retort distillation method has been widely used by the industry for testing drilling muds and is simple to perform on offshore facilities in remote conditions. The version of the method presented in Appendix A has an estimated detection limit of 200 mg/kg (0.02% by weight). Documentation on precision and accuracy measurements of the test method is included in the record for this rulemaking.

IX. Request for Comments

As previously stated, the Agency is considering a BAT and NSPS oil content limitation of up to 1.0% by weight for drill cuttings associated with either oil-based or water-based drilling fluids. Such a limitation may be based upon attainable performance of the control and treatment technologies discussed in this notice and prior notices pertaining to this rulemaking. The Agency solicits comment on all aspects of such a BAT and NSPs oil content limitation for control of priority and toxic non-conventional pollutants in the hydrocarbons present in drill cuttings. This limitation would apply to all drill cuttings discharges to surface waters, whether or not oil is added to the associated drilling fluid system.

Moreover, for cuttings asssociated with oil-based muds, this oil content limitation would replace the prohibition on the discharge of such cuttings. The Agency particularly solicits comment on: (1) Whether such an oil content limitation is appropriate for drill cuttings; (2) the appropriate technology basis for an oil content limitation; and (3) whether an oil content limitation should apply in addition to or instead of one or more of the other limitations and standards for drill cuttings presented in Part 1 of this notice.

The Agency also invites comment on all aspects of establishing BAT and NSPS oil content limitations for water-based drilling fluids. The Agency particularly solicits comment on the practicality and technical achievability of processing water-based drilling fluids by these technologies at offshore drilling sites and on the issue of space constraints with regard to installing these systems at offshore facilities.

The Agency solicits comment on the model drilling scenarios selected for analysis, the costs to implement the treatment technologies and treatment methods discussed in this part, and on any actual and foreseeable problems regarding adequate onshore disposal sites for drilling wastes. The Agency also invites comment on the extent to which the oil content and the toxicity of drill cuttings and drilling fluids is due to downhole contamination. The Agency also invites comment on the applicability of these technologies to drilling wastes from Alaskan coastal and offshore facilities.

Some of the technologies discussed in this part of today's notice have air emissions associated with the operation of the processes. The Agency has obtained some air emissions characterization data on these technologies, but does not have sufficient information to properly consider the non-water quality aspects of these technologies. The Agency solicits additional emissions characterization data from the operation of these technologies.

As indicated by the analytical method for oil content determinations presented in Appendix A of today's notice, the Agency's preferred method for oil content determinations for wastes containing high solids content (*i.e.*, drill cuttings, drilling fluids) is the "retort-gravimetric" method. The Agency requests that any commenters that intend to supply the Agency with performance data on drilling fluid or drill cuttings treatment technologies provide oil content determinations based upon the retort-gravimetric method presented in Appendix A below.

Appendix A—Proposed Method 1651—Oil Content and Diesel Oil in Drilling Muds and Drill Cuttings by Retort Gravimetry and GCFID

1 Scope and Application

1.1 This method is used to determine the oil content and the identity and concentration of diesel oil in drilling fluid (mud) samples. It is applicable to all mud types and may also be used to determine the oil content and diesel oil in drill cuttings.

1.2 This method may be used for compliance monitoring purposes as part of the "Effluent Limitations Guidelines and New Source Performance Standards for the Offshore Subcategory of the Oil and Gas Extraction Point Source Category".

1.3 When this method is used to analyze samples for which there is no reference diesel oil, diesel oil identification should be supported by at least one additional qualitative technique. Methods 625 and 1625 provide gas chromatograph/mass spectrometer (GC-MS) conditions appropriate for the qualitative and quantitative confirmation of the presence of the components of diesel oil (references 1–2).

1.4 The detection limit of this method is usually dependent upon the presence of other oils in the sample. Excluding interferences, estimated detection limits of 200 mg/kg of oil content and 100 mg/kg of diesel oil can be obtained.

1.5 Any modification of this method beyond those expressly permitted shall be considered as a major modification subject to application and approval of alternate test procedures under 40 CFR 136.4 and 136.5.

1.6 The gas chromatography portions of this method are restricted to use by or under the supervision of analysts experienced in the use of gas chromatograms. Each laboratory that uses this method must generate acceptable results using the procedures described in sections 8.2 and 12 of this method.

2 Summary of Method

2.1 A weighed amount of drilling mud is distilled using a retort apparatus. The distillate is extracted with methylene chloride and the extract is dried by passage through sodium sulfate. The extract is evaporated to dryness, and the total amount of oil is redissolved in methylene chloride, an internal standard is added, and an aliquot is injected into a gas chromatograph (GC). The components of the oil are separated by the GC and detected using a flame ionization detector (FID).

2.2 Identification of diesel oil (qualitative analysis) is performed by comparing the pattern of GC peaks (retention times and intensities) from the sample extract with the pattern of GC peaks from a reference diesel oil sample. Identification of diesel oil is established when the reference diesel and sample patterns agree per the criteria in this method.

2.3 Quantitative analysis of diesel oil is performed using an internal standard technique.

3 Contamination and Interferences

3.1 Solvents, reagents, glassware and other sample processing hardware may yield artifacts and/or elevated baselines causing misinterpretation of chromatograms. All material shall be demonstrated to be free from interferences under the conditions of the analysis by running method blanks initially and with set of samples. Specific selection of reagents and purification of solvents by distillation in all-glass systems may be required. Glassware and, where possible, reagents are cleaned by solvent rinse or baking at 450 degree C for one hour minimum.

3.2 There is no standard diesel oil. Oil components, as seen by GC–FID, will differ depending upon the oil source, the production date, production process, and the producer. In addition, there are three basic types of diesel oils: ASTM Designations No. 1–D, No. 2–D, and No. 4–D. The No. 2–D is most common "diesel oil"; however, No. 2–D is sometimes blended with No. 1–D which has a lower boiling range. For rigorous identification and quantification of diesel oil in a drilling fluid sample by GC–FID, the chromatographic pattern from the diesel oil should be matched with the chromatographic pattern from a reference standard of the same diesel oil suspected to be in the sample.

3.3 To aid in the identification of interferences, the chromatographic pattern from a reference sample of drilling fluid prior to use is compared to the chromatographic pattern of the drilling fluid after use. An interference is present when the pattern of the background oil does not match, but contributes substantially to, the pattern of the diesel oil in the sample.

3.4 Mineral oils are often added to drilling fluids for lubricity. These oils when examined by GC–FID, contain some components common to diesel oil but have chromatographic patterns that are distinctly different from diesel oil. The analyst must first determine if the sample chromatogram shows the presence of diesel, mineral, or a combination of both before reliable quantification can be performed. This method permits selection of GC peaks unique to diesel oil for determination of diesel oil in the presence of mineral oil.

4 Safety

4.1 The toxicity or carcinogenicity of each reagent used in this method has not been defined. Therefore, each chemical compound should be treated as a potential health hazard. From this viewpoint, exposure to these chemicals must be reduced to the lowest possible level by whatever means available. The laboratory is responsible for maintaining a current awareness file of OSHA regulations regarding the safe handling of the chemical specified in this method. A reference file of material handling data sheets should also be made available to all personnel involved in the chemical analysis. Additional references to laboratory safety are available and have been identified (references 3–5) for the information of the analyst.

4.2 Methylene chloride has been classified as a known health hazard. All steps in this method which involve exposure to this compound shall be performed in an OSHA approved fume hood.

5 Apparatus and Materials

5.1 Sample bottles for discrete sampling

5.1.1 Bottle—4 oz Boxton round wide mouth jar with Teflon lined screw cap (Sargent Welsh S–9184–72CA, or equivalent). New bottles are used as received with no further cleaning required.

5.1.2 Bottle mailer—to fit bottles above (Sargent-Welsh 2306, or equivalent).

5.2 Distillation Apparatus

5.2.1 Retort—20 mL retort apparatus (IMCO Services Model No. R2100 or equivalent).

5.2.2 Glass wool—Pyrex (Corning 3950, or equivalent). Solvent extracted or baked at 450 degrees C for one hour minimum.

5.3 Extraction/drying apparatus

5.3.1 Separatory funnel—60 mL with Teflon stopcock

5.3.2 Drying column—400 mm x 15 to 20 mm i.d. Pyrex chromatographic column equipped with coarse glass frit or glass wool plug.

5.3.3 Glass filtering funnel—crucible holder (Corning No. 9480, or equivalent).

5.3.4 Spatulas—stainless steel or Teflon

5.4 Evaporation/concentration apparatus

5.4.1 Kuderna-Danish (K–D) apparatus

5.4.1.1 Evaporation flask—500 mL (Kontes K–570001–0500, or equivalent), attached to concerntrator tube with springs (Kontes K–662750–0012).

5.4.1.2 Concentrator tube—10 mL, graduated (Kontes K–570050–1025, or equivalent) with calibration verified. Ground glass stopper (size 19/22 joint) is used to prevent evaporation of extracts.

5.4.1.3 Snyder column—three ball macro (Kontes K–503000–0232, or equivalent).

5.4.1.4 Snyder column—two ball micro (Kontes K–469002–0219, or equivalent).

5.4.1.5 Boiling chips

5.4.1.5.1 Glass or silicon carbide—approx 10/40 mesh, extracted with methylene chloride and baked at 450 degrees C for one hr minimum.

5.4.1.5.2 Teflon (optional)—extracted with methylene chloride.

5.4.2 Water bath—heated, with concentric ring cover, capable of temperature control (+/− 2 degrees C), installed in a fume hood.

5.4.2 Sample vials—amber glass, 1 — 5 mL with Teflon-lined screw or crimp cap, to fit GC autosampler.

5.5 Balances

5.5.1 Analytical—capable of weighing 0.1 mg. Calibration must be verified with class S weights each day of use.

5.5.2 Top loading—capable of weighing 10 mg.

5.6 Gas Chromatograph (GC)—analytical system with split injection, capillary column, temperature program with initial and final isothermal holds, and all required accessories including syringes, analytical columns, gases, detector, and recorder. The analytical system shall meet the performance specifications in section 12.

5.6.1 Column—30 +/−5 m × 0.25 +/− 0.02 mm i.d., 99% methyl, 1% vinyl, 1.0 um film thickness, bonded phase fused silica capillary (Supelco SPB–1, or equivalent).

5.6.2 Detector—flame ionization. This detector has proven effective in the analyses of drilling fluids for diesel oil, and was used to develop the method performance statements in section 16. Guidelines for using alternate detectors are provided in section 11.1.

5.7 GC Data system—shall collect and record GC data, store GC runs in magnetic memory or on magnetic disk or tape, process GC data, compute peak areas, store calibration data including retention times and response factors, identify GC peaks through retention times, and compute concentrations

5.7.1 Data acquisition—GC data shall be collected continuously throughout the analysis and stored on a mass storage device.

5.7.2 Response factors and calibration curves—the data system shall be used to record and maintain lists of response factors, and multi-point calibration curves (section 7). Computations of relative standard deviation (coefficient of variation; CV) are used for testing calibration linearity. Statistics on initial (section 8.2) and on-going (section 12.5) performance shall be computed and maintained.

5.7.3 Data processing—the data system shall be used to search, locate, identify, and quantify the compounds of interest in each GC analysis. Software routines shall be employed to compute and record retention times and peak areas. Displays of chromatograms and library comparisons are required to verify results.

6 Reagents

6.1 Sodium sulfate—anhydrous, (ACS) granular.

6.2 Methylene chloride—Nanograde or equivalent.

6.3 Reagent water—water in which the compounds of interest and interfering compounds are not detected by this method.

6.4 Internal standard—dissolve 1.0 g of 1,3,5-Trichlorobenzene (Kodak No. 1801 or equivalent) in 100 mL methylene chloride. Store in glass and tightly cap with Teflon lined lid to prevent loss of solvent by evaporation. Label with the concentration and date. Mark the level of the meniscus on the bottle to detect solvent loss.

6.5 Calibration standards—calibration standards are prepared from the same diesel oil expected to be in the sample; otherwise, No. 2 diesel oil is used. Calibration standards are prepared at the concentrations shown in table 1.

6.5.1 Weigh the appropriate amount of oil into a tared 10 mL volumetric flask and dilute to volume with methylene chloride. Calibration

standards are made fresh daily to avoid solvent loss by evaporation.

6.5.2 Using a micropipet or microsyringe, transfer 100 uL of each reference standard solution (Section 6.5.1) to a GC injection vial. Add 100 uL of the TCB internal standard (6.4) to each vial and mix thoroughly.

6.6 QC standard—used for tests of initial (section 8.2) and ongoing (section 12.5) performance. A reference drilling fluid known to contain 10,000–50,000 mg/kg of diesel oil is used, if available. If a reference drilling fluid is not available, a solution containing 600 mg/mL of No. 2 diesel oil in methylene chloride is used.

7 Calibration

7.1 Establish gas chromatographic operating conditions given in Table 2. Verify that the GC meets the performance criteria in section 12 and that the EDL given in section 1.4 can be achieved. The gas chromatographic system is calibrated using the internal standard technique.

7.2 Internal standard calibration procedure—1,3,5-Trichlorobenzene (TCB) has been shown to be free of interferences from the diesel oils tested in the development of this method. However, if an interference is known or suspected, the analyst must choose an alternate internal standard that is free from interferences.

7.2.1 Inject 1 uL of each reference oil standard containing the internal standard (table 1 and section 6.5.2) into the GC–FID. The TCB will elute approx. 8.5 minutes after injection. For the CG–FID used in the development of this method, the TCB internal standard peak was 30–50 percent of full scale at an attenuator setting of 8E–11 amp.

7.2.2 Individual response factors

7.2.2.1 Tabulate the peak area responses against concentration for each n-alkane peak listed in table 3 and for the internal standard. Calculate response factors (RF) for each n-alkane peak using the following equation:

Equation 1:

$$RF = \frac{(As)\ (Cis)}{(Ais)\ (Cs)}$$

where:

As = Area of the peak to be measured.
Ais = Area of the internal standard peak.
Cs = Concentration of the peak to be measured (mg/kg).
Cis = Concentration of the internal standard (mg/kg).

7.2.2.2 If the RF is constant (<10% CV) over the calibration range (table 1), the RF can be assumed to be invariant and the average RF can be used for calculations. Alternatively, the results can be used to plot a calibration curve of response ratios, As/Ais, vs RF.

7.2.2.3 Calibration verification—the average RF or a point on the calibration curve shall be verified on each working day by the measurement of one or more calibration standards. If the RF for any peak varies from the RF obtained in the calibration by more than +/− 15 percent, the test shall be repeated using a fresh calibration standard. Alternatively, a new calibration curve shall be prepared.

7.2.3 Combined response factor—to reduce the error associated with the measurement of a single n-alkane peak, a combined response factor is used for computation of the diesel oil concentration. This combined response factor is the sum of individual response factors as given in equations 2 or 3:

Equation 2:

$$RF_{combined} = \frac{[RF(1)+RF(2)\ .\ .\ .+RF(n)]\ (Cis)}{(Cs)}$$

Equation 3:

$$RF_{combined} = \frac{[As(1)+As(2)\ *\ *\ *+As(n)]\ (Cis)}{(Ais)\ (Cs)}$$

where:

As(1) * * *A(n) are the areas of the individual peaks.

8. Quality assurance/quality control.

8.1 Each laboratory that uses this method is required to operate a formal quality assurance program (reference 6). The minimum requirements of this program consist of an initial demonstration of laboratory capability, an ongoing analysis of standards and blanks as a test of continued performance, analyses of spiked samples to assess accuracy, and analysis of duplicates to assess precision. Laboratory performance is compared to established performance criteria to determine if the results of analyses meet the performance characteristics of the method.

8.1.1 The analyst shall make an initial demonstration of the ability to generate acceptable accuracy and precision with this method. This ability is established as described in section 8.2.

8.1.2 The analyst is permitted to modify this method to improve separations or lower the costs of measurements, provided all performance requirements are met. Each time a modification is made to the method, the analyst is required to achieve the EDL (section 1.4) and to repeat the procedure in section 8.2 to demonstrate method performance.

8.1.3 Analyses of blanks are required to demonstrate freedom from contamination. The procedures and criteria for analysis of a blank are described in section 8.5.

8.1.4 The laboratory shall, on an ongoing basis, demonstrate through calibration verification and the analysis of the QC standard (section 6.6) that the analysis system is in control. These procedures are described in section 12.

8.1.5 The laboratory shall maintain records to define the quality of data that is generated. Development of

accuracy statements is described in sections 8.3.4 and 12.5.

8.2 Initial precision and accuracy—to establish the ability to generate acceptable precision and accuracy, the analyst shall perform the following operations:

8.2.1 Retort, extract, concentrate, and analyze four samples of the QC standard (section 6.6 and 10.1.3) according to the procedure beginning in section 10.

8.2.2 Using results of the set of four analyses, compute the average recovery (X) in mg/kg and the standard deviation of the recovery (s) in mg/kg for each sample by the internal standard method (sections 7.2 and 14.2).

8.2.3 For each compound, compare s and X with the corresponding limits for initial precision and accuracy in table 4. If s and X meet the acceptance criteria, system performance is acceptable and analysis of samples may begin. If however, s exceeds the precision limit or X falls outside the range for accuracy, system performance is unacceptable. In this event, correct the problem, and repeat the test.

8.3 Method accuracy—the laboratory shall spike a minimum of 20 percent (one sample in each set of five samples) of all drilling fluid samples. This sample shall be spiked with the diesel oil that was added to the drilling fluid. If a reference standard of diesel oil that was added to the drilling fluid is not available, No. 2 diesel oil shall be used for this spike. If doubt of the identity and concentration of diesel oil in any of the remaining 80 percent of the samples exists, that sample shall be spiked to confirm the identity and establish the diesel oil concentration.

8.3.1 The concentration of the spike in the sample shall be determined as follows:

8.3.1.1 If, as in compliance monitoring, the concentration of the oil in the sample is being checked against a regulatory concentration limit, the spike shall be at that limit or at one to five times higher than the background concentration determined in section 8.3.2, whichever concentration is larger.

8.3.1.2 If the concentration of the oil in a sample is not being checked against a limit, the spike shall be at the concentration of the QC standard (section 6.6) or at one to five times higher than the background concentration, whichever concentration is larger.

8.3.2 Analyze one sample aliquot to determine the background concentration (B) of oil content and of diesel oil. If necessary, prepare a standard solution appropriate to produce a level in the sample at the regulatory concentration limit or at one to five times the background concentration (per section 8.3.1). Spike a second sample aliquot with the standard solution and analyze it to determine the concentration after spiking (A) of each analyte. Calculate the percent recovery (P) of oil content and of diesel oil:

$P = 100\,(A-B)/T$

where T is the true value of the spike.

8.3.3 Compare the percent recovery for oil content and for diesel oil with the corresponding QC acceptance criteria in table 4. If the results of the spike fail the acceptance criteria, and the recovery of QC standard in the on-going precision and recovery test (sections 10.1.3 and 12.5) is within the acceptance criteria in table 4, an interference may be present (see sections 3 and 15 for identification of interferences). If, however, the results of both the spike and the on-going precision and recovery test fail the acceptance criteria, the analytical system is judged to be out of control and the problem must be immediately identified and corrected, and the sample reanalyzed.

8.3.4 As part of the QA program for the laboratory, method accuracy for samples shall be assessed and records shall be maintained. After the analysis of five spike samples in which the recovery passes the test in section 8.3, compute the average percent recovery (P) and the standard deviation of the percent recovery (sp). Express the accuracy assessment as a percent recovery interval from P—2sp to P + 2sp. For example, if P = 90% and sp = 10% for five analyses of diesel oil, the accuracy interval is expressed as 70—110%. Update the accuracy assessment on a regular basis (e.g. after each 5—10 new accuracy measurements).

8.4 The laboratory shall analyze duplicate samples for each drilling fluid type at a minimum of 20 percent (one sample for each five sample set). A duplicate sample shall consist of a well-mixed, representative aliquot of the sample.

8.4.1 Analyze one sample in the set in duplicate per the procedure beinning in section 10.

8.4.2 Compute the relative percent difference (RPD) between the two results per the following equation:

Equation 4:

$$RPD = \frac{(D1-D2)}{(D1+D2)/2} \times 100$$

where:

D1 = concentration of diesel in the sample
D2 = concentration of diesel oil in the second (duplicate) sample

8.4.3 The relative percent difference for duplicates shall meet the acceptance criteria in table 5. If the criteria are not met, the analytical system shall be judged to be out of control, and the problem must be immediately identified and corrected, and the sample set reanalyzed.

8.5 Blanks—reagent water blanks are analyzed to demonstrate freedom from contamination.

8.5.1 Extract and concentrate a reagent water blank initially and with each sample set (samples started through the analysis on the same day, to a maximum of 5 samples). Analyze the blank immediately after analysis of the QC standard (section 6.6) to demonstrate freedom from contamination.

8.5.2 If any of the components of diesel oil or any potentially interfering compound is detected in a blank, analysis of samples is halted until the source of contamination is eliminated and a blank shows no evidence of contamination.

8.6 Comparison of gravimetric and diesel oil measurements.

8.6.1 Compare the concentration of the oil content (14.1.2) determined gravimetrically with the diesel oil concentration determined by GCFID (14.2.2). If the diesel oil concentration exceeds the gravimetric oil concentration, the analysis has been performed improperly. Correct the error or repeat the sample analysis beginning with section 10.

8.7 The specifications contained in this method can be met if the apparatus used is calibrated properly, then maintained in a calibrated state. The standards used for calibration (section 6.4), calibration verification (section 7.3), and for initial (section 8.2) and on-going (section 12.5) precision and recovery should be

identical, so that the most precise results will be obtained. The GC instrument will provide the most reproducible results if dedicated to the settings and conditions required for the analyses of the analyte given in this method.

8.8 Depending on specific program requirements, field replicates and field spikes of diesel oil into samples may be required to assess the precision and accuracy of the sampling and sample transporting techniques.

9 Sample Collection, Preservation, and Handling

9.2 Collect samples in glass containers following conventional sampling practices (reference 7). Drilling fluid samples are collected in wide-mouth jars.

9.2 Samples must be representative of the entire bulk drilling fluid. In some instances, composite samples may be required.

9.3 Maintain samples at 0—4 degrees C from the time of collection until extraction.

9.4 Sample and extract holding times for this method have not yet been established. However, based on tests of wastewater for the analytes determined in this method, samples shall be extracted within seven days of collection and extracts shall be analyzed within 40 days of extraction.

9.5 As a precaution against analyte and solvent loss or degradation, sample extracts are stored in glass bottles with Teflon lined caps, in the dark, at –20 to –10 degrees C.

10 Sample extraction and concentration

10.1 Retort

10.1.1 Tare the retort sample cup and cap to the nearest 0.1 gm. Transfer a well homogenized and representative portion of the drilling fluid to be tested into the sample cup. Do not fill the retort cup to the top so that excess sample must be wiped off. Place the cap on the cup and reweigh. Record the weight of the sample to the nearest 0.1 g.

Note: on agitation, most drilling fluids entrain air as small bubbles. The extent of air entrainment is uncertain and is difficult to detect when the mud is poured into the retort cup. By weighing the drilling fluid, the quantitative detection of diesel oil is improved. In addition, by using a gravimetric measurement of the amount of sample, the retort cup does not need to be completely filled. This procedure avoids the error that occurs when the cup is filled and the oil rises to the surface of the sample and must be wiped off (as occurs if the manufacturer's instructions are followed), thus resulting in a loss of oil.

10.1.2 Follow the manufacturer's instructions for retort of the drilling fluid. Substitute 6 g of loosely packed glass wool for the steel wool inthe manufacturer's instructions and distill the sample into a glass receiver. The presence of solids in the distillate require that the distillation be rerun starting with a new portion of sample. Placing more glass wool in the retort expansion chamber, per the manufacturer's instructions, will help prevent the solids from being carried over in the distillation.

10.1.3 QC standard—used for tests of initial (section 8.2) and on-going (section 12.5) precision and accuracy. For the initial set of four samples (section 8.2) and for each set of samples started through the retort process on the same working day (to a maximum of five), prepare a QC sample as follows:

10.1.3.1 Place the reference drilling fluid containing 10,000—50,000 mg/kg of diesel oil (section 6.6) in the retort cup beginning in section 10.1.

10.1.3.2 Alternatively, pipet 1.00 mL of the solution containing 600 mg/mL of diesel oil in methylene chloride into a clean retort cup and weigh to the nearest mg. Record the weight of the oil to the nearest mg. Add approximately 10 mL of reagent water to the cup and place the cap on the cup.

10.1.3.3 Analyze the QC standard beginning with section 10.1.2 then proceeding to section 10.2

10.1.4 Blank—For the initial set of four samples (section 8.2) and for each set for samples started through the retort process on the same working day (to a maximum of five), prepare a blank as follows:

10.1.4.1 Place 10 mL of reagent water in a clean, tared, retort cup and weigh to the nearest mg. Record the weight of the reagent water.

10.1.4.2 Analkyze the blank beginning with section 10.1.2 then proceeding to section 10.2.

10.2 Extraction and drying

10.2.1 After the distillation is complete, pour the retort distillate into a 60 mL separatory funnel. Quantitatively rinse the inner surfaces of the retort stem and condenser with methylene chloride into the separatory funnel. Rinse the receiver with two full receiver volumes of methylene chloride and add to the separatory funnel.

10.2.2 Stopper and shake the funnel for one minute, with periodic venting to prevent a build up of gas pressure. Allow the layers to separate.

10.2.2 Prepare a glass filtering funnel by plugging the bottom with a piece of glass wool and pouring in 1—2 inches of anhydrous sodium sulfate. Wet the funnel with a small portion of methylene chloride and allow the methylene chloride to drain to a waste container. Alternatively, a drying column may be used.

10.2.3 Place the glass filtering funnel or drying column into the top of a Kuderna-Danish (K–D) flask equipped with a preweighed 10 mL receiving flask. Add a preweighed boiling chip to the receiving flask. Drain the methylene chloride (lower) layer into the glass filtering funnel or drying column, and collect the extract in the K–D flask.

10.2.4 Repeat the methylene chloride extraction twice more, rinsing the retort with two thorough washings each time and draining each methylene chloride extract through the funnel or drying column into the K–D flask.

10.3 Concentration

10.3.1 Place a Snyder column on the K–D flask. Prewet the Snyder column by adding about one mL methylene chloride to the top. Place the K–D apparatus on a hot water bath (60—65 degrees C) so that the concentrator tube is partially immersed in the hot water, and the entire lower rounded surface of the flask is bathed with hot vapor. Adjust the vertical position and the water temperature as required to complete the concentration in 15—20 minutes. At the proper rate of distillation, the balls of the column will actively chatter but the chambers will not flood with condensed solvent. Concentrate the sample until it is free of methylene chloride. Remove the K–D apparatus from the hot water bath and allow to cool.

10.3.2 Weigh and record the final weight of the receiving flask.

10.3.3 Dissolve the oil in methylene chloride and adjust the final volume to 1.0 mL. If the extract did not concentrate to a final volume of 1.0 mL or less, adjust the final volume to 10.0 mL.

11 Gas chromatography

11.1 Table 3 lists the retention times that can be achieved under the conditions in table 2 for the n-alkanes of interest. Examples of separations that can be achieved

are shown in figure 1.[1] Other retort devices, columns, chromatographic conditions, or detectors may be used if the EDL stated in this method and the requirements of section 8.2 are met.

11.2 Using a micropipet or microsyringe, transfer equal 100 μL volumes of the sample extract or QC standard extract (section 10.3.3) and the TCB internal standard solution (section 6.4) into a GC injection vial. Cap tightly and mix thoroughly.

11.3 Inject 1 μL of the sample extract or reference standard into the GC using the conditions in table 2.

11.4 Begin data collection and the temperature program at the time of injection.

11.5 If the area of any peak exceeds the calibration range of the system, make a 10-fold dilution of the extract (section 10.3.3), mix a 100 μL aliquot of this dilute extract with 100 μL of the internal standard solution (section 6.4), and reanalyze.

12 System and laboratory performance

12.1 At the beginning of each working day during which analyses are performed, GC calibration is verified. For these tests, analysis of the 300 mg/mL calibration standard (table 1) shall be used to verify all performance criteria. Adjustment and/or recalibration (per section 7) shall be performed until all performance criteria are met. Only after all performance criteria are met may the QC standard and samples be analyzed.

12.2 Retention times

12.2.1 Retention time of the internal standard—the absolute retention time of the TCB internal standard shall be within the range of 7.96–8.08 minutes.

12.2.2 Relative retention times of the n-alkanes—the retention times of the n-alkanes relative to the TCB internal standard shall be within the limits given in table 4.

12.3 Calibration verification

12.3.1 Compute the response factor for each n-alkane by the internal standard technique (section 7.2).

12.3.2 For each n-alkane, compare the response factor with the response factor from the initial calibration (section 7.2.2). If all response factors are within +/− 15 percent of their respective values in the calibration data, system calibration has been verified. If not, prepare a fresh calibration standard and repeat the test (section 12.1), or recalibrate (section 7).

12.4 Multiple GC peaks—each n-alkane shall give a single, distinct GC peak.

12.5 On-going precision and accuracy

12.5.1 Compute the oil content concentration and the concentration of diesel oil in the QC standard in each sample set (section 10.1.3) prior to analysis of any sample in the set.

12.5.2 Compare the concentration with the QC limit in table 4. If the concentrations of oil content and of diesel oil in the QC standard meet the acceptance criteria, system performance is acceptable and analysis of samples may proceed. If, however, the concentrations do not meet the acceptance criteria, system performance is unacceptable. In this event, correct the problem, reprocess the sample set (section 10), and repeat the on-going precision adn accuracy test (sections 10.1.3 and 12.5).

12.5.3 Add results that pass the specifications in section 12.5.2 to initial and previous on-going data. Update QC charts to form a graphic representation of continued laboratory performance. Develop statements of laboratory accuracy for oil content and diesel oil in drilling fluids by accuracy for oil content and diesel oil in drilling fluids by calculating the average percent recovery (R) and the standard deviation of percent recovery (sr). Express the accuracy statement as a recovery interval from R−2 sr to R+2 sr. For example, if R=95 percent and sr=5 percent, the accuracy is 85–105 percent.

13 Qualitative determination

13.1 Compare the sample chromatogram to the chromatogram of the standard. If the sample contains diesel oil, the major peaks present in the standard (n-alkanes) will also be present in the sample and have the same relative intensity and pattern (see figure 1).

13.2 Relative retention times—the major n-alkane peaks (table 3) shall be present and shall be within the limits in table 3.

13.3 Some mineral oil lubricity additives have similar chromatographic patterns to that of diesel oil. The presence of early, smaller peaks with retention times in the range of one to four minutes will differentiate between distillates containing only mineral oil and those with diesel oil.

14 Quantitative determination

14.1 Oil content by gravimetry

14.1.1 Subtract the weight of the preweighed receiving flask and boiling chip (10.2.3) from the final weight of the receiving flask (10.3.2).

14.1.2 Calculate the concentration of oil in the sample using the following equation:

Equation 7:

$$C\ (mg/kg) = \frac{Wf}{Ws} \times 100$$

where:
Wf = final weight of oil in mg (from 14.1.1)
Ws = wet weight of sample in grams (from 10.1.1)

14.2 Diesel oil by gas chromatography

14.2.1 Compute the concentration of diesel oil in the sample extract using the combined response factor given in section 7.3.3 and either of the following equations:

Equation 5:

$$Cex\ (mg/mL) = (Cis)\ \frac{[RF(1)+RF(2)\ldots+RF(n)]}{(RF\ combined)}$$

[1] Figure 1—Sample Chromatograms, is not published in the **Federal Register** but is available in the public docket. See "Addresses" section.

Equation 6:

$$Cex\ (mg/mL) = (Cis)\ \frac{[As(1) + As\ (2) \ldots + As(n)]}{(Ais)\ (RF\ combined)}$$

where:
Cex is the concentration of the oil in the extract

14.2.2 Calculate the concentration of diesel oil (in mg/kg) in the sample as follows:

Equation 6:

$$C\ (mg/kg) = \frac{(Cex)\ (Vex)}{(Ws)} \times 100$$

where:
Vex = final extract volume in mL (from 10.3.3 or 14.2.3)
Ws = wet weight of samle in grams (from 10.1.1)

14.2.3 If area of any peak in the chromatographic pattern exceeds the calibration range of the GC, the extract is diluted by a factor of 10 with methylene chloride, 100 µL is withdrawn and mixed with 100 µL of the internal standard solution (section 6.4) and the diluted extract is reanalyzed.

14.3 Results of analyses of drilling fluids are reported in units of mg/kg (wet weight) to three significant figures. Results for samples that have been diluted are reported at the least dilute level at which the peak areas are within the calibration range (section 14.2.3).

15 Complex samples

15.1 The most common interference in the determination of diesel oil is from mineral oil in the drilling fluid (see sections 3 and 13). Drilling fluids may also contain proprietary lubricity additives that can interfere with the identification and quantification of diesel oil.

15.2 The presence of mineral oil or other interfering oils and additives can often be determined by comparing the pattern of chromatographic peaks in the sample with the patterns of chromatographic peaks in the reference standard (sections 6.5 and 10.1.3) and in the spiked sample (section 8.3).

15.3 In cases where there is a mixture of diesel and mineral oil, the analyst may have to choose some of the smaller early or late eluting peaks present in the chromatographic pattern of the diesel oil, and not present in the chromatographic pattern of the mineral oil, to determine the diesel content. Quantification using these peaks is performed by using these peaks for calibration (section 7) and for determination of the final concentration (section 14).

15.4 In extreme cases, the method of standard additions may be required to reliably quantitate the diesel content of a sample containing interferences.

16 Method performance

16.1 This method was developed by two laboratoreis that tested for diesel oil in drilling fluids (mainly drilling muds) over a two-year period. The performance data for this method is based on the performance of the method in these two laboratories (reference 8).

16.2 The most commonly occurring drilling fluid in the tests of this method was a seawater lignosulfonate mud (EPA Generic Mud No. 8). The estimated detection limit for diesel oil in this mud is 100 µg/kg.

References

1. Brown, John S, "Organic Chemical Characterization of Diesel and Mineral Oils Used as Drilling Mud Additives", Proceedings of Tenth Annual Analytical Symposium, USEPA, Industrial Technology Division (WH-552), 401 M St, Washington DC 20460, March 19-20 1986.

2. Brown, John S, "Final Report for Research Program on: Organic Chemical Characterization of Diesel and Mineral Oils used as Drilling Mud Additives", Phase II, Contract Reference Agreement No. 501-P-5476R, to Offshore Operators Committee, Environmental Subcommittee, Houston, TX, Prepared by Battelle Ocean Science and Technology Department, 397 Washington St, Duxbury MA 02332.

3. "Carcinogens—Working With Carcinogens", Department of Health, Education, and Welfare, Public Health Service, Center for Disease Control, National Institute for Occupational Safety and Health, Publication No. 77-206, August 1977.

4. "OSHA Safety and Health Standards, General Industry", [29 CFR 1910]. Occupational Safety and Health Administration, OSHA 2206 (Revised, January 1976).

5. "Safety in Academic Chemistry Laboratories", American Chemical Society Publication, Committee Chemical Safety, 3rd Edition, 1979.

6. "Handbook of Analytical Quality Control in Water and Wastewater Laboratories", USEPA, EMSL, Cincinnati, OH 45268, EPA-600/4-79-019 (March 1979).

7. "Standard Practice for Sampling Water", ASTM Annual Book of Standards, ASTM, Philadelphia, PA 76 (1980).

8. Rushneck, D R, and Eynon B P, "Precision and Recovery Analysis of DPMP Diesel Measurements", Memorandum to Dennis Ruddy, USEPA, Industrial Technology Division (WH-552), 401 M St SW, Washington DC 20460 (23 August 1987, draft).

TABLE 1—CONCENTRATION OF CALIBRATION STANDARDS

Expected concentration in sample	Wt of Diesel oil in 10 mL volumetric [1] (g)	Concentration in standard
50,000 mg/kg	Use undiluted oil.	
30,000 mg/kg	7.6	760 mg/mL
10,000 mg/kg	3.0	300 mg/mL
5,000 mg/kg	1.5	150 mg/mL
2,000 mg/kg	0.6	60 mg/mL

[1] Weigh oil to the nearest mg.

TABLE 2—GAS CHROMATOGRAPHIC OPERATING CONDITIONS—METHOD 1651 [1]

Injection port, transfer line, and detector temperatures = 275 C
Column temperature program:
Initial temperature: 90 C
Initial time: 0 minutes
Ramp: 90 - 250 C @ 5 C per min
Final temperature: 250 C
Final hold: 10 minutes or until all peaks have eluted.
Carrier gas and flow rates:
Carrier: nitrogen or helium
Velocity: 20 - 40 cm/sec @ 90 C
Split ratio: 80:1 - 120:1
Makeup gas: as required by manufacturer
Hydrogen and air flow rates: as specified by manufacturer
Detector amplifier settings: 10-11 amp full scale. Attention is adjusted so that the highest peaks are on scale in the most concentrated standard.
Recorder: Chart speed of 1 - 2 cm/min (fixed).

[1] Conditions are approximate and can be adjusted to meet the performance criteria in section 12.

TABLE 3.—RETENTION TIMES AND RELATIVE RETENTION TIME LIMITS FOR MAJOR COMPONENTS OF DIESEL OIL—METHOD 1651

Compound	Retention time	
	Mean	Relative
TCB	8.0	1.00-1.00
n-C12	9.9	1.22-1.24
n-C14	12.6	1.55-1.57
n-C16	15.3	1.98-1.92
n-C18	17.9	2.21-2.25
n-C20	20.4	2.52-2.56
n-C22	22.9	2.82-2.88
n-C24	25.2	3.12-3.15

TABLE 4—QC ACCEPTANCE CRITERIA FOR PRECISION AND RECOVERY—METHOD 1651 [1]

Analyte	Test concentration (mg/kg)	Limit for s (mg/kg)	Range for X (mg/kg)	Range for P (mg/kg)
Oil Content by grav	20,000	3,400	18,000–23,700	16,700–24,900
	[1] n	0.17n	0.88n–1.16n	0.82n–1.22n
Diesel oil by GC	20,000	3,600	17,200–20,300	13,600–21,400
	[2] n	0.18n	0.80n–1.08n	0.73n–1.14n

[1] Preliminary specifications; final specifications to be developed at a later date.
[2] For other test concentrations in the range of 1,000–50,000 mg/kg, assuming a spike to background ratio of 5:1.

Table 5—QC ACCEPTANCE CRITERIA FOR DUPLICATES—METHOD 1651

Concentration detected (mg/kg)	Relative percent oil content	Difference diesel oil
500	36	94
750	30	68
1,000	38	54
2,000	24	34
5,000	21	22
10,000	21	18
20,000	20	16
50,000	20	15

Dated: October 3, 1988.

William A. Whittington,

Acting Assistant Administrator for Water.

[FR Doc. 88–23893 Filed 10–20–88; 8:45 am]

BILLING CODE 6560–50–M

DEPARTMENT OF DEFENSE

48 CFR Parts 214 and 215

Department of Defense Federal Acquisition Regulation Supplement; Sealed Bidding

AGENCY: Department of Defense (DoD).

ACTION: Proposed rule and request for public comments.

SUMMARY: The Defense Acquisition Regulatory (DAR) Council is considering changes to the Defense Federal Acquisition Regulation Supplement (DFARS), Subpart 214.2 and 215.4 to delete this coverage as a result of recent recommendations to add similar coverage to the Federal Acquisition Regulation. The proposed additions to the Federal Acquisition Regulation are also publshed in this issue of the **Federal Register.**

DATE: Comments on this proposed revisions should be submitted in writing to the Executive Secretary, DAR Council, at the address shown below, on or before December 20, 1988, to be considered in the formulation of the final rule. Please cite DAR Case 88–50 in all correspondence relating to this issue.

ADDRESS: Interested parties should submit written comments to: Defense Acquisition Regulatory Council, ATTN: Mr. Charles W. Lloyd, Executive Secretary, DAR Council, ODASD (P)/DARS, c/o OASD(P&L) (MRS), Room 3D139, The Pentagon, Washington, DC 20301–3062.

FOR FURTHER INFORMATION CONTACT: Mr. Charles W. Lloyd, Executive Secretary, DAR Council, (202) 697–7266.

SUPPLEMENTARY INFORMATION:

A. Background

The Defense Acquisition Regulatory Council has reviewed the DoD FAR Supplement and determined that the coverage at 214.270 and 215.470 is appropriate for inclusion in the Federal Acquisition Regulation.

B. Regulatory Flexibility Act

The proposed rule does not constitute a significant FAR revision within the meaning of FAR 1.501 and Pub. L. 98–577 and publication for public comment is not required. Master solicitations, in and of themselves are nothing more than a package of solicitations and clauses sent to contractors who are on bidders mailing lists and the package is referred to when an actual solicitation is issued. Therefore, the Regulatory Flexibility Act does not apply. However, comments from small entities concerning the affected DFARS Subpart will also be considered in accordance with section 610 of the Act. Such comments must be submitted separately and cite DFARS Case 88–610D in correspondence.

C. Paperwork Redcution Act

The ruel does not contain information collection requirements which require the approval of OMB under 44 U.S.C. 3501.

List of Subjects in 48 CFR Parts 214 and 215

Government procurement.

October 13, 1988.

Charles W. Lloyd,

Executive Secretary, Defense Acquisition Regulatory Council.

Therefore, it is proposed to amend 48 CFR Parts 214 and 215 as follows:

The authority citation for 48 CFR Parts 214 and 215 continues to read as follows:

Authority: 5 U.S.C. 301, 10 U.S.C. 2202, DoD Directive 5000.35, and DoD FAR Supplement 201.301.

PART 214—SEALED BIDDING

214.270 [Removed]

2. Section 214.270 is removed.

PART 215—CONTRACTING BY NEGOTIATION

215.470 [Removed]

3. Section 215.470 is removed.

[FR Doc. 88–24411 Filed 10–20–88; 8:45 am]

BILLING CODE 3810–01–M

Notices

Federal Register
Vol. 53, No. 204
Friday, October 21, 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.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Meetings: Rulemaking Committee

ACTION: Committee on rulemaking; notice of public meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act (Pub. L. 92–463), notice is hereby given a meeting of the Committee on Rulemaking of the Administrative Conference of the United States. The committee has scheduled the meeting to discuss a draft committee recommendation on presidential review of federal agency rules. A copy of the draft recommendation may be obtained from Office of the Chairman at the address and telephone number given below.

DATE: Tuesday, November 8, 1988 at 2:00 p.m.

Location: Library of the Administrative Conference, 2120 L Street NW., Suite 500, Washington, DC.

Public Participation: The committee is open to the interested public, but limited to the space available. Persons wishing to attend notify the contact person at least two days prior to the meeting. The committee chairman may permit members of the public to present oral statements at the meeting. Any member of the public may file a written statement with the committee before, during, or after the meeting. Minutes of the meeting will be available on request.

FOR FURTHER INFORMATION CONTACT: Michael W. Bowers, Office of the Chairman, Administrative Conference of the United States, 2120 L Street NW., Suite 500, Washington, DC 20037. Telephone: (202) 254–7065.

Dated: October 18, 1988.

Jeffrey S. Lubbers,

Research Director.

[FR Doc. 88–24419 Filed 10–20–88; 8:45 am]

BILLING CODE 6110–01–M

DEPARTMENT OF AGRICULTURE

Cooperative State Research Service

Food and Agricultural Sciences National Needs Graduate Fellowships Grants Program; Solicitation of Graduate Fellowships Grants Proposals

Purpose: Notice is hereby given that under the authority contained in section 1417(a)(3)(B) of the National Agricultural Research, Extension, and Teaching Policy Act of 1977, as amended (7 U.S.C. 3152 (a)(3)(B)), the Cooperative State Research Service (CSRS) through its Higher Education Programs (HEP) will award competitive grants to colleges and universities for doctoral fellowships to meet national needs for the development of professional and scientific expertise in the food and agricultural sciences.

Available Funds: The total amount for this purpose in Fiscal Year 1989 is approximately $2,800,000.

Targeted areas: Food and agricultural sciences areas appropriate for fellowship applications are those in which developing shortages of expertise have been determined and targeted by CSRS–HEP for national needs doctoral fellowship support. The five targeted national needs areas for FY 1989 are: Water science; biotechnology; food, forest products, or agribusiness marketing; food science or human nutrition; and engineering in agriculture production, processing, and distribution systems. Approximately twenty percent of the available funds will be allocated to each national need area.

Proposal limitations: For fiscal year 1989 program, a proposal may request funding in only one (1) national need area. A proposal may request a minimum of two (2) fellowships and a maximum of four (4) fellowships in the national need area for which funding is requested. While no limitation is placed on the number of proposals an institution may submit, not more than two (2) proposals may be submitted by the same college or equivalent administrative unit within an institution. Additionally, total funds awarded to an institution under the program in Fiscal Year 1989 shall not exceed $288,000.

Financial and other limitations: Each institution funded will receive $48,00 for each doctoral fellowship awarded. However, total program fund available are not evenly divisible by $48,000. Therefore, one fellowship will be supported on a partial basis with a lesser amount of funds. Except in the case of the partially funded fellowship, fellowship monies must be used to: (1) Support the same doctoral fellow for three (3) years at $15,000 per year; and (2) provide for an institution annual cost-of-education allowance of $1,00, not to exceed a total of $3,000 over the three year duration of the fellowship.

While proposals must document institution willingness to recruit and train at least 2–4 fellows in a National Need Area, the Department may, based on reviewers comments, fund fewer fellows than requested in a proposal.

Application information: An Application Kit has been developed which provides the forms, instructions, and other relevant information needed by institutions to apply for the Food and Agricultural Sciences National Needs Graduate Fellowships Grants Program described herein. Applicants should be alert to the instruction that proposals must be typed, double-spaced, and paginated. Additionally, applicants are cautioned to comply with the 20-page limitation for Part 3 (National Need Narrative) of the proposal and the inclusion only of *summary* faculty vitae, as specified, in Part 5 of the proposal. To obtain a copy of the Application Kit, write or call the Grants Administrative Management office (address and telephone number below):

USDA–CSRS, Office of Grants and Program Systems, Grants Administrative Management, Room 303 Aerospace Building, 901 D Street, SW., Washington, DC 20250–2200, Telephone (202) 475–5049.

Six (6) copies of a proposal and one (1) copy of the institution's latest graduate catalog must be received by the Grants Administrative Management office at the preceding address no later than the close of business February 13, 1989. The grants will be awarded and administered in accordance with the regulations set forth in Title 7, Chapter XXXIV, Part 3402, published in the "**Federal Register**" February 13, 1987, 52 FR 4712. Additional regulations regarding this assistance program may be found in the Department of Agriculture Uniform Federal Assistance Regulations (7 CFR Part 3015).

Supplementary information: This program is listed in the Catalog of Federal Domestic Assistance Programs under No. 10.210. For the reasons set forth in the Final Rule related notice to 7 CFR Part 2015, Subpart V, 48 FR 29115, June 25, 1983, when the authority to administer this program resided in the Agricultural Research Service, this program is excluded from the scope of Executive Order 12372 which requires intergovernmental consultation with State and local officials.

Under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. 3504(h)), the collection of information requirements contained in this Notice have been approved under OMB Document No. 0524–0024.

Done at Washington, DC, this 13th day of October 1988.

John Patrick Jordan,

Administrator, Cooperative State Research Service.

[FR Doc. 88–24373 Filed 10–20–88; 8:45 am]

BILLING CODE 3410-22-M

Federal Grain Inspection Service

Request for Designation Applicants To Provide Official Services in the Peoria, Ill., Geographic Area

AGENCY: Federal Grain Inspection Service (Service), USDA.

ACTION: Notice.

SUMMARY: This notice announces that the Peoria Grain Inspection Service, Inc. (Peoria) has withdrawn its application for designation renewal, and that its designation will terminate on October 31, 1988. The Service is again requesting applications for designation to provide official services under the U.S. Grain Standards Act, as Amended (Act) in the area serviced by Peoria. Official inspection service will be provided in this geographic area by Eastern Iowa Grain Inspection and Weighing Service, Inc., beginning November 1, 1988, on an interim basis until such time as an applicant is designated to perform official services.

DATE: Applications to be postmarked on or before November 21, 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.

The Service announced that Peoria's designation terminates on October 31, 1988, and requested applications for official agency designation to provide official services within a specified geographic area in the May 3, 1988, **Federal Register** (53 FR 15721). Applications were to be postmarked by June 6, 1988. Peoria was the only applicant for designation in its area and applied for designation renewal in the entire area currently assigned to that agency.

The Service announced the applicant name in the June 30, 1988, **Federal Register** (53 FR 24752) and requested comments on the applicant for designation. Comments were to be postmarked by August 15, 1988; none were received.

Subsequent to the request for comments, Peoria withdrew its application for designation renewal. In accordance with the Act and regulations, Peoria's designation will terminate on October 31, 1988. The Service is again requesting applications for designation to provide official services in the specified geographic area.

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.

The geographic area presently assigned to Peoria, in the State of Illinois, 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 Stark County line to Marshall County; the northern Marshall County line to Putnam County; the western Putnam County line north to State Route 29; State Route 29 north to Interstate 180; Interstate 180 east to State Route 26;

Bounded on the East by State Route 26 south to State Route 116; State Route 116 south to Interstate 74; Interstate 74 southeast to State Route 121; State Route 121 south to State Route 10;

Bounded on the South by State Route 10 west to Mason County; the eastern and southern Mason County lines west to the Illinois River; the Illinois River northeast to Fulton County; the southern Fulton County line; and

Bounded on the West by the western and northern Fulton County lines to Peoria County; the western Peoria and Stark County lines.

Interested parties are hereby given opportunity to apply for official agency designation to provide the official services in the geographic area, as specified above, under the provisions of section 7(f) of the Act and § 800.196(d) of the regulations issued thereunder. 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. Accordingly, designation in the specified geographic area is for a period not to exceed 3 years. Parties wishing to apply for designation should contact the Review Branch, Compliance Division, at the address listed above for forms and information.

Applications and other available information will be considered in determining which applicant will be designated to provide official services in a geographic area.

Persons or firms located in this geographic area requiring official inspection service should contact Eastern Iowa Grain Inspection and Weighing Service, Inc., at (319) 322–7149 to obtain such service beginning November 1, 1988, on an interim basis until such time as an applicant is designated to perform official services.

Pub. L. 94–582, 90 Stat. 2867, as amended (7 U.S.C. 71 *et seq.*)

Date: October 17, 1988.

Neil E. Porter,

Acting Director, Compliance Division.

[FR Doc. 88–24371 Filed 10–20–88; 8:45 am]

BILLING CODE 3410-EN-M

DEPARTMENT OF COMMERCE

International Trade Administration

[A–122–804]

Initiation of Antidumping Duty Investigation: New Steel Rail, Except Light Rail, From Canada

AGENCY: Import Administration, International Trade Administration, Commerce.

ACTION: Notice.

SUMMARY: On the basis of a petition filed in proper form with the U.S. Department of Commerce, we are initiating an antidumping duty investigation to determine whether imports of new steel rail, except light rail, from Canada are being, or are likely to be, sold in the United States at less than fair value. We are notifying the U.S. International Trade Commission (ITC) of this action so that it may determine whether imports of this product materially injure, or threaten material injury to, a U.S. industry. If this investigation proceeds normally, the ITC will make its preliminary determination on or before November 10, 1988. If that determination is affirmative, we will make a preliminary determination on or before March 6, 1989 .

EFFECTIVE DATE: October 21, 1988.

FOR FURTHER INFORMATION CONTACT: Loc Nguyen or Charles Wilson, Office of Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone (202) 377–3530 or (202) 377–5288.

SUPPLEMENTARY INFORMATION:

The Petition

On September 26, 1988, we received a petition filed in proper form by Bethlehem Steel Corporation on behalf of the domestic industry engaged in the production of rail. In compliance with the filing requirements of 19 CFR 353.36, petitioner alleges that imports of new steel rail, except light rail, from Canada are being, or are likely to be, sold in the United States at less than fair value within the meaning of section 731 of the Tariff Act of 1930, as amended (the Act), and that these imports materially injure, or threaten material injury to, a U.S. industry.

If any interested party as described under paragraphs (C), (D), (E), or (F) of section 771(9) of the Act wishes to register support of or opposition to this petition, please file written notification with the Commerce official cited in the "For Further Information Contact" section of this notice.

United States Price and Foreign Market Value

Petitioner calculated U.S. price using various methodologies. U.S. price was based on Department of Commerce statistics on imports of the subject merchandise, Canadian export statistics, U.S. import statistics on a monthly basis, port by port, as well as specific prices from known import transactions obtained by petitioner from customers in the United States.

Petitioner also estimated Canadian foreign market value using several methodologies. Petitioner's calculations were based on list prices from the *American Metal Market*, various issues, as well as discounted list prices, adjusted according to the Eastern and Western spot market quotations recorded in *World Steel Intelligence, Pricetrack*. Furthermore, petitioner used the cost of production in Canada, based on its own production costs, U.S. exports to Canada (using Department of Commerce statistics), and petitioner's own prices for export to Canada as bases for calculating foreign market value.

Base on a comparison of United States price and foreign market value, petitioner alleges dumping margins ranging from 39.7% to 241.8%.

Initiation of Investigation

Under section 732(c) of the Act, we must determine, within 20 days after a petition is filed, whether it sets forth the allegations necessary for the initiation of an antidumping duty investigation, and whether it contains information reasonably available to the petitioner supporting the allegations.

We examined the petition on new steel rail, except light rail, from Canada and found that it meets the requirements of section 732(b) of the Act. Therefore, in accordance with section 732 of the Act, we are initiating an antidumping duty investigation to determine whether imports of new steel rail, except light rail, from Canada are being, or are likely to be, sold in the United States at less than fair value. If our investigation proceeds normally, we will make our preliminary determination by March 6, 1989.

Scope of Investigation

The United States has developed a system of tariff classification based on the international harmonized system of customs nomenclature. On January 1, 1989, the U.S. tariff schedules will be fully converted to the *Harmonized Tariff Schedule* (HTS) and all merchandise entered or withdrawn from warehouse for consumption on or after this date will be classified solely according to the appropriate HTS item numbers(s). Until that time, however, the Department will be providing both the appropriate *Tariff Schedules of the United States Annotated* (TSUSA) item number(s) and the appropriate HTS item number(s) with its product descriptions. As with the TSUSA, the HTS item numbers are provided for convenience and customs purposes. The written description remains dispositive as to the scope of the product coverage.

We are requesting petitioners to include the appropriate HTS item number(s) as well as the TSUSA item number(s) in all petitions filed with the Department through the end of this year. A reference copy of the HTS is available for consultation in the Central Records Unit, Room B–099, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington DC 20230. Additionally, all U.S. Customs officers have reference copies, and petitioners may contact the Import Specialist at their local customs office to consult the schedule.

The product covered by this investigation is new steel rail, except light rail, currently provided for under TSUSA item numbers 610.2010, 610.2025, 610.2100, 688.4280 and currently classificable under HTS item numbers 7302.10.1020, 7302.10.1040, 7302.10.5000, and 8548.00.0000.

Steel rail, whether of carbon, high carbon, alloy or other quality steel, includes, but is not limited to, standard rails, all main line sections (over 60 pounds per yard), heat-treated or head-hardened (premium) rails, transit rails, contact rail (or "third rail") and crane rails. Rails are used by the railroad industry, by rapid transit lines, by subways, in mines and in industrial applications.

Specifically excluded from this investigation are light rails which are 60 pounds or less per yard. Also excluded are relay rails which are used rails taken up from a primary railroad track and relaid in a railroad yard or on a secondary track.

Notification of ITC

Section 732(d) of the Act requires us to notify the ITC of this action and to provide it with the information we used to arrive at this determination. We will notify the ITC and make available to it all nonprivileged and nonproprietary information. We will allow the ITC access to all privileged and business proprietary information in our files, provided it confirms in writing that it will not disclose such information either publicly or under administrative protective order without the written consent of the Assistant Secretary for Import Administration.

Preliminary Determination by ITC

The ITC will determine by November 10, 1988, whether there is a reasonable indication that imports of new steel rail, except light rail, from Canada materially injure, or threaten material injury to, a U.S. industry. If its determination is negative, the investigation will be terminated; otherwise, it will proceed

according to the statutory and regulatory procedures.

This notice is published pursuant to section 732(c)(2) of the Act.

Jan W. Mares,

Assistant Secretary for Import Administration.

October 17, 1988.

[FR Doc. 88-24421 Filed 10-20-88; 8:45 am]

BILLING CODE 3510-DS-M

[C-122-805]

Initiation of Countervailing Duty Investigation: New Steel Rail, Except Light Rail, From Canada

AGENCY: Import Administration, International Trade Administration, Commerce.

ACTION: Notice.

SUMMARY: On the basis of a petition filed in proper form with the U.S. Department of Commerce, we are initiating a countervailing duty investigation to determine whether manufacturers, producers, or exporters in Canada of new steel rail, except light rail (steel rails), as described in the "Scope of Investigation" section of this notice, receive benefits which constitute subsidies within the meaning of the countervailing duty law. We are notifying the U.S. International Trade Commission (ITC) of this action, so that it may determine whether imports from Canada materially injure, or threaten material injury to, a U.S. industry. If this investigation proceeds normally, we will make our preliminary determination on or before December 20, 1988.

EFFECTIVE DATE: October 21, 1988.

FOR FURTHER INFORMATION CONTACT: Roy Malmrose or Barbara Tillman, Office of Countervailing Duty Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone (202) 377-2815 and (202) 377-2438.

SUPPLEMENTARY INFORMATION:

The Petition

On September 26, 1988, we received a petition in proper form from Bethlehem Steel Corporation, filed on behalf of the U.S. industry producing steel rails. In addition to the petitioner, the only remaining producer of steel rails in the United States is CF&I Steel Corporation. In compliance with the filing requirements of § 355.26 of the Commerce Regulations (19 CFR 355.26), the petition alleges that manufacturers, producers, or exporters of steel rails in Canada receive subsidies within the meaning of section 701 of the Tariff Act of 1930, as amended (the Act).

Since Canada is a "country under the Agreement" within the meaning of section 701(b) of the Act, Title VII of the Act applies to this investigation, and the ITC is required to determine whether imports of the subject merchandise from Canada materially injure, or threaten material injury to, the U.S. industry.

Petitioner has alleged that it has standing to file the petition. Specifically, petitioner has alleged that it is an interested party as defined under section 771(9)(C) of the Act and that it has filed the petition on behalf of the U.S. industry manufacturing the products that are subject to this investigation. If any interested party as described under paragraphs (C), (D), (E) or (F) of section 771(9) of the Act wishes to register support of or opposition to this petition, please file written notification with the Commerce official cited in the "For Further Information Contact" section of this notice.

Initiation of Investigation

Under section 702(c) of the Act, we must make the determination on whether to intiate a countervailing duty proceeding within 20 days after a petition is filed. Section 702(b) of the Act requires the Department to initiate a countervailing duty proceeding whenever an interested party files a petition, on behalf of an industry, that (1) alleges the elements necessary for the imposition of a duty under section 701(a), and (2) is accompanied by information reasonably available to the petitioner supporting the allegations. We have examined the petition on steel rails from Canada and have found that for most of the programs alleged the petition meets these requirements. Therefore, we are initiating a countervailing duty investigation to determine whether Canadian manufacturers, producers, or exporters of steel rails, as described in the "Scope of Investigation" section of this notice, receive subsidies. However, we are not initiating an investigation for certain programs because the petition failed to allege the elements necessary for the imposition of a duty or in some instances failed to provide the necessary supporting information. If our investigation proceeds normally, we will make our preliminary determination on or before December 20, 1988.

Scope of Investigation

The United States has developed a system of tariff classification based on the international harmonized system of customs nomenclature. On January 1, 1989, the U.S. tariff schedules will be fully converted to this Harmonized Tariff Schedule (HTS) and all merchandise entered or withdrawn from warehouse for consumption on or after this date will be classified solely according to the appropriate HTS item number(s). Until that time, however, the Department will be providing both the appropriate Tariff Schedules of the United States Annotated (TSUSA) item number(s) and the appropriate HTS item number(s) with its product descriptions. As with the TSUSA, the HTS item numbers are provided for convenience and customs purposes. The written description remains dispositive as to the scope of the product coverage.

We are requesting petitioners to include the appropriate HTS item number(s) as well as the TSUSA item number(s) in all new petitions filed with the Department through the end of this year. A reference copy of the HTS schedule is available for consultation in the Central Records Unit, Room B-099, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230. Additionally, all Customs Offices have reference copies and petitioners may contact the Import Specialist at their local Customs office to consult the schedule.

The product covered by this investigation is new steel rail, except light rail, currently provided for under TSUSA Item numbers 610.2010, 601.2025, 610.2100, 688.4280 and currently classifiable under HTS item numbers 7302.10.1020, 7302.10.1040, 7302.10.5000, and 8548.00.0000.

Steel rail, whether of carbon, high carbon, alloy or other quality steel, includes but is not limited to, standard rails, all main line sections (over 60 pounds per yard), heat-treated or head-hardened (premium) rails, transit rails, contact rail (or "third rail") and crane rails. Rails are used by the railroad industry, by rapdi transit lines, by subways, in mines and in industrial applications.

Specifically excluded from this investigation are light rails which are 60 pounds or less per yard. Also excluded are relay rails which are used rails taken up from a primary railroad track and relaid in a railroad yard or on a secondary track.

Allegations of Bounties or Grants

Petitioner lists a number of practices by the Government of Canada, and the provincial governments of Ontario and Nova Scotia which allegedly confer subsidies on manufacturers, producers, or exporters of steel rails in Canada. We

are initiating an investigation of the following programs:

A. Federal Programs

1. Income Tax Exemption for Sysco.
2. Certain Investment Tax Credits.
3. Regional Development Incentive Program and Industrial and Regional Development Program.
4. Loans Under the Enterprise Development Program.
5. Defense Industry Productivity Program.
6. Promotional Projects Program.
7. Program for Export Market Development.
8. Federal Expansion and Development/Northern Ontario.

B. Joint Federal-Provincial Programs

1. Equity Infusions, Grants, Loans and Loan Guarantees Provided to Sysco.
2. Iron Ore Freight Subsidy to Algoma.
3. Mineral Development Agreement Benefits to Algoma.
4. General Development Agreements.
5. Economic and Regional Development Agreements.

C. Provincial Programs

1. Ontario Development Corporation Export Support Loans, Other Loans and Loan Guarantees.
2. Provision of Subsidized Electricity by Ontario Hydro to Algoma Steel.

Although not specifically alleged by petitioner, we are also investigating whether the manufacturers, producers or exporters of steel rails in Canada receive countervailable benefits under the following programs:

1. Community-Based Industrial Adjustment Program Grants.
2. Export Credit Financing.

We are not initiating an investigation of the programs listed below. Section 702(b) of the Act requires the Department to initiate a countervailing duty proceeding whenever an interested party files a petition, on behalf of an industry, that (1) alleges the elements necessary for the imposition of a duty under section 701(a), and (2) is accompanied by information reasoanbly available to the petitioner supporting the allegations. All the programs listed below were alleged to confer domestic subsidies. The elements which must be alleged for a domestic subsidy program are: (1) Specificity, (i.e., the program is limited to a specific enterprise or industry or group of enterprises or industries, and (2) provision of a benefit (i.e., a subsidy paid or bestowed directly or indirectly on the manufacturer, producer, or exporter of any class or kind of merchandise). For upstream subsidies, the initiation threshold is higher. Under section 701(e) of the Act, the Department must have reasonable grounds to believe or suspect that an upstream subsidy, as defined in section 771A of the Act, is being paid or bestowed upon the merchandise under investigation. For the programs listed below, the requirements of section 702(b) or 701(e) of the Act were not fulfilled in the petition.

1. Provision of Subsidized Electric Energy by Hydro-Quebec

Petitioner alleges that an upstream subsidy is conferred upon Algoma in the form of low-cost electric energy. Specifically, petitioner alleges that Hydro-Quebec, a provincially-owned power company, is being subsidized and that the subsidy passes through Algoma's supplier of electricity, Ontario Hydro, to Algoma.

The provisions of section 771A(a) of the Act define an upstream subsidy as:

> Any subsidy described in section 771(5)(B)(i), (ii), (iii), or (iv) by the government of a country that—
>
> (1) Is paid or bestowed by that government with respect to a product (hereinafter referred to as an "input product") that is used in the manufacture or production in that country of merchandise which is the subject of a countervailing duty proceeding;
>
> (2) In the judgment of the administering authority bestows a competitive benefit on the merchandise; and
>
> (3) Has a significant effect on the cost of manufacturing or producing the merchandise.

Petitioner maintains that Hydro-Quebec is primarily subsidized by reason of a contract it has for the purchase of electricity from the provincial power authority in Newfoundland. Assuming *arguendo* that electricity is an input as defined by the Act, petitioner has not provided any evidence which indicates that the contract between Hydro-Quebec and the Newfoundland power authority was not an arms-length contract made in the ordinary course of business. On the contrary, the information submitted tends to show that although the provisions of the contract may now favor Hydro-Quebec, at the time the contract was negotiated it was considered a mutually beneficial contract negotiated and agreed to at arms-length. Thus, petitioner's primary allegation regarding the subsidization of the input appears unsubstantiated.

Moreover, with respect to the competitive benefit to Algoma of the subsidized input, the petitioner alleges it can be measured by the incentive rates provided to large volume users by Ontario Hydro. We are initiating an investigation on the alleged provision of subsidized electricity by Ontario Hydro. Consequently, the alleged subsidy provided by this program will be examined separately. Petitioner has not alleged or demonstrated any competitive benefit separate from the incentive rate structure.

Finally, we note that the Department has previously determined that the government of one political jurisdiction cannot subsidize production in another political jurisdiction [*See Initiation of Countervailing Duty Investigation of Carbon Steel Wire Rod From Saudi Arabia*, (50 FR 28231, 28232, July 11, 1985).] Although this determination was based on the language in section 303 of the Act, which defines a "bounty or grant," section 771(5) of the Act states that the term "bounty or grant" has the same meaning as the term "subsidy".

Based on the foregoing, we are not initiating on this upstream subsidy allegation because the petitioner has not provided reasonable grounds for the Department to believe or suspect that an upstream subsidy has in fact been paid or bestowed upon the production of steel rails in Canada.

2. *Income Tax Exemption for Government-Owned Companies other than Sysco*

Petitioner alleges that the tax exemption for Crown Corporations is "an important benefit in connection with the provision of subsidized electricity or coal to Canadian steel companies, because the Canadian provincial power companies are state-owned Crown Corporations". This statement raises the issue of whether an upstream subsidy is being provided to the producers of steel rail in Canada. However, petitioner has not made an upstream allegation regarding this program. Therefore, we are not initiating an investigation on the tax-exempt status of state-owned provincial power companies.

With respect to the Cape Breton Development Corporation (Devco), a supplier of coal to Sysco, we note that despite its status as a Crown Corporation, the supporting information provided by the petitioner states that Devco is not tax-exempt. Therefore, we are not initiating an investigation of the alleged tax-exempt status of Devco.

3. Special Tax Subsidy to Algoma

Petitioner alleges that a tax ruling with respect to a joint venture between Algoma Steel and its parent company, Canadian Pacific Railroad, was exceptional and not usually available under Canadian tax laws and constitutes *prima facie* preferential treatment countervailable under section 701 of the Act. Information in the petition indicates that the tax ruling

permitted the financing of a seamless tube mill. Petitioner alleges that, although earmarked for the tube mill, the money generated from the tax ruling in fact benefitted all of Algoma's investment programs, and in particular, permitted the modernization of its rail facilities.

Petitioner, however, has not alleged how this tax ruling confers a domestic subsidy. A specific allegation that this benefit is limited to a specific enterprise or industry or group of enterprises or industries was not made. Furthermore, petitioner has not provided any information to indicate that the tax ruling was mandated by the government rather than a neutral interpretation of Canadian tax law. Therefore, we have no basis on which to initiate an investigation on this program.

4. Other Investment Tax Credits

Petitioner alleges that a variety of investment tax credits provide a benefit to producers or exporters of steel rails in Canada. We are not initiating an investigation on the following types of investment tax credits.

- Tax credits for investment in "qualified property"—we are initiating an investigation on the tax credits given for investments in "qualified property" made in certain regions of Canada. Petitioner also argues, however, that we must make a determination of whether the basic tax credit rate of seven percent for investments in "qualified property" is limited to specific industries on a *de facto* basis. We have previously determined that the seven percent credit is not countervailable because it is not limited to a specific enterprise or industry or group of enterprises or industries. [*See Final Affirmative Countervailing Duty Determination: Certain Fresh Atlantic Groundfish from Canada* (51 FR 10041, March 24, 1986) (*Groundfish*) and *Final Affirmative Countervailing Duty Determination: Oil Country Tubular Goods from Canada* (51 FR 15037, April 22, 1986) (OCTG).] Absent the provision of new evidence, or an allegation of changed circumstances, we have no basis upon which to re-initiate an investigation of this type of investment tax credit.
- Tax credits for research and development expenses—In *OCTG*, we determined that investment tax credits of 10 percent of research and development expenses (20 percent for small businesses) were not countervailable because they are not limited to a specific enterprise or industry or group of enterprises or industries. Absent the provision of new evidence, or an allegation of changed circumstances, we have no basis upon which to re-initiate an investigation of this type of investment tax credit.

5. Enterprise Development Program: Loan Guarantees and Grants

Availability of loan guarantees and grants through the Enterprise Development Program was investigated in *Groundfish*. We determined that the provision of loan guarantees and grants under this program was not limited to a specific enterprise or industry or group of enterprises or industries. Absent the provision of new evidence, or an allegation of changed circumstances, we have no basis upon which to re-initiate an investigation of the provision of loan guarantees and grants under this program.

6. Indirect Government Intervention

Petitioner alleges that, in 1982/1983, the federal and Nova Scotia governments agreed to share the cost of stockpiling rails produced by Sysco until the time they were needed by the purchaser, Canadian National Railroad (CNR), which is a Crown Corporation. However, petitioner has not made an allegation that this alleged benefit is limited to a specific enterprise or industry or group of enterprises or industries.

Petitioner also alleges that a recent agreement between Sysco and CNR, whereby CNR agreed to purchase 80 percent of its needs from Sysco, constitutes a countervailable subsidy benefiting a specific company. However, petitioner has not provided any evidence to indicate that this was a government provided or mandated benefit. Nothing in the petition indicates that this contract was not strictly commercial in nature and was not made at arms-length in the normal course of business.

7. Government Assistance to Algoma's Reduction in Force Program

Petitioner alleges that the government has assisted Algoma in directing laid-off workers towards retraining, relocation, alternate employment and other available programs and that this constitutes an assumption of cost by the government. However, petitioner has not provided any evidence that the government has assumed a pre-existing or contractual obligation of the company. Therefore, the elements of an assumption of cost subsidy do not appear to be present.

8. Cape Breton Development Corporation (Devco)

Petitioner alleges that Devco, a Crown Corporation sells subsidized coal to Sysco. Petitioner alleges that the sale of subsidized coal to Sysco constitutes, either the provision of a good at a preferential rate, an assumption of cost by the federal government or an upstream subsidy. Petitioner provides evidence which indicates that Devco has incurred operating losses, and that it sells coal at below its cost. However, petitioner has not made any allegation that the subsidy is limited to a specific enterprise or industry or group of enterprises or industries. Furthermore, a sufficient upstream allegation has not been made by the petitioner in accordance with section 771A of the Act.

9. Other Mineral Development Agreements

As discussed above, the purpose of these agreements is to provide geoscience data, mining and mineral processing technology, and market and economic studies to the mining sector. This raises the issue of whether an upstream subsidy is being provided to producers or exporters of steel rail in Canada. However, a sufficient upstream allegation in this regard has not been made by the petitioner in accordance with section 771A of the Act. Petitioner also alleges that benefits under MDAs constitute an assumption of cost by the governments involved and the provision of goods at preferential rates. However, petitioner has not provided any evidence that the government assumed a pre-existing or contractual obligation, or that the government is providing goods or services to some industries at a lower price than to others. Therefore, we are not initiating an investigation of the MDAs except with respect to assistance under the MDAs provided to Algoma.

Notification of ITC

Section 702(d) of the Act requires us to notify the ITC of this action, and to provide it with the information we used to arrive at this determination. We will notify the ITC and make available to it all nonprivileged and nonproprietary information in our files, provided it confirms that it will not disclose such information, either publicly or under administrative protective order, without the written consent of the Assistant Secretary for Import Administration.

Preliminary Determination by ITC

The ITC will determine by November 10, 1988, whether there is a reasonable indication that imports of steel rails from Canada materially injure, or threaten material injury to, a U.S. industry. If its determination is negative, this investigation will terminate; otherwise, this investigation will

continue according to the statutory procedures. This notice is published pursuant to section 702(c)(2) of the Act.

Jan W. Mares,

Assistant Secretary for Import Administration.

October 17, 1988.

[FR Doc. 88-24420 Filed 10-20-88; 8:45 am]

BILLING CODE 3510-DS-M

COMMITTEE FOR PURCHASE FROM THE BLIND AND OTHER SEVERELY HANDICAPPED

Procurement List 1988; Additions and Deletion

AGENCY: Committee for Purchase from the Blind and Other Severely Handicapped.

ACTION: Additions to and deletion from Procurement List.

SUMMARY: This action adds to and deletes from Procurement List 1988 commodities to be produced and services to be provided by workshops for the blind or other severely handicapped.

EFFECTIVE DATE: November 21, 1988.

ADDRESS: Committee for Purchase from the Blind and Other Severely Handicapped, Crystal Square 5, Suite 1107, 1755 Jefferson Davis Highway, Arlington, Virginia 22202-3509.

FOR FURTHER INFORMATION CONTACT: Beverly Milkman (703) 557-1145.

SUPPLEMENTARY INFORMATION: On July 15, August 5, Augst 19, and August 26, 1988, the Committee for Purchase from the Blind and Other Severely Handicapped published notices (53 FR 26847, 29511, 31735 and 32642) of proposed additions to and deletion from Procurement List 1988, December 10, 1987 (52 FR 46926).

Additions

After consideration of the relevant matter presented, the Committee has determined that the commodities and services listed below are suitable for procurement by the Federal Government under 41 U.S.C. 46-48c and 41 CFR 51-2.6.

I certify that the following actions will not have a significant impact on a substantial number of small entities. The major factors considered were:

a. The actions will not result in any additional reporting, recordkeeping or other compliance requirements.

b. The actions will not have a serious economic impact on any contractors for the commodities and services listed.

c. The actions will result in authorizing small entities to produce the commodities and provide the services procured by the Government.

Accordingly, the following commodities and services are hereby added to Procurement List 1988:

Commodities

Folder, File,
7530-00-990-8884, (Requirements for Chicago, Illinois Supply Distribution Facility only).

Cloth, Wiping,
7930-00-NSH-0003 (w/o Lanyard),
7930-00-NSH-0004 (w/Lanyard),
(Requirements for Charleston Naval Supply Center, Charleston, South Carolina only).

Services

Commissary Shelf Stocking and Custodial Service,
Langley Air Force Base, Virginia.

Commissary Warehouse Service,
Langley Air Force Base, Virginia.

Deletion

After consideration of the relevant matter presented, the Committee has determined that the service listed below is no longer suitable for procurement by the Federal Government under 41 U.S.C. 46-48c and 41 CFR 51-2.6. Accordingly, the following service is hereby deleted from Procurement List 1988:

Commissary Shelf Stocking and Custodial Service,
Columbus Air Force Base, Mississippi.

Beverly L. Milkman,

Executive Director.

[FR Doc. 88-24406 Filed 10-20-88; 8:45 am]

BILLING CODE 6820-33-M

Procurement List 1988; Proposed Additions

AGENCY: Committee for Purchase from the Blind and Other Severely Handicapped.

ACTION: Proposed additions to Procurement List.

SUMMARY: The Committee has received proposals to add to Procurement List 1988 a commodity to be produced and a service to be provided by workshops for the blind and other severely handicapped.

DATE: Comments must be received on or before November 21, 1988.

ADDRESS: Committee for Purchase from the Blind and Other Severely Handicapped, Crystal Square 5, Suite 1107, 1755 Jefferson Davis Highway, Arlington, Virginia 22202-3509.

FOR FURTHER INFORMATION CONTACT: Beverly Milkman (703) 557-1145.

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 47(a)(2) and 41 CFR 51-2.6. Its purpose is to provide interested persons an opportunity to submit comments on the possible impact of the proposed actions.

If the Committee approves the proposed additions, all entities of the Federal Government will be required to procure the commodity and service listed below from workshops for the blind or other severely handicapped.

It is proposed to add the following commodity and service to Procurement List 1988, December 10, 1987 (52 FR 46926).

Commodity

Bag, Cargo,
1670-01-0653748.

Service

Janitorial/Custodial,
FAA Facility, Williamsport Lycoming Airport, Montoursville, Pennsylvania.

Beverly L. Milkman,

Executive Director.

[FR Doc. 88-24407 Filed 10-20-88; 8:45 am]

BILLING CODE 6820-33-M

DEPARTMENT OF DEFENSE

Public Information Collection Requirement Submitted to OMB for Review

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance the following proposal for collection of information under the Paperwork Reduction Act (44 U.S.C. Chapter 35).

SUMMARY: The previous notice published in Vol. 53, No. 163 dated Tuesday, August 23, 1988, is withdrawn.

Title, Applicable Form, and Applicable OMB Control Number: DoD FAR Supplement, Part 27, Patents, Data and Copyrights; No Form; and OMB Control Number 0704-0240.

Type of Request: Emergency Submission.

Average Burden Hours/Minutes Per Response: 79 hours and 28 minutes

Frequency of Response: Monthly.

Number of Respondents: 16,560.

Annual Burden Hours: 2,307,240.

Annual Responses: 16,560.

Need and Uses: This request concerns information collection and recordkeeping requirements related to technical data, software copyrights, patents, and contracts.

Affected Public: Businesses or other for-profit.

Respondent's Obligation: Mandatory.

OMB Desk Officer: Ms. Eyvette R. Flynn.

Written comments and recommendations on the proposed information collection should be sent to Ms. Eyvette R. Flynn at Office of Management and Budget, Desk Officer, Room 3235, New Executive Office Building, Washington, DC 20503.

DOD Clearance Officer: Ms. Pearl Rascoe-Harrison.

A copy of the information collection proposal may be obtained from Ms. Rascoe-Harrison, WHS/DIOR, 1215 Jefferson Davis Highway, Suite 1204, Arlington, Virginia 22202–4302, telephone (202) 746–0933.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

October 18, 1988.

[FR Doc. 88–24443 Filed 10–20–88; 8:45 am]

BILLING CODE 3810–01–M

Public Information Collection Requirement Submitted to OMB for Review

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Title, Applicable Form, and Applicable OMB Control Number: Verification of Professional Educator Employment for Salary Rating Purposes; SD Form 809; and OMB Control Number 0704–0226.

Type of Request: Reinstatement.

Average Burden Hours/Minutes Per Response: 5 minutes.

Frequency of Response: On Occasion.

Number of Respondents: 11,000.

Annual Burden Hours: 917.

Annual Responses: 11,000.

Needs and Uses: Information collected is used to verify an applicant's previous experience which is used to establish rate of pay.

Affected Public: Individuals or households.

Respondent's Obligation: Required to obtain or retain a benefit.

OMB Desk Officer: Dr. J. Timothy Sprehe.

Written comments and recommendations on the proposed information collection should be sent to Dr. J. Timothy Sprehe at Office of Management and Budget, Desk Officer, Room 3235, New Executive Office Building, Washington, DC 20503.

DOD Clearance Officer: Ms. Pearl Rascoe-Harrison.

A copy of the information collection proposal may be obtained from, Ms. Rascoe-Harrison, WHS/DIOR, 1215 Jefferson Davis Highway, Suite 1204, Arlington, Virginia 22202–4302, telephone (202) 746–0933.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

October 18, 1988.

[FR Doc. 88–24444 Filed 10–20–88; 8:45 am]

BILLING CODE 3810–01–M

Office of the Secretary of Defense

Meetings; D/A Advisory Board

AGENCY: Defense Intelligence Agency Advisory Board, DOD.

ACTION: Notice of closed meeting.

SUMMARY: Pursuant to the provisions of subsection (d) of section 10 of Pub. L. 92–463, as amended by section 5 of Pub. L. 94–409, notice is hereby given that a closed meeting of a panel of the DIA Advisory Board (formerly DIA Scientific Advisory Committee) has been changed as follows: The October 20, 1988 meeting previously published at 53 FR 37334, Sept. 26, 1988 has been rescheduled to the date listed below.

DATE: October 27, 1988, 8:30 a.m. to 3:30 p.m.

ADDRESS: The DIAC, Bolling AFB, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Lieutenant Colonel John E. Hatlelid, USAF, Executive Secretary, DIA Advisory Board, Washington, DC 20340–1328 (202/373–4930).

SUPPLEMENTARY INFORMATION: The entire meeting will be devoted to the discussion of classified information as defined in section 552b(c)(1), Title 5 of the U.S. Code and therefore will be closed to the public. Subject matter will be used in a special study on HUMINT/Scientific and Technical Intelligence Interface.

L.M. Bynum,

Alternate OSD Federal Register Liaison, Officer, Department of Defense.

October 18, 1988.

[FR Doc. 88–24378 Filed 10–20–88; 8:45 am]

BILLING CODE 3810–01–M

Meetings: DIA Advisory Board

AGENCY: Defense Intelligence Agency Advisory Board, DOD.

ACTION: Notice of closed meeting.

SUMMARY: Pursuant to provisions of subsection (d) of section 10 of Pub. L. 92–463, as amended by section 5 of Pub. L. 94–409, notice is hereby given that a closed meeting of a panel of the DIA Advisory Board (formerly DIA Scientific Advisory Committee) has been changed as follows: The October 17, 1988 meeting previously published at 53 FR 36876, Sept. 22, 1988 has been rescheduled to the date listed below.

DATE: November 15, 1988 (8:30 a.m. to 5:00 p.m.)

ADDRESS: The DIAC, Bolling AFB, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Lieutenant Colonel John E. Hatlelid, USAF, Executive Secretary, DIA Advisory Board, Washington, DC 20340–1328 (202/373–4930).

SUPPLEMENTARY INFORMATION: The entire meeting will be devoted to the discussion of classified information as defined in section 552b(c)(1), Title 5 of the U.S. Code and therefore will be closed to the public. Subject matter will be used in a special study on tactical intelligence information handling systems.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

October 18, 1988.

[FR Doc. 88–24379 Filed 10–20–88; 8:45 am]

BILLING CODE 3810–01–M

DEPARTMENT OF EDUCATION

Proposed Information Collection Requests

AGENCY: Department of Education.

ACTION: Notice of proposed information collection requests.

SUMMARY: The Director, Office of Information Resources Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1980.

DATE: Interested persons are invited to submit comments on or before November 21, 1988.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Jim Houser, Desk Officer, Department of Education, Office of Management and Budget, 726 Jackson Place NW., Room 3208, New Executive Office Building, Washington, DC 20503. Requests for copies of the proposed information collection requests should be addressed to Margaret B. Webster, Department of Education, 400 Maryland

Avenue SW., Room 5624, Regional Office Building 3, Washington, DC 20202.

FOR FURTHER INFORMATION CONTACT: Margaret B. Webster (202) 732–3915.

SUPPLEMENTARY INFORMATION: Section 3517 of the Paperwork Reduction Act of 1980 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations.

The Director, Office of Information Resources Management, publishes this notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following:

(1) Type of review requested, e.g., new, revision, extension, existing or reinstatement; (2) Title; (3) Frequency of collection; (4) The affected public; (5) Reporting burden; and/or (6) Recordkeeping burden; and (7) Abstract. OMB invites public comment at the address specified above. Copies of the requests are available from Margaret Webster at the address specified above.

Dated: October 18, 1988.

Carlos U. Rice,

Director for Office of Information Resources Management.

Office of Educational Research and Improvement

Type of Review: Revision.
Title: Common Core of Data (CCD), 1988–89.
Frequency: Annually.
Affected Public: State or Local Governments.
Reporting Burden:
Responses: 57
Burden Hours: 4,592.5
Recordkeeping:
Recordkeepers: 0
Burden Hours: 0

Abstract: These surveys provide information about student enrollment, graduates, teachers, and related finances and are used in the allocation of Federal funds under Chapter 1, Education Consolidation and Improvement Act, as amended. Data are also provided to the general public as requested.

Office of Elementary and Secondary Education

Type of Review: Reinstatement.
Title: Application for grants under Indian Fellowship Program (New and Continuation) Financial Report.
Frequency: Annually.
Affected Public: Higher Education Institutions.
Reporting Burden:
Responses: 1,070
Burden Hours: 1,733
Recordkeeping:
Recordkeepers: 0
Burden Hours: 0

Abstract: This application will be used by institutions of higher education to determine eligibility for funds under the Indian Fellowship Program. The Department will use the information to make grant awards.

Office of Planning, Budget and Evaluation, Planning and Evaluation Service

Type of Review: New.
Title: Survey of School Dropout Demonstration Assistance Programs.
Frequency: One time per grantee.
Affected Public: State or Local Governments.
Reporting Burden:
Responses: 90
Burden Hours: 135
Recordkeeping:
Recordkeepers: 0
Burden Hours: 0

Astracts: This survey will be completed by Federally-funded agencies under the School Dropout Demonstration Assistance Act of 1988. The Department will use the information collected to assess the accomplishments of program goals and objectives and to aid in effective program management.

Office of Postsecondary Education

Type of Review: Revision.
Title: Application-Program Announcement for the Minority Science Improvement Program.
Frequency: Annually.
Affected Public: Businesses or other for-profit; Non-profit institutions.
Reporting Burden:
Responses: 150
Burden Hours: 6,300
Recordkeeping:
Recordkeepers: 0
Burden Hours: 0

Abstract: These forms are used by minority institutions, eligible nonprofit science oriented organizations, professional scientific societies, and colleges and universities to apply for funding under the Higher Education Amendments Act of 1986, as amended. The Department uses the information to conduct a competitive evaluation process and to make grant awards.

[FR Doc. 88–24442 Filed 10–20–88; 8:45 am]

BILLING CODE 4000–01–M

DEPARTMENT OF ENERGY

Assistant Secretary for International Affairs and Energy Emergencies

Proposed Subsequent Arrangement; Atomic Energy

Pursuant to section 131 of the Atomic Energy Act of 1954, as amended (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 Australia concerning Peaceful Uses of Nuclear Energy, 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/EU(AU)–6, for the transfer of 0.016 grams of plutonium-239 contained in Synroc samples from Australia to Karlsruhe, the Federal Republic of Germany for analysis.

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 November 7, 1988.

For the Department of Energy.

Date: October 18, 1988.

David B. Waller,

Assistant Secretary of Energy International Affairs and Energy Emergencies.

[FR Doc. 88–24445 Filed 10–20–88; 8:45 am]

BILLING CODE 6450–01–M

Proposed Subsequent Arrangement; Atomic Energy

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 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 and the Agreement for Cooperation between the Government of the United States of America and the Government of the Republic of Indonesia concerning Peaceful Uses of Nuclear Energy.

The subsequent arrangement to be carried out under the above-mentioned agreements involves the retransfer of 33,000 grams of U308-powder enriched to 19.95 percent of the isotope uranium-235 from the Federal Republic to the JANUS–30 type MPR research reactor, Serpong, Java/Indonesia. Retransfer document RTD/IE (EU)–5 has been assigned to this retransfer.

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 November 7, 1988.

For the Department of Energy.

Date: October 18, 1988.

David B. Waller,

Assistant Secretary of Energy, International Affairs and Energy Emergencies.

[FR Doc. 88–24446 Filed 10–20–88; 8:45 am]

BILLING CODE 6450–01–M

Proposed Subsequent Arrangement; Atomic Energy

Pursuant to section 131 of the Atomic Energy Act of 1954, as amended (U.S.C. 2160) notice is hereby given of a proposed "subsequent arrangement" under 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 agreement involves the approval for the shipment of 40 kilograms of spent fuel from the HFR reactor in the Netherlands for storage and reprocessing at the Department of Energy facilities. The return of highly enriched uranium (HEU) is consistent with U.S. nonproliferation policy in that it serves to reduce the amount of HEU abroad.

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 November 7, 1988.

For the Department of Energy.

Date: October 18, 1988.

David B. Waller,

Assistant Secretary of Energy, International Affairs and Energy Emergencies.

[FR Doc. 88–24447 Filed 10–20–88; 8:45 am]

BILLING CODE 6450–01–M

Proposed Subsequent Arrangement; Atomic Energy

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 International Atomic Energy Agency (IAEA) concerning Peaceful Application of Atomic Energy, as amended.

The subsequent arrangement to be carried out under the above-mentioned agreements involves the supply of 1.07 grams of plutonium for use as standard reference material at the Nuclear Research Institute, Central Control Laboratory, Prague, Czechoslovakia. Contract Number S–IAEA–150 has been assigned to this transactions.

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 November 7, 1988.

For the Department of Energy.

Date: October 18, 1988.

David B. Waller,

Assistant Secretary of Energy International Affairs and Energy Emergencies.

[FR Doc. 88–24448 Filed 10–20–88; 8:45 am]

BILLING CODE 6450–01–M

Office of Energy Research

High Energy Physics Advisory Panel: Open Meeting

Pursuant to the provisions of the Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770), notice is hereby given of the following meeting:

Name: High Energy Physics Advisory Panel (HEPAP).

Date and Time: Monday, November 14, 1988, 8:30 am–6:00 pm. Tuesday, November 15, 1988, 8:30 am–4:00 pm.

Place: National Science Foundation, 1800 G Street, NW., Room 540, Washington, DC 20550.

Contact: Dr. Enloe T. Ritter, Executive Secretary, High Energy Physics Advisory Panel, U.S. Department of Energy, ER–221, GTN, Washington, DC 20545, Telephone: (301) 353–4829.

Purpose of Panel: To provide advice and guidance on a continuing basis with respect to the high energy physics research program.

Tentative Agenda:

Monday, November 14, 1988

—Discussion of Budgets and Programs for National Science Foundation Elementary Particle Physics.
—Discussion of Budgets and Programs for Department of Energy, High Energy Physics.
—Status Reports from High Energy Physics Laboratories and Superconducting Super Collider.
—Discussion of High Energy Physics Detectors.
—Discussions of Special Topics in High Energy Physics.
—Discussion by HEPAP of Foregoing Items.
—Public Comment.

Tuesday, November 15, 1988

—Further Discussion of Foregoing Items and Presentation of Information Reports as Needed.
—Report on the Meeting of the Joint Coordinating Committee for United States/Peoples Republic of China Cooperation in High Energy Physics.
—Discussion on Transmittal of the Report of the Subpanel on High Energy Gamma Ray and Neutrino Astronomy.
—Public Comment.

Public Participation: The meeting is open to the public. The Chairperson of the Panel is empowered to conduct the meeting in a fashion that will, in his judgment, facilitate the orderly conduct of business. Any member of the public who wishes to make oral statements pertaining to agenda items should contact the Executive Secretary at the address of telephone number listed above. Requests must be received at least 5 days prior to the meeting and reasonable provision will be made to include the presentation on the agenda.

Minutes: Available for public review and copying at the Public Reading Room, Room 1E–190, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC between 9:00 a.m. and 4:00 p.m., Monday through Friday, except Federal holidays.

Issued at Washington, DC, on October 17, 1988.

J. Robert Franklin,

Deputy Advisory Committee Management Officer.

[FR Doc. 88–24449 Filed 10–20–88; 8:45 am]

BILLING CODE 6450–01–M

Federal Energy Regulatory Commission

[Docket No. QF88-537-000]

J-W Operating Co.; Application for Commission Certification of Qualifying Status of a Small Power Production Facility

October 6, 1988.

On September 23, 1988, J-W Operating Company (Applicant), of 15508 Wright Brothers Dr., Addison, Texas 75224 submitted for filing an application for certification of a facility as a qualifying small power production facility pursuant to § 292.207 of the Commission's regulations. No determination has been made that the submittal constitutes a complete filing.

The small power production facility will be located in Selma, California. The facility will consist of three gas-fired engine generators. The electric power production capacity will be 693 kilowatts. The primary energy source will be biomass in the form of landfill gas. Construction of the facility is expected to begin in October 1988.

Any person desiring to be heard or objecting to the granting of qualifying status should file a petition 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 petitions or protests must be filed within 30 days after the date of publication of this notice and must be served on the applicant. 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 petition to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 88-24387 Filed 10-20-88; 8:45 am]

BILLING CODE 6717-01-M

Application Filed With the Commission

October 18, 1988.

Take notice that the following hydroelectric application has been filed with the Federal Energy Regulatory Commission and is available for public inspection:

a. Type of Application: Amendment to Transfer of License.

b. Project No.: 2725-018.

c. Date filed: October 13, 1988.

d. Applicant: Georgia Power Company, Oglethorpe Power Corporation, and Piedmont-Forrest Corporation.

e. Name of Project: Rocky Mountain Project.

f. Location: On Heath Creek in Big Texas Valley, in Floyd County, Georgia.

g. Filed Pursuant to: Section 9 of the Federal Power Act 16 U.S.C. 791(a) 825(r).

h. Applicant Contact: For Georgia Power (GP) and Piedmont-Forrest Corporation (PFC).

William H. Watson, General Manager, Fossil and Hydro Projects, Georgia Power Company, 333 Piedmont Avenue NE., Atlanta, GA 30308

John R. Molen, Esq., Troutman, Sanders, Lockerman & Ashmore, 127 Peachtree Street NE., Atlanta, GA 30043

For Oglethorpe Power (OP): Tom D. Kilgore, Senior Vice President, Power Supply Division, Oglethorpe Power Corporation, 2100 East Exchange Place, P.O. Box 1349, Tucker, GA 30085-1349.

i. FERC Contact: Ed Lee (202) 376-5786.

j. Comment Date: October 28, 1988.

k. Description of Application: On January 21, 1977, a license was issued to GP for the 760-MW Rocky Mountain Project No. 2725. On January 28, 1988, an order Approving Transfer of License and Extension of Competion date was issued to GP and OP. As joint applicants, GP, PFC, and OP, request that the Commission approve the application for amendment to the transfer of license by modifying its order of January 28, 1988, witht he addition of PFC as a transferee and transferor of the license for the Rocky Mountain Project. GP and OP assert that the substance of this arrangement will be the same as that contemplated in its original transfer application. The only difference will be that PFC will become a transitory licensee.

l. This notice also consists of the following standard paragraphs: B and C.

Standard Paragraphs

B. *Comments, Protests, or Motions to Intervene*—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of the Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

C. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title "COMMENTS," "RECOMMENDATIONS FOR TERMS AND CONDITIONS," "NOTICE OF INTENT TO FILE COMPETING APPLICATION," "COMPETING APPLICATIONS," "PROTEST" or "MOTION TO INTERVENE," as applicable, and the project number of the particular application to which the filing is in response. Any of these documents must be filed by providing the original and the number of copies required by the Commission's regulations to: the Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426. An additional copy must be sent to: the Director, Division of Project Review, Office of Hydropower Licensing, Federal Energy Regulatory Commission, Room 204-RB, at the above address. A copy of any notice of intent, competing application, or motion to intervene must also be served upon each representative of the applicant specified in the particular application.

Lois D. Cashell,

Secretary.

[FR Doc. 88-24439 Filed 10-20-88; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. CP88-868-000 et al.]

K N Energy, Inc., et al.; Natural Gas Certificate Filings

Take notice that the following filings have been made with the Commission:

1. K N Energy, Inc.

[Docket No. CP88-868-000]

October 7, 1988.

Take notice that on September 29, 1988, K N Energy, Inc. (K N) filed in Docket No. CP88-868-000 a request pursuant to sections 7(b) and 7(c) of the Natural Gas Act and Part 157 of the Commission's Regulations thereunder for a certificate of public convenience and necessity authorizing K N to

(a) Replace, relocate and abandon certain facilities as follows:

(i) Replace 30.8 miles of pipeline between Cozad and Elm Creek, Nebraska with smaller pipe;

(ii) Replace 6.8 miles of pipeline near Sargent, Nebraska with smaller pipe;

(iii) Replace 2.0 miles of pipeline near North Loup, Nebraska with smaller pipe;

(iv) Abandon 37.3 miles of pipeline in the Lightning Creek Field in eastern Wyoming;

(v) Abandon two compressor units and relocated facilities from the Lightning Creek Field; and

(vi) Relocate one compressor unit from the Palco, Kansas Compressor Station to the Big Springs, Nebraska Compressor Station.

(b) Make a one-time accounting balance with respect to imbalances accrued under two Wyoming field exchanges known as the "Fremont County Exchange" and the "Madden Field Exchange" between K N and Williston Basin Interstate Pipeline Company (hereinafter referred to as Williston) [1]

All as more fully set forth in the Application on file with the Commission and open to public inspection.

Comment date: October 28, 1988, in accordance with Standard Paragraph F at the end of this notice.

2. Natural Gas Pipeline Company

[Docket No. CP89-4-000]

October 14, 1988.

Take notice that on October 3, 1988, Natural Gas Pipeline Company of America (Natural), 701 East 22nd Street, Lombard, Illinois 60148, filed in Docket No. CP89-4-000 a request pursuant to the notice procedure in § 157.205 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to transport, on an interruptible basis, up to a maximum of 80,000 MMBtu (plus any additional volumes accepted pursuant to the overrun provisions of Natural's Rate Schedule ITS) for Anadarko Trading Company (Anadarko), a marketeer of natural gas, under Natural's blanket certificate issued in Docket No. CP86-582 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request on file with the Commission and open to public inspection.

Natural states that, pursuant to an interruptible transportation agreement dated June 27, 1988, as amended September 7, 1988, it proposes to transport, on an interruptible basis, up to a maximum of 80,000 MMBtu of natural gas per day on behalf of Anadarko. It is stated that the gas would be transported from points of receipt located in Louisiana, offshore Louisiana, New Mexico, Oklahoma, Texas, offshore Texas, Kansas, Iowa, and Illinois to points of delivery located in Illinois, Missouri, Texas, offshore Texas, Louisiana, and offshore Louisiana. Peak day and average day transportation volumes are expected to be 80,000 MMBtu and 50,000 MMBtu, respectively. Based on the estimate for the average day transportation volume, the annual transportation volume is expected to be 18,250,000 MMBtu. Finally, Natural advises that the transportation service commenced on August 1, 1988, under § 284.223(a) as reported in Docket No. ST89-18-000.

Comment date: November 28, 1988, in accordance with Standard Paragraph G at the end of this notice.

3. Natural Gas Pipeline Company of America

[Docket No. CP89-17-000]

October 14, 1988

Take notice that on October 6, 1988, Natural Gas Pipeline Company of America (Natural), 701 East 22nd Street, Lombard, Illinois 60148, filed in Docket No. CP89-17-000 a request pursuant to § 157.205 of the Commission's Regulations for authorization to transport natural gas on behalf of V.H.C. Gas Systems, L.P. (V.H.C.), a marketer of natural gas, under Natural's blanket certificate issued in Docket No. CP86-582-000, pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Natural proposes to transport on an interruptible basis up to 200,000 MMBtu of natural gas per day for V.H.C. on a peak day plus any additional volumes accepted pursuant to the overrun provisions of Natural's Rate Schedule ITS, 50,000 MMBtu on an average day and 18,250,000 MMBtu on an annual basis for V.H.C. It is stated that Natural would receive the gas at specified receipt points in Louisiana, Texas, Illinois, Oklahoma, New Mexico, Kansas, Colorado, Iowa, Arkansas and Nebraska, and would deliver equivalent volumes of gas at specified delivery points in Texas and New Mexico. It is asserted that the transportation service would be effected using existing facilities and would not require any construction of additional facilities. It is explained that the service commenced August 1, 1988, under the automatic authorization provisions of § 284.223 of the Commission's Regulations, as reported in Docket No. ST89-94.

Comment date: November 28, 1988, in accordance with Standard Paragraph G at the end of this notice.

Natural Gas Pipeline Company of America

[Docket No. CP89-13-000]

October 14, 1988.

Take notice that on October 5, 1988, Natural Gas Pipeline Company of America (Natural), 701 East 22nd Street, Lombard, Illinois 60148, filed in Docket No. CP89-13-000 a request pursuant to § 157.205 of the Commission's Regulations for authorization to transport natural gas on behalf of Amoco Production Company (Amoco), a producer of natural gas, under Natural's blanket certificate issued in Docket No. CP86-582-000, pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Natural proposes to transport on an interruptible basis up to 400,000 MMBtu of natural gas per day for Amoco on a peak day plus any additional volumes accepted pursuant to the overrun provisions of Natural's Rate Schedule ITS, 60,000 MMBtu on an average day and 21,900,000 MMBtu on an annual basis for Amoco. It is stated that Natural would receive the gas at specified receipt points in Louisiana, offshore Louisiana, Texas, offshore Texas, Illinois, Oklahoma, New Mexico, Kansas, Arkansas, Nebraska, Wyoming, Missouri and Montana and would deliver equivalent volumes of gas at specified delivery points in Illinois, Iowa and Kansas. It is asserted that the transportation service would be effected using existing facilities and would not require any construction of additional facilities. It is explained that the service commenced August 1, 1988, under the automatic authorization provisions of § 284.223 of the Commission's Regulations, as reported in Docket No. ST89-66.

Comment date: November 28, 1988, in accordance with Standard Paragraph G at the end of this notice.

Standard Paragraphs:

F. Any person desiring to be heard or make any protest with reference to said filing should on or before the comment date file with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

[1] See Williston Basin Interstate Pipeline Company, Docket No. CP87-253-000, filed on March 16, 1987.

Take further notice that, pursuant to the authority contained in and subject to jurisdiction conferred upon the Federal Energy Regulatory Commission by sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this filing if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that a grant of the certificate is required by the public convenience and necessity. If a motion for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for the applicant to appear or be represented at the hearing.

G. Any person or the Commission's staff may, within 45 days after the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to § 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the Natural Gas Act.

Lois D. Cashell,

Secretary.

[FR Doc. 24385 Filed 10-20-88; 8:45am]

BILLING CODE 6717-01-M

[Docket Nos. CP88-828-000 et al.]

Questar Pipeline Company et al.; Natural Gas Certificate Filings

October 18, 1988.

Take notice that the following filings have been made with the Commission:

1. Questar Pipeline Company

[Docket No. CP88-828-000]

Take notice that on September 23, 1988, Questar Pipeline Company (Questar), 79 South State Street, Salt Lake City, Utah 84111, filed in Docket No. CP88-828-000 an application pursuant to section 7(b) of the Natural Gas Act for permission and approval to abandon part of the maximum daily volume (MDV) applicable to transportation service provided to Mountain Fuel Supply Company (MFS), all as more fully set forth in the application which is an file with the Commission and open to public inspection.

Questar indicates that MFS has requested a reduction in its MDV under Rate Schedule X-33 from 160 MMcf per day to 110 MMcf per day because of MFS's decline in the deliverability of natural gas due to current and projected market conditions and requirements.

Comment date: November 8, 1988, in accordance with Standard Paragraph F at the end of this notice.

2. Panhandle Eastern Pipe Line Company

[Docket No. CP89-26-000]

Take notice that on October 7, 1988, Panhandle Eastern Pipe Line Company (Panhandle), P.O. Box 1642, Houston, Texas 77251-1642, filed in Docket No. CP89-26-000 a request pursuant to § 157.205 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to transport natural gas for EnTrade Corporation (EnTrade), an end-user of natural gas, under Panhandle's blanket certificate issued in Docket No. CP86-585-000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open for public inspection.

Panhandle proposes to transport up to 50,000 dt of natural gas per day, on an interruptible basis, on behalf of EnTrade pursuant to a transportation agreement dated August 2, 1988, between Panhandle and EnTrade. It is stated that the transportation agreement provides for Panhandle to receive gas from various existing points of receipt on its system in Texas, Oklahoma, Kansas, Colorado, Wyoming, and Illinois. It is further stated that Panhandle would then transport and redeliver subject gas, less fuel and unaccounted for line loss to Natural Gas Pipeline Company of America (NGPL) in Clark County, Kansas.

Panhandle states that the estimated daily and estimated annual quantities would be 15,000 dt and 5,475,000 dt, respectively. Service under § 284.223(a) commenced on August 3, 1988, as reported in Docket No. ST88-5643, it is stated. The transportation service, as described herein, is proposed to commence immediately upon expiration of the 120-day automatic authorization period. Pursuant to the transportation agreement, service would continue in effect until terminated by either party upon 30-days prior written notice, which would be the expiration of the contractual term for the purpose of § 284.221(d), it is stated. Panhandle states that no new facilities nor expansion of existing facilities are required to provide the service requested hereunder.

Comment date: December 2, 1988, in accordance with Standard Paragraph G at the end of this notice.

3. Northern Natural Gas Company, Division of Enron Corp.

[Docket No. CP88-873-000]

Take notice that on September 29, 1988, Northern Natural Gas Company, Division of Enron Corp., (Northern), 1400 Smith Street, P.O. Box 1188, Houston, Texas 77251-1188, filed in Docket No. CP88-873-000, an application pursuant to §§ 157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act for authorization to transport natural gas on behalf of Arco Oil & Gas Company (Arco), a producer of natural gas, under Northern's blanket certificate issued in Docket No. CP86-435-000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Northern proposes the interruptible transportation of up to 100 billion Btu equivalent of natural gas per day for Arco pursuant to Rate Schedule IT-1. Northern indicates that it would transport the gas between various specified receipt and delivery points. Northern indicates that service under § 284.223(a) has commenced as filed in Docket No. ST88-5351.

Comment date: December 2, 1988, in accordance with Standard Paragraph G at the end of this notice.

4. CNG Transmission Corporation

[Docket No. CP89-5-000]

Take notice that on October 3, 1988, CNG Transmission Corporation (Transmission) 445 West Main Street, Clarksburg, West Virginia 26301, filed in Docket No. CP89-5-000 an application pursuant to section 7 of the Natural Gas Act for a certificate of public convenience and necessity authorizing a new interruptible sales service, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Transmission proposes a new interruptible sales service under Rate Schedule USA to on-system and off-system buyers. Specifically, Transmission requests blanket authorization with pregranted abandonment to make interruptible sales to any local distribution company,

interstate pipeline, intrastate pipeline, or Hinshaw pipeline. Transmission also requests blanket authorization, with pre-granted abandonment, to use its facilities to effectuate the direct delivery of gas under this rate schedule to end-users and marketers. Transmission states that Rate Schedule USA would be used to market system supply gas that it has determined to be in excess of its needs.

Transmission requests authorization to charge Rate Schedule USA customers a rate ranging between a minimum of Transmission's weighted average cost of gas, on a unit of purchase basis for the month in which gas is delivered, plus fuel, variable costs of delivering gas, ACA and GRI charges, where applicable, and a maximum of Transmission's 100 percent load factor RQ rate.

Transmission proposes to retain all non-gas revenues generated by sales under this rate schedule and to flow the gas cost revenues through Account No. 191. Transmission states it would discount its rate as necessary to meet competition, but would not discriminate between transportation and sales customers in the discount of the non-gas rate being offered.

Comment date: November 8, 1988, in accordance with Standard Paragraph F at the end of his notice.

5. Transcontinental Gas Pipe Line Corporation

[Docket No. CP89-006-000]

Take notice that on October 3, 1988, Transcontinental Gas Pipe Line Corporation (Transco), Post Office Box 1396, Houston, Texas 77251, filed in Docket No. CP89-006-000 an application pursuant to the Order issued September 16, 1988 in *Northeast U.S. Pipeline Projects*, Docket No. CP87-451-000, *et al.*, for authorization, pursuant to Section 7(c) of the Natural Gas Act, to transport up to the dekatherm equivalent of 170,000 Mcf per day on long term, firm basis for the Associated PennEast Customer Group (APEC). Transco further seeks authorization to construct, install, and operate certain pipeline loop and compression facilities on its Leidy Line and in the market area of its system, all as more fully set forth in the application on file with the Commission and open for public inspection.

Transco states that it seeks authorization for seasonal firm transportation service for the APEC customers in order to effectuate the delivery of winter season volumes purchased from CNG Transmission Corporation or other suppliers. The APEC customer group consists of Public Service Electric & Gas Company, Brooklyn Union Gas Company, Long Island Lightning Company, New Jersey Natural Gas Company, Elizabeth Gas Company, and South Jersey Gas Company.

To provide additional capacity to render the proposed winter season transportation service, Transco states that it would construct 3.81 miles of 20-inch diameter pipeline loop, 5.15 miles of 30 inch diameter pipeline loop, 17.47 miles of 36-inch diameter compression, 12,600 HP of additional compression, a 30,000 Mcf/d M&R Station and a 170,000 Mcf/d M&R Station expansion. Transco states that the proposed facilities, which were initially proposed in Docket No. CP88-177-000, would cost approximately $44.9 million. Transco proposes that these costs would be financed initially through short-term loans and funds on hand, with permanent financing proposed to be arranged as part of Transco's overall long-term financing program.

Transco states that it has derived an initial monthly demand rate of $6.26 per dekatherm of contract demand and a commodity rate of $.0026, which would be based upon the proposed incremental cost of service in the first full year of operation of the proposed facilities. The methodology used to design the proposed rates is more fully set forth in the application.

Comment date: November 8, 1988, in accordance with Standard Paragraph F at the end of this notice.

6. Southern Natural Gas Company

[Docket No. CP88-896-000]

Take notice that on September 30, 1988, Southern Natural Gas Company (Southern) P.O. Box 2563, Birmingham, Alabama 35202-2563, filed in Docket No. CP88-896-000 a request pursuant to §§ 157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act for authorization to transport natural gas on an interruptible basis for Sonat Marketing Company (SMC) under Southern's blanket certificate issued in Docket No. CP88-316-000 under section 7 of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Southern states it would perform the proposed transportation service for SMC, a marketer, under Southern's Rate Schedule IT. Southern proposes to transport 30 billion Btu equivalent of natural gas on a peak day; 10 billion Btu equivalent on an average day; and 3,650 billion Btu equivalent on an annual basis for SMC. Southern proposes to receive the gas at various receipt points in Texas, Louisiana, offshore Louisiana and Mississippi for delivery to an end user in Georgia.

Southern states that it commenced transportation of natural gas for SMC on July 28, 1988, as reported in Docket No. ST88-5219 pursuant to § 284.223(a) of the Commission's Regulations.

Comment date: December 2, 1988, in accordance with Standard Paragraph G at the end of this notice.

7. Washington Natural Gas Company

[Docket No. CP88-833-000]

Take notice that on September 26, 1988, Washington Natural Gas Company, as project operator of the Jackson Prairie Storage Project (Applicant), 815 Mercer Street, Seattle, Washington 98109, filed in Docket No. CP88-833-000, an application pursuant to section 7(c) of the Natural Gas Act for a certificate of public convenience and necessity authorizing the construction and operation of facilities to increase the firm daily delivery capability and seasonal storage capacity of the Jackson Prairie Storage Project located in Lewis County, Washington, and for authority to operate the storage project at expanded levels of service, all as more fully set forth in the application on file with the Commission and open to public inspection.

Applicant states that the Jackson Prairie Storage Project is an acquifer type storage facility which provides the storage capacity under existing authorizations to enable Northwest Pipeline Corporation (Northwest) to provide a winter season peaking service for its customers under Rate Schedule SGS-1 in its FERC Gas Tariff, First Revised Volume No. 1. Applicant further states that the Storage Project is connected to Northwest's mainline in Lewis County, Washington. Applicant receives gas from Northwest at the interconnection, transports the gas through the project facilities, stores the gas in the Project, withdraws the gas on instruction from Northwest, transports the gas and returns it to Northwest at the interconnection.

It is further stated that the Storage Project is also utilized by Northwest for load balancing and for storage system supply. Under a pending application in Docket No. CP88-651-000, the project will be utilized to enable Northwest to provide a new storage service under its proposed Rate Schedule SGS-2 in connection with Northwest's open access transportation services as authorized in the blanket certificate of

public convenience and necessity issued in Docket No. CP86-578-000.

Applicant further states that the Storage Project is owned in joint and equal interests by the Applicant, Washington Water Power Company and Northwest. It is said that, pursuant to agreement among the owners, Applicant acts as project operator, and that the Storage Project is operated pursuant to a Gas Storage Project Agreement on file with the Commission as Applicant's Rate Schedule S-1 in its FERC Gas Tariff, Original Volume No. 1.

Applicant states that, under existing authorizations and the requested authorization pending in Docket No. CP87-516-000,[1] the Storage Project can be operated at the following levels of storage service:

Seasonal working gas: 12,800,000 Mcf
Cushion gas—Zone 2: 19,300,000 Mcf
Cushion gas—Zone 9: 2,000,000 Mcf
Total Storage gas: 34,400,000 Mcf
Firm daily delivery rate: 375,000 Mcf
Daily "best efforts" gas: 71,800 Mcf

In its application in this proceeding, Applicant proposes to expand the capability of the Storage Project for storage gas and service to the following levels:

Seasonal working gas: 15,100,000 Mcf
Cushion gas—Zone 2: 16,800,000 Mcf
Cushion gas—Zone 9: 2,000,000 Mcf
Total storage gas: 34,400,000 Mcf
Firm daily delivery rate: 450,000 Mcf
Daily "best efforts" rate: 71,800 Mcf

Applicant further states that the expanded capability of the Storage Project will cost approximately $3,200,000 to recomplete six existing wells, to add two dehydration towers and two cooling towers with associated piping, to loop the 9,000-foot mainline with a 20-inch pipeline and to rebuild the meter station at the interconnection between the Project's mainline and Northwest's pipeline. It is stated that the construction costs will be financed by the Project owners.

Applicant states that the new meter station that will be required in connection with the expanded capabilities of the Storage Project will be constructed, owned and operated by Northwest and Northwest will file a concurrent application to construct and operate the meter station and for authority to render increased Rate Schedule SGS-1 and Rate Schedule SGS-2 storage services for customers contracting for such services.

Comment date: November 8, 1988, in accordance with Standard Paragraph F at the end of this notice.

Standard Paragraphs

F. Any person desiring to be heard or make any protest with reference to said filing should on or before the commet date file with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

Take further notice that, pursuant to the authority contained in and subject to jurisdiction conferred upon the Federal Energy Regulatory Commission by sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this filing if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that a grant of the certificate is required by the public convenience and necessity. If a motion for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for the applicant to appear or be represented at the hearing.

G. Any person or the Commission's staff may, within 45 days after the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214), a motion to intervene or notice of intervention and pursuant to § 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the Natural Gas Act.

Lois D. Cashell,

Secretary.

FR Doc. 88-24440 Filed 10-20-88; 8:45 am]

BILLING CODE 6717-01-M

[1] Authorization is pending in Docket No. CP87-516-000 to increase the firm daily delivery rate from 325,000 Mcf to 375,000. The increase does not require any additional facilities and is available because of a reevaluation of the capability of the Project with existing facilities.

[Docket No. G-4550-002 et al.]

ARCO Oil & Gas Co., Division of Atlantic Richfield Company, et al.; Applications for Certificates, Abandonment of Service and Amendment of Certificates [1]

October 17, 1988.

Take notice that each of the Applicants listed herein has filed an application pursuant to section 7 of the Natural Gas Act for authorization to sell natural gas in interstate commerce, to abandon service or to amend certificates as described herein, all as more fully described in the respective applications which are on file with the Commission and open to public inspection.

Any person desiring to be heard or to make any protest with reference to said applications should on or before October 31, 1988, file with the Federal Energy Regulatory Commission, Washington, DC 20426, a petition to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party in any proceeding herein must file a petition to intervene in accordance with the Commission's rules.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for Applicants to appear or to be represented at the hearing.

Lois D. Cashell,

Secretary.

[1] This notice does not provide for consolidation for hearing of the several matters covered herein.

Docket No. and date filed	Applicant	Purchaser and location	Description
G-4550-002, D, Sept. 22, 1988	ARCO Oil and Gas Company, Division of Atlantic Richfield Company, P.O. Box 2819, Dallas, TX 75221.	Tennessee Gas Pipeline Company, San Salvador Field, Hidalgo County, Texas.	(1)
G-5766-003, D, Sept. 12, 1988	Conoco Inc., P.O. Box 2197, Houston, TX 77252	El Paso Natural Gas Company, Jalmat-Langlie-Mattix Field, Lea County, New Mexico.	(2)
G-5766-004, D, Sept. 19, 1988	Conoco Inc	do	(3)
G-5766-005, D, Sept. 19, 1988	do	do	(3)
G-6342-015, D, Sept. 12, 1988	do	El Paso Natural Gas Company Monument Area, Lea County, New Mexico.	(2)
G-6342-016, D, Sept. 15, 1988	do	do	(4)
G-6342-017, D, Sept. 15, 1988	do	do	(4)
G-8284-001, D, Sept. 19, 1988	Anadarko Petroleum Corporation, P.O. Box 1330, Houston, TX 77251-1330.	Panhandle Eastern Pipe Line Company, Sec. 18-33S-40W, Morton County, Kansas.	(5)
G-10122-008, CI88-150-001, D, Sept. 30, 1988.	Conoco Inc	Tennessee Gas Pipeline Company, West Delta Block 84, Offshore Louisiana.	(6)
G-16134-003, D, Sept. 26, 1988	Sun Exploration and Production Company, P.O. Box 2880, Dallas, TX 75221-2880.	Natural Gas Pipeline Company of America, Camrick Field, Texas County, Oklahoma.	(7)
G-20178-001, D, Sept. 19, 1988	Anadarko Petroleum Corporation	Colorado Interstate Gas Company, Sec. 20-34S-41W, Morton County, Kansas.	(5)
CI61-684-001, D, Sept. 19, 1988	do	Panhandle Eastern Pipe Line Company, Sec. 9, 16, 17, 21, T34S-R43W, Morton County, Kansas.	(5)
CI61-1618-001, D, Sept. 18, 1988	do	Panhandle Eastern Pipe Line Company, Morton County, Kansas.	(5)
CI64-1422-000, D, Sept. 14, 1988	Tenneco Oil Company, P.O. Box 2511, Houston, TX 77252.	Ringwood Gathering Company, Ringwood Field, Major County, Oklahoma.	(8)
CI68-691-003, D, Sept. 28, 1988	ARCO Oil and Gas Company, Division of Atlantic Richfield Company.	Natural Gas Pipeline Company of America, Lochridge and Worsham Bayer Fields, Ward and Reeves Counties, Texas.	(9)
CI71-714-005, D, Sept. 19, 1988	APX Corporation, P.O. Box 1330, Houston, TX 77251-1330.	Panhandle Eastern Pipe Line Company, Morton County, Kansas.	(10)
CI72-407-001, D, Sept. 19, 1988	Anadarko Petroleum Corporation	Panhandle Eastern Pipe Line Company, Sec. 30-34S-39W, Morton County, Kansas.	(5)
CI75-220-002, D, Sept. 19, 1988	do	Panhandle Eastern Pipe Line Company, Sec. 6-33S-40W, Morton County, Kansas.	(5)
CI84-294-001, D, Sept. 19, 1988	Mesa Operating Limited Partnership, P.O. Box 2009, Amarillo, TX 79189-2009.	Colorado Interstate Gas Company, Laverne Field, Beaver County, Oklahoma.	(11)
CI88-623-000 (G-13135), D, Sept. 14, 1988.	Sohio Petroleum Company, P.O. Box 4587, Houston, TX 77210.	Southern Natural Gas Company, St. Martin and Iberville Parishes, Louisiana.	(12)
CI88-624-000 (G-10274), D, Sept. 12, 1988.	Sohio Petroleum Company	Natural Gas Pipeline Company of America, Beaver County, Oklahoma.	(13)
CI88-626-000, E, Sept. 16, 1988	Conoco Inc	Florida Gas Transmission Company, Vermilion Blocks 21 and 22, Offshore Louisiana.	(14)
CI88-627-000 (G-2921), D, Sept. 19, 1988.	ARCO Oil and Gas Company, Division of Atlantic Richfield Company.	Tennessee Gas Pipeline Company, Edinburgh Field Unit, Hidalgo County, Texas.	(15)
CI88-628-000 (CI67-1758), D, Sept. 20, 1988.	Tenneco Oil Company	El Paso Natural Gas Company, Red Hills Field, Lea County, New Mexico.	(16)
CI88-629-000 (CI77-554), D, Sept. 20, 1988.	do	Transwestern Pipeline Company, South Empire Deep Field, Eddy County, New Mexico.	(17)
CI88-630-000 (CI80-164), D, Sept. 20, 1988.	Tenneco Oil Company, operator for G. L. M. Oil and Gas Company.	El Paso Natural Gas Company, Santa Rosa Field, Pecos County, Texas.	(18)
CI88-631-000 (CI77-565), D, Sept. 20, 1988.	Tenneco Oil Company	Transwestern Pipeline Company, South Empire Deep Field, Eddy County, New Mexico.	(17)
CI88-632-000 (CI61-949), D, Sept. 21, 1988.	ARCO Oil and Gas Company, Division of Atlantic Richfield Company.	Lone Star Gas Company, a Division of ENSERCH Corporation, East Durant Field, Bryan County, Oklahoma.	(19)
CI88-634-000 (CI78-1228), D, Sept. 22, 1988.	do	Pioneer Gas Products Company, Godfrey #1-22, Bryan County, Oklahoma.	(19)
CI88-635-000 (CI64-1004), B, Sept. 22, 1988.	Tenneco Oil Company	El Paso Natural Gas Company, Roberts and Sonora Fields, Sutton County, Texas.	(20)
CI88-636-000, F, Sept. 23, 1988	Sun Exploration and Production Company	El Paso Natural Gas Company, Jalmat Field, Lea County, New Mexico.	(21)
CI88-637-000, F, Sept. 26, 1988	Mobil Producing Texas & New Mexico Inc., Nine Greenway Plaza, Suite 2700, Houston, TX 77046.	Transcontinental Gas Pipe Line Corporation, La Gloria Field, Brooks County, Texas.	(22)
CI88-638-000, F, Sept. 26, 1988	Amoco Production Company, 1700 Broadway, Room 1754, Denver, CO 80202.	Northwest Pipeline Corporation, Basin Dakota Field, San Juan County, New Mexico.	(23)
CI88-639-000, F, Sept. 26, 1988	Amoco Production Company	Northern Natural Gas Company, Division of Enron Corp., Mocane Laverne Gas Area & Catesby NE Field, Ellis County, Oklahoma.	(24)
CI88-642-000 (CI76-511), D, Sept. 23, 1988.	Northern Michigan Exploration Company, P.O. Box 1150, Jackson, MI 49204.	United Gas Pipe Line Company, West Deer Island Field, Terrebonne Parish, Louisiana.	(25)
CI88-643-000 (CI76-535), D, Sept. 23, 1988.	Northern Michigan Exploration Company	United Gas Pipe Line Company, West Deer Island Field, Terrebonne Parish, Louisiana.	(26)
CI88-646-000, F, Sept. 27, 1988	Tenneco Oil Company	ANR Pipeline Company, Laverne Field, Beaver County, Oklahoma.	(27)
CI89-1-000, A, Oct. 3, 1988	Union Exploration Partners, Ltd., P.O. Box 7600, Los Angeles, CA 90051.	Natural Gas Pipeline Company of America, Block 40, Vermilion Area, Offshore Louisiana.	(28)

[1] Effective February 18, 1988, and March 1, 1988, Applicant assigned certain interests to Vernon E. Faulconer, Inc.
[2] By assignment executed August 15, 1988, and effective August 1, 1988, Applicant assigned certain acreage to Lewis B. Burleson, small producer certificate holder in Docket No. CS69-36.
[3] Effective August 1, 1988, Applicant assigned certain interests to Earl R. Bruno.
[4] Effective August 1, 1988, Applicant assigned certain acreage subject to Applicant's FERC Gas Rate Schedule No. 85 to Earl R. Bruno.

[5] Certain leases reverted to the lessor and the acreage was subsequently leased to new producer-owner(s).
[6] Effective September 8, 1988, Applicant assigned certain acreage subject to Applicant's FERC Gas Rate Schedule No. 503 to S. Parish Oil Company.
[7] Effective August 1, 1988, Applicant assigned certain interests to Alan R. Staab.
[8] By respective assignments dated April 17, 1986, March 30, 1987, and May 2, 1988, Applicant assigned its interests in certain acreage to Beck Pump and Supply, Vanguard Oil & Gas Inc. and Maple Properties Corporation. Effective May 15, 1981, the Bierig #2 well was plugged and abandoned.
[9] By assignment executed February 27, 1987, and effective January 1, 1987, Applicant assigned certain acreage to Hondo Oil & Gas Company, small producer certificate holder in Docket No. CS87-79-000.
[10] Certain leases reverted and the acreage was subsequently leased to new producer-owner(s). Applicant states that certain wells are subject to the Order No. 451 good faith negotiation process and abandonment authorization for those wells was effective August 12, 1987, pursuant to Order No. 451.
[11] By letter agreement dated February 2, 1987, Applicant assigned its interest in certain acreage in Laverne Field, Beaver County, Oklahoma, to Prentice, Napier & Green, Inc.
[12] By assignment executed August 17, 1988, and effective August 1, 1988, Applicant assigned certain acreage to LGS Exploration, Inc., small producer certificate holder in Docket No. CS78-617.
[13] By assignment executed October 24, 1986, Applicant assigned certain acreage to Shar-Alan Oil Company. By letter dated May 1, 1988, Natural advised Sohio that the contract was being terminated and that Natural was abandoning purchases pursuant to Order No. 490. Sohio states that the contract has expired on its own terms.
[14] Effective January 1, 1988, Applicant acquired certain interests from Shell Offshore Inc. (SOI) previously covered under SOI's Rate Schedule Nos. 36 and 78 and certain interests which SOI acquired from West Timbers Limited Partnership, *et al.*, which acquired their interests from Crown Central Petroleum Corporation.
[15] Effective January 31, 1987, Applicant assigned certain interests to Mobil Producing Texas & New Mexico Inc.
[16] Effective January 1, 1987, Applicant assigned certain interests to Petrus Oil Company, L.P.
[17] Effective December 1, 1987, Applicant assigned certain interests to Prudential-Bache Energy Income Partnership IIIP-12, *et al.*
[18] Effective February 14, 1984, Applicant assigned certain interests to Energy Methods Corporation.
[19] Effective January 1, 1987, Applicant assigned certain interests to Hondo Oil & Gas Company.
[20] Effective December 1, 1987, Applicant assigned certain interests to Prudential-Bache Energy Income Production Partnership IIIP-12, *et al.* The remaining leases expired or were released.
[21] Effective September 1, 1987, Applicant acquired certain interests from Cities Service Oil and Gas Corporation.
[22] Effective August 1, 1987, Applicant acquired certain interests from Conoco Inc.
[23] Effective October 1, 1987, Applicant acquired certain interests from Beta Development Co.
[24] Effective January 1, 1987, Applicant acquired certain interests from Atlantic Richfield Company.
[25] Effective June 1, 1988, Applicant assigned its interest in the leases included in the CL&F #21-1 Unit (the only producing unit and well subject to the December 31, 1975, contract) to LLOG Exploration Company.
[26] Effective June 1, 1988, Applicant assigned its interest in the leases included in the CL&F #21-1 Unit (the only producing unit and well subject to the December 11, 1957, contract) to LLOG Exploration Company.
[27] Effective February 1, 1988, Applicant acquired certain interests from ONEOK Exploration Company.
[28] Applicant seeks authorization to initiate sales under a contract dated September 1, 1988.
Filing Code: A—Initial Service; B—Abandonment; C—Amendment to add acreage; D—Amendment to delete acreage; E—Total Succession; F—Partial Succession.

[FR Doc. 88-24386 Filed 10-20-88; 8:45 am]
BILLING CODE 6717-01-M

[Project Nos. 2404 & 2419]

Alpena Power Co.; Intent To File an Application for a New License

October 18, 1988.

Take notice that on August 19, 1988, Alpena Power Company, the existing licensee for the Thunder Bay River Basin Project No. 2404 and the Hillman Project No. 2419, filed a notice of intent to file an application for a new consolidated license, pursuant to section 15(b)(1) of the Federal Power Act (Act), 16 U.S.C. 808, as amended by section 4 of the Electric Consumers Protection Act of 1986, Pub. L. 99-495. The licenses for both projects expire on December 31, 1993.

The projects are both located on the Thunder Bay River in Alpena and Montmorency Counties, Michigan. The principal works of Project No. 2404 include five dams and reservoirs; three powerhouses with a combined installed capacity of 6,850 kW; and appurtenant facilities. The principal works of Project No. 2419 include a single dam and reservoir; a powerhouse with an installed capacity of 250 kW; and appurtenant facilities.

Pursuant to section 15(b)(2) of the Act, the licensee is required to make available certain information described in Docket No. RM87-7-000, Order No. 496 (Final Rule issued April 28, 1988). A copy of this Docket can be obtained from the Commission's Public Reference Branch, Room 1000, 825 North Capitol Street, NE., Washington, DC 20426. The above information as described in the rule is now available from the licensee at 310 North Second Avenue, Alpena, Michigan 49707.

Pursuant to section 15(c)(1) of the Act, each application for a new license and any competing license applications must be filed with the Commission at least 24 months prior to the expiration of the existing license. All applications for license for these projects, separate or consolidated, must be filed by December 30, 1991.

Lois D. Cashell,

Secretary.

[FR Doc. 88-24433 Filed 10-20-88; 8:45 am]
BILLING CODE 6717-01-M

[Docket No. RP88-127-005]

Carnegie Natural Gas Co.; Revised Compliance Filing

October 18, 1988.

Take notice that Carnegie Natural Gas Company ("Carnegie"), on October 11, 1988, tendered for filing proposed changes in its FERC Gas Tariff, Volume No. 1. Specifically, Carnegie filed the following tariff sheets.

Substitute Second Revised Sheet No. 91
Substitute First Revised Sheet No. 92e

Carnegie states that these tariff sheets which contain portions of its purchased gas cost adjustment ("PGA") clause, are being filed to correct tariff sheets submitted with a filing dated July 14, 1988. That filing was submitted in compliance with a Letter Order issued June 14, 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.

Carnegie states that copies of the filing were served upon parties to this Docket No. RP88-127-000, and 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 NW., 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 October 25, 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 in the Public Reference Room.

Lois D. Cashell,

Secretary.

[FR Doc. 88-24434 Filed 10-20-88; 8:45 am]
BILLING CODE 6717-01-M

[Docket No. TM89-1-24-000]

Equitrans, Inc.; Proposed Changes in FERC Gas Tariff

October 18, 1988.

Take notice that Equitrans, Inc. on October 11, 1988 tendered for filing as part of its FERC Gas Tariff, Original Volume No. 1, six copies of each of the following tariff sheets:

Original Volume No. 1

Fourth Revised Sheet No. 10
Fourth Revised Sheet No. 14
First Revised Sheet No. 23

Original Volume No. 3

First Revised Sheet No. 4
First Revised Sheet No. 8

Equitrans states that pursuant to Order No. 472, the Commission authorized pipeline companies to track and pass-through to its customers its annual charges under an Annual Charge Adjustment (ACA) clause. The 1988 ACA unit surcharge approved by the Commission is $0.0018 Mcf. Equitrans has converted this Mcf rate to a dekatherm rate of $0.0081 per Dth.

Equitrans asks that these revised sheets be made effective October 1, 1988. Equitrans respectfully requests that the Commission accept the above-mentioned tariff sheets and grant any waiver of the regulations as may be necessary to permit such accepted tariff sheets to become effective as proposed.

Copies of the filing were served on all authorized purchasers of natural gas and services from Equitrans and interested state commissions. Copies have also been mailed to all current Rate Schedule PLS, GS-1, STS-1, ITS, and FTS customers.

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 October 25, 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,

Secretary.

[FR Doc. 88-24435 Filed 10-21-88; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP89-3-000]

Lawrenceburg Gas, Transmission Corporation; Tariff Filing

October 18, 1988.

Take notice that on October 13, 1988, Lawrenceburg Gas Transmission Corporation ("LGT") tendered for filing the following revised tariff sheets to its FERC Gas Tariff, First Revised Volume No. 1:

Fourth Revised Sheet No. 20A
Fourth Revised Sheet No. 20B

LGT states that this filing is made to reflect the allocation and one-time lump sum billings of Texas Gas Transmission Corporation's fixed take-or-pay charges to LGT's downstream customers. This filing is consistent with the Commission's proposed Interim Rule and Statement of Policy pursuant to Order No. 500 issued August 7, 1987, which allows "downstream pipelines * * * to allocate the fixed take-or-pay charges of upstream pipelines on the same basis as that upon which they are incurred, namely, cumulative purchase deficiencies." LGT's wholesale customers have agreed to one-time lump sum billings of such allocated amounts as a prelude to LGT's abandonment of operations effective November 1, 1988 pursuant to authority granted by Commission Order issued September 26, 1988 in Docket No. CP88-368-000. LGT reserves the right to revise the filing as necessary to reflect any modifications made by the Commission or as required by any appellate court. The proposed effective date of the tariff sheets listed above is October 17, 1988.

Copies of this filing were served upon LGT's affected jurisdictional sales 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 2.11 and 2.14 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). 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. All motions or protests should be filed on or before October 25, 1988.

Lois D. Cashell,

Secretary.

[FR Doc. 88-24436 Filed 10-20-88; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP85-206-041]

Northern Natural Gas Co., Division of Enron Corp; Proposed Changes in FERC Gas Tariff

October 18, 1988.

Take Notice that on Oct. 11, 1988, Northern Natural Gas Company, Division of Enron Corp. (Northern), tendered for filing to become a part of Northern Natural Gas Company's (Northern) F.E.R.C. Gas Tariff, Third Revised Volume No. 1,

Thirty-Sixth Revised Sheet No. 87
Thirtieth Revised Sheet No. 90
Seventeenth Revised Sheet No. 96
Fifteenth Revised Sheet No. 97
Eighteenth Revised Sheet No. 98
Seventh Revised Sheet No. 125

Northern states these sheets contain changes to the List of Purchasers and Directory of Communities Served to correspond to the revised Service Agreements filed by Northern on this date. Service Agreements were filed for Iowa Electric Light and Power Company to convert CD-1 firm entitlement to FT-1 firm entitlement effective October 15, 1988.

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 the Commission's Rules of Practice & Procedure (18 CFR 385.211, 385.214). All such motions or protests should be filed on or before October 25, 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,

Secretary.

[FR Doc. 88-24437 Filed 10-20-88; 8:45 am]

BILLING CODE 6717-01-M

[Project No. 2239]

Tomahawk Power & Pulp Co.; Intent To File an Application for a New License

October 18, 1988.

Take notice that on August 8, 1988, Tomahawk Power and Pulp Company, the existing licensee for the Kings Dam Hydroelectric Project No. 2239, filed a notice of intent to file an application for a new license, pursuant to section 15(b)(1) of the Federal Power Act (Act), 16 U.S.C. 808, as amended by section 4 of the Electric Consumers Protection Act of 1986, Pub. L. 99–495. The original license for Project No. 2239 was issued July 1, 1959, and expires July 31, 1993.

The project is located on the Wisconsin River in Lincoln County, Wisconsin. The principal works of the Kings Dam Project include a concrete dam and spillway with earth dikes on either side of the dam; a reservoir of 1,400 acres; a powerhouse with an installed capacity of 2,611 kW; a connection to a Wisconsin Public Service Corporation substation; and appurtenant facilities.

Pursuant to section 15(b)(2) of the Act, the licensee is required to make available certain information described in Docket No. RM87–7–000, Order No. 496 (Final Rule issued April 28, 1988). A copy of this Docket can be obtained from the Commission's Public Reference Branch, Room 1000, 825 North Capitol Street NE, Washington, DC 20426. The above information as described in the rule is now available from the licensee at N10099 Kings Road, Tomahawk, WI 54487.

Pursuant to section 15(c)(1) of the Act, each application for a new license and any competing license applications must be filed with the Commission at least 24 months prior to the expiration of the existing license. All applications for license for this project must be filed by July 30, 1991.

Lois D. Cashell,

Secretary.

[FR Doc. 88–24438 Filed 10–21–88; 8:45 am]

BILLING CODE 6717-01-M

ENVIRONMENTAL PROTECTION AGENCY

[FRL–3465–9]

Agency Information Collection Activities Under OMB Review

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and is available to the public for review and comment. The ICR describes the nature of the information collection and its expected cost and burden; where appropriate, it includes the actual data collection instrument.

FOR FURTHER INFORMATION CONTACT: Carla Levesque at EPA, (202) 382–2740.

SUPPLEMENTARY INFORMATION:

Office of Pesticides and Toxic Substances

Title: Asbestos School Hazard Abatement Act, Grant and Loan Program Application Form. (EPA ICR #1233).

Abstract: ASHAA requires EPA to provide assistance to schools for asbestos abatement projects. Applications must contain information describing the nature of the asbestos problem and information describing the financial resources of the school district. The appropriation requires that EPA solicit applications no later than January 1, 1989, and that awards be made by May 15, 1989.

Burden Statement: Public reporting burden for this collection of information is estimated to average 31 hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this collection of information, including suggestions for reducing this burden, to Chief, Information Policy Branch, PM–223, U.S. Environmental Protection Agency, 401 M St., SW., Washington, DC 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

Respondents: Local Education Agencies.
Estimated No. of Respondents: 1,000.
Frequency of collection: Annually.
Total Estimated Annual Burden: 33,000.
Period of review: 30 days.

Send comments regarding this collection of information, to:

Carla Levesque, Environmental Protection Agency, Information Policy Branch (PM–223), 401 M Street SW., Washington, DC 20460

and

Tim Hunt, Office of Management and Budget, Office of Information and Regulatory Affairs, 726 Jackson Place NW., Washington, DC 20503, (Telephone (202) 395–3084).

Date: October 13, 1988.

Paul Lapsley,

Director, Information and Regulatory Systems Division.

[FR Doc. 88–24397 Filed 10–20–88; 8:45 am]

BILLING CODE 6560-50-M

[ER–FRL–3466–2]

Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared October 3, 1988 through October 7, 1988 pursuant to the Environmental Review Process (ERP), under section 309 of the Clean Air Act and section 102(2)(c) of the National Environmental Policy Act as amended. Requests for copies of EPA comments can be directed to the Office of Federal Activities at (202) 382–5074. An explanation of the ratings assigned to draft environmental impact statements (EISs) was published in the **Federal Register** dated April 22, 1988 (53 FR 13318).

Draft EISs

ERP No. D–FHW–C40122–NY, Rating E02, NY–290 Relocation, Butternut Interchange (I–481/I–690) to Manlius Center, Funding and 404 Permit, Towns of DeWitt and Manlius, Onondaga County, NY. **SUMMARY:** EPA has environmental objections to the proposed project because of the selection of alternatives with significant adverse impacts to wetlands and floodplains, and the possibility for secondary impacts in these areas. Accordingly, EPA has requested additional information to assess the alternatives analysis and the impacts resulting from the project.

ERP No. D–FHW–D40236–PA, Rating EC2, Airport Parkway-Southern Expressway Construction, US 22/30 and PA–60 Interchange to PA–60/Beaver Valley Expressway, Funding, Allegheny County, PA. **SUMMARY:** EPA is concerned about potential impacts to wetlands and water quality resulting from the proposed project. Clarification of some of the figures, as well as several points regarding level of service, air quality and terrestrial habitat, is also needed in the final EIS.

ERP No. D–UMT–K54017–CA, Rating LO, Muni Metro System Turnaround Project, Facilities Construction, Embarcadero, Clay Street to Brannon, Funding, City and County of San Francisco, CA. **SUMMARY:** EPA

expressed a lack of objections but asked to be kept apprised if any hazardous substances are discovered in the project area and of any remedial actions that are taken.

Final EISs

ERP No. F-AFS-K61091-CA, Shasta and Trinity Units, Revised Operation and Development Plan, Whiskeytown-Shasta-Trinity National Recreation Area, Implementation, Shasta and Trinity National Forests, Shasta and Trinity Counties, CA. **SUMMARY:** EPA's review of this document was not deemed necessary. No formal comments were sent to the agency.

ERP No. F-MMS-A02224-00, 1989 Central and Western Planning Areas Gulf of Mexico Outer Continental Shelf (OCS) Oil and Gas Sales No. 118 and 122, Lease Offerings offshore the coast of Alabama, Mississippi, Louisiana and Texas. **SUMMARY:** EPA has significant objections with this document as it does not commit to (1) inclusion of protective environmental stipulations and (2) a comprehensive ozone (03) modeling effort.

EPA No. F-NOA-A91054-00, Atlantic, Gulf and Caribbean Exclusive Economic Zones (EEZ) Billfish Fishery Management Plan, White and Blue Marlin, Sailfish, and the Longbill Spearfish, Implementation. **SUMMARY:** EPA's review of the final EIS has been completed and the project found to be satisfactory.

ERP No. F-USA-F11013-MN, Camp Ripley Army National Guard Training Site, Mission Expansion and Multiple Construction, Implementation, Morrison County, MN. **SUMMARY:** EPA has no objections to the proposed project as long as the Record of Decision commits to minimizing wetland impacts and complying with the Federal regulation on new source performance standards and asbestos removal.

Regulations

ERP No. R-FCC-A86229-00, 47 CFR Part 1; Amendment of the Commission's Environmental Rules (Gen. Docket No. 88-387; FCC 88-265) (53 FR 34558). **SUMMARY:** EPA supports the proposed rule requiring completion of environmental processing prior to construction of any facilities that might have a significant environmental impact.

Dated: October 18, 1988.

William D. Dickerson,

Deputy Director, Office of Federal Activities.

[FR Doc. 88-24451 Filed 10-20-88; 8:45 am]

BILLING CODE 6560-50-M

[ER-FRL-3466-1]

Environmental Impact Statements; Availability

Responsible Agency

Office of Federal Activities, General Information (202) 382-5074 or (202) 382-5075. Availability of Environmental Impact Statements Filed October 10, 1988 Through October 14, 1988, Pursuant to 40 CFR 1506.9.

EIS No. 880346, Draft, SCS, KY, South Fork of Little River Watershed Multiple Purpose Floodwater Protection and Municipal and Industrial Water Supply Project, Funding and Implementation, Christian and Todd Counties, KY, Due: December 5, 1988, Contact: Randall W. Giessler (606) 233-2747.

EIS No. 880347, Draft, COE, CA, Los Angeles Raiders Football Stadium, Parking and Associated Facilities Development, Land Use Change and Implementation, Santa Fe Dam Flood Control Basin and Recreation Area, City of Irwindale, Los Angeles County, CA. Due: December 5, 1988, Contact: Rick Grover (213) 894-7962.

EIS No. 880348, Draft, AFS, OR, WA, Pacific Northwest Region Western Spruce Budworm Management Plan, Implementation, WA and OR. Due: December 22, 1988, Contact: Roger M. Odgen (503) 221-2727.

EIS No. 880349, Final, OR, I-5/Pacific Highway Improvements, Hayesville Interchange to Battle Creek Interchange, Funding and 404 Permit Marion County, OR. Due: November 21, 1988, Contact: Dale Wilken (503) 399-5749.

Dated: October 18, 1988.

William D. Dickerson,

Deputy Director,

Deputy Director, Office of Federal Activities.

[FR Doc. 88-24450 Filed 10-20-88; 8:45 am]

BILLING CODE 6560-50-M

[OPTS-59264; FRL-3466-3]

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) 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 one application for exemption, provides a summary, and requests comments on the appropriateness of granting this exemption. Written comments by:

T 89-1—November 10, 1988.

ADDRESS: Written comments, identified by the document control number "[OPTS-59264]" and the specific TME number should be sent to: Document Processing Center (TS-790), Office of Toxic Substances, Environmental Protection Agency, Room L-100, 401 M Street SW., Washington, DC 20460, (202) 554-1305.

FOR FURTHER INFORMATION CONTACT: Lawrence Culleen, Premanufacture Notice Management Branch, Chemical Control Division (TS-794), Office of Toxic Substances, Environmental Protection Agency, Room 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 89-1

Close of Review Period. November 24, 1988.

Manufacturer. AM International, Inc.

Chemical. (G) Polymer of a fat and heterocyclic substituted olefin.

Use/Production. (S) Surfactant for electrophotographic toner. Prod. range: Confidential.

Date: October 14, 1988.

Steven Newburg-Rinn,

Chief, Public Data Branch, Information Management Division, Office of Toxic Substances.

[FR Doc. 88-24398 Filed 10-20-88; 8:45 am]

BILLING CODE 6560-50-M

[OPTS-59854; FRL-3466-4]

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) requires any person who intends to manufacture or import a new chemical substance to submit a premanufacture notice (PMN) to EPA at least 90 days before manufacture or import commences. Statutory requirements for section 5(a)(1) premanufacture notices are discussed in the final rule published in the **Federal Register** of May 13, 1983 (48 FR 21722). 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 88–261—October 3, 1988
Y 88–354—October 18, 1988
Y 88–355, 88–356, 88–357, 88–358, 88–359, 88–360—October 20, 1988
Y 89–1—October 23, 1988
Y 89–2, 89–3—October 24, 1988
Y 89–4, 89–5, 89–6, 89–7, 89–8, 89–9, 89–10—October 25, 1988.

FOR FURTHER INFORMATION CONTACT: Lawrence Culleen, Premanufacture Notice Management Branch, Chemical Control Division (TS–794), Office of Toxic Substances, Environmental Protection Agency, Room 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 PMNs 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.

Y 88–261

Manufacturer. Confidential.
Chemical. (G) Functional polymer of mixed acrylate and methacrylate based monomers.
Use/Production. (G). Prod. range: 277,500–555,000 kg/yr.

Y 88–354

Importer. Nachem, Inc.
Chemical. (G) Sulfonated phenol-formaldehyde condensation product.
Use/import. (G) Stain resister for synthetic fibers. Import range: Confidential.

Y 88–355

Manufacturer. Confidential.
Chemical. (G) Polyester polyol.
Use/Production. (S) Resin component for an adhesive. Prod. range: 23,000–70,000 kg/yr.

Y 88–356

Manufacturer. Confidential.
Chemical. (G) Short oil alkyd resin.
Use/Production. (S) Resin component of a flexible primer coating. Prod. range: 12,000–22,700 kg/yr.

Y 88–357

Manufacturer. Confidential.
Chemical. (G) Coconut oil alkyd resin.
Use/Production. (S) Resin for industrial finishes. Prod. range: 16,000–24,000 kg/yr.

Y 88–358

Manufacturer. Confidential.
Chemical. (G) Acrylic alkyd copolymer.
Use/Production. (S) Resin component for implement finish. Prod. range: 85,000–102,000 kg/yr.

Y 88–359

Manufacturer. Freemna Chemical Corporation.
Chemical. (G) Chain stopped alkyd resin.
Use/Production. (S) Air dry implement finish. Prod. range: 511,000–680,000 kg/yr.

Y 88–360

Manufacturer. Confidential.
Chemical. (G) Polyester polyol.
Use/Production. (S) Water reducible ink resin. Prod. range: 68,600–127,000 kg/yr.

Y 89–1

Manufacturer. Confidential.
Chemical. (G) Urethane modified linseed alkyd resin.
Use/Production. (S) Resin component of a mirror back coating. Prod. range: 11,400–23,000 kg/yr.

Y 89–2

Importer. Confidential.
Chemical. (G) Polyethylene terephthalalate (modified).
Use/Import. (G) Open, nondispersive use. Import range: Confidential.

Y 89–3

Manufacturer. Confidential.
Chemical. (G) Ethene olefin terpolymer.
Use/Production. (S) Raw material for polyolefin film. Prod. range: Confidential

Y 89–4

Importer. Confidential.
Chemical. (G) Polyester resin.
Use/Import. (G) Polyester component for specialty industrial coatings. Import range: Confidential.

Y 89–5

Manufacturer. Confidential.
Chemical. (G) Polyester resin carboxylated.
Use/Production. (G) Electrostatic powder coatings. Prod. range: Confidential.

Y 89–6

Manufacturer. Confidential.
Chemical. (G) Polyester resin carboxylated.
Use/Production. (G) Electrostatic powder coatings. Prod. range: Confidential.

Y 89–7

Manufacturer. Confidential.
Chemical. (G) Polyester resin carboxylated.
Use/Production. (G) Electrostatic powder coatings. Prod. range: Confidential.

Y 89–8

Manufacturer. Confidential.
Chemical. (G) Polyester resin carboxylated.
Use/Production. (G) Electrostatic powder coatings. Prod. range: Confidential.

Y 89–9

Manufacturer. Confidential.
Chemical. (G) Polyester resin carboxylated.
Use/Production. (G) Electrostatic powder coatings. Prod. range: Confidential.

Y 89–10

Importer. Confidential.
Chemical. (G) Polyester resin carboxylated.
Use/Import. (G) Electrostatic powder coatings. Import range: Confidential.

Date: October 14, 1988.

Steven Newburg-Rinn,
Chief, Public Data Branch, Information Management Division, Office of Toxic Substances.

[FR Doc. 88–24399 Filed 10–20–88; 8:45 am]
BILLING CODE 6560–50–M

FEDERAL MARITIME COMMISSION

Notice of Agreement(s) Filed

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, DC office of the Federal Maritime Commission, 1100 L Street, NW., Room 10325. Interested parties may submit comments on each agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days after the date of the **Federal Register** in which this notice appears. The requirements for comments are found in § 572.603 of Title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Agreement No.: 202–007680–069.

Title: American West African Freight Conference ("Conference").

Parties:

America-Africa-Europe Line GMBH,
Barber West Africa Line,
Farrell Lines, Inc.,
Maersk Line,
Societe Inviorienne De Tranport Maritime, SITRAM,
Torm West Africa Line,
Westwind Africa Line.

Synopsis: The proposed modification would prescribe procedures for allocating each member's share in the Conference's assets and/or liabilities in the event a party either withdraws, or is expelled from the Agreement.

Agreement No.: 202–008493–019.

Title: Trans Pacific American Flag Berth Operators Agreement.

Parties:

American President Lines, Ltd., Sea-Land Service, Inc.

Synopsis: The proposed modification would conform the agreement to the Commission's requirements concerning Docket No. 86–16, service contract provisions.

Agreement No.: 206–010707–001.

Title: Japan Eastbound Bridging Agreement.

Parties:

Barber Blue Sea,
Kawasaki Kisen Kaisha, Ltd.,
Mitsui O.S.K. Lines, Ltd.,
A.P Moller-Maersk Line,
Neptune Orient Lines Limited,
Nippon Liner System, Ltd.,
Nippon Yusen Kaisha,
Orient Overseas Container Line, Inc.

Synopsis: The proposed modification would conform the agreement to the Commission's requirements concerning Docket No. 86–16, service contract provisions. It would also expand the agreement's scope to include intermodal movements via U.S. Atlantic and Gulf Coasts, and to make other non-substantive changes.

Agreement No.: 232–011184–001.

Title: Evergreen Marine Corporation (Taiwan) Ltd. and Costa Container Lines SPA. Space Charter and Sailing Agreement in the Mediterranean—U.S. Trades Agreement.

Parties:

Evergreen Marine Corporation (Taiwan) Ltd. Costa Container Lines SPA.

Synopsis: The proposed modification would add Italia di Navigazione, S.p.A. as a party to the agreement. It would also reduce the agreement's geographic scope to but not including Jacksonville, Florida,; increase the maximum TEU capacity to 18,000; extend the agreement to five years; change the name of the agreement to Evergreen Marine Corporation (Taiwan) Ltd., Italia di Navigazione SpA. And Contship Containerlines Ltd./Costa Container Lines SpA. Space Charter and Sailing Agreement in the Mediterranean—U.S. Trade ("EMC/Italia/Costa"); and make other non-substantive changes.

By Order of the Federal Maritime Commission.

Joseph C. Polking,

Secretary.

Dated: October 18, 1988.

[FR Doc. 88–24409 Filed 10–20–88; 8:45 am]

BILLING CODE 6730–01–M

FEDERAL RESERVE SYSTEM

Southeast Banking Corp., Miami, FL; Proposed Acquisition of Federal Savings and Loan Associations

Southeast Banking Corporation, Miami, Florida ("Southeast"), has applied under § 225.23(a)(3) of the Board's Regulation Y (12 CFR 225.23(a)(3)) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) ("BHC Act") and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to acquire all of the to-be-issued voting shares of First Federal Savings and Loan Association of Jacksonville, Jacksonville, Florida ("First Federal"), after its conversion from a mutual to stock form of organization on a voluntary supervisory basis pursuant to regulations of the Federal Home Loan Bank Board; and to subsequently cause First Federal to acquire by supervisory merger (with Federal Savings and Loan Insurance Corporation assistance) South Florida Savings, a Federal Savings and Loan Association, Miami, Florida ("South Florida").

In connection with this application, Southeast also proposes to acquire five service corporation subsidiaries of First Federal, which engage in real estate investment and development; mortgage banking activities; general insurance brokerage and agency activities; and advertising, marketing, promotional, and public relations services solely on behalf of First Federal. Additionally, Southeast proposes to acquire three service corporation subsidiaries of South Florida, all of which engage in real estate investment and development. Southeast has committed to terminate impermissible real estate development and insurance activities within two years of consummation.

The Board previously has determined by order that the operation of a thrift institution is closely related to banking, but not, as a general matter, a proper incident to banking under section 4(c)(8) of the BHC Act. *See, e.g., Citicorp,* 72 Federal Reserve Bulletin 724 (1986). The Board, however, has approved several proposals involving the acquisition of failing thrift institutions on the basis that any adverse effects would be overcome by the public benefits of preserving the institutions. *Citicorp, supra; The Chase Manhattan Corporation,* 71 Federal Reserve Bulletin 462 (1985).

Interested persons may express their views in writing on the question whether consummation of the proposed acquisitions can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interest, or unsound banking practices." Any comments must conform with the requirements of the Board's Rules of Procedure (12 CFR 262.3(e)).

The Board has been requested to act expeditiously upon these applications in order to recapitalize and revitalize the thrift institutions. Comments regarding each of these applications must be submitted in writing and must be received at the offices of the Board of Governors not later than 5:00 p.m. on November 11, 1988. Each application is available for immediate inspection at the offices of the Board of Governors and at the Federal Reserve Bank of Atlanta.

Board of Governors of the Federal Reserve System, October 19, 1988.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 88–24522 Filed 10–20–88; 8:45 am]

BILLING CODE 8210–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Agency Forms Submitted to the Office of Management and Budget for Clearance

Each Friday the Department of Health and Human Services (HHS) publishes a list of information collection packages it has submitted to the Office of Management and Budget (OMB) for clearance in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). The following is submitted to OMB since the last list was published on October 21, 1988.

Social Security Administration

(Call Report Clearance Officer on 301–965–4149 for copy of package)

Action: The Social Security Administration submitted the following public information clearance request to OMB for review and clearance under the Paperwork Reduction Act of 1980, Pub. L. 96–511.

Note: The Social Security Administration requested expedited review (less than 60 days) of this survey/evaluation by OMB in order for SSA to quickly determine how well the new service is working.

Summary: The information collected will be used to evaluate the effectiveness of SSA's new 800 service. The affected public will be comprised for a sample of individuals who recently used the 800 number. The following summarizes the information collection proposal submitted to OMB.

Type of Request: New Collection.

Originating Office: Social Security Administration.

Title of information collection: 800 Number Service Evaluation.

Form number: SSA–4305.

Frequency: One Time Only.

Respondents: Individual or Households.

Estimated Number of responses; 2,000.

Average hours per response: 10 minutes.

Total estimated burden hours: 240.

Additional Information or Comments: A copy of the proposed survey is attached herewith. Comments and questions should be directed immediately to (OMB) Justin Kopca (202) 395–7316 or for program information call Ron Compston at (301) 965–4149.

Written comments and recommendations for the proposed information collections should be sent directly to the appropriate OMB Desk Officer designated above at the following address: OMB Reports Management Branch, New Executive Office Building, Room 3208, Washington, DC 20503.

Date: October 14, 1988.

James V. Oberthaler,

Deputy Assistant Secretary for Information Resources Management.

Paper Work/Privacy Act Notice

The Social Security Administration is authorized to collect the information on this questionnaire under section 702 of Title VII of the Social Security Act. Your response to those questions is strictly voluntary. The information you provide will be used to help us improve the service that we give to you.

BILLING CODE 4110-60-M

OMB NO. 0960

800 SERVICE EVALUATION
CALLER RECONTACT SURVEY

I. GENERAL INFORMATION

DATE OF CONTACT _____

DS |_|_|_|_|_|_| 0
M M D D Y Y

TELEPHONE NUMBER (___)_____

SAMPLE NUMBER _____
(Enter first nine digits of telephone number.)

SN |_|_|_|_|_|_|_|_|_|
Sample Number

II. INTRODUCTION

Hello, may I speak with _____? My name is _____. I am with the Social Security Administration and we are calling a sample of people all over the country who have recently used our new 800 number. You have been selected at random and we would like your opinions on such areas as how satisfied you were with the service, how easy or difficult you found it to get through to us, and how courteous you found our representative. This survey should only take a few minutes and is strictly voluntary. All information will be kept confidential and will be used to help us evaluate this new service.

NOTE : IF SAMPLED INDIVIDUAL IS NOT HOME, UNAVAILABLE, OR THE TIME IS NOT CONVENIENT FOR THEM, ARRANGE FOR A CALLBACK.

800 SERVICE EVALUATION
CALLER RECONTACT SURVEY

III. SURVEY QUESTIONS	
1. How did you learn about the new 800 phone number? (Circle all applicable codes. Enter code corresponding to lowest entry.)	ST __ 01 - Television 02 - Radio 03 - Newspaper 04 - Mail 05 - District Office 06 - Friend / Family 07 - Don't remember 08 - Other (Explain in space at left.)
2. On this new 800 service line, how many times did you try before you got through?	CD __ 01 - One Time (Got Through on First Call) 02 - Two Times 03 - Three Times 04 - More Than Three Times 05 - Do Not Remember
3. When you got through, were you placed on hold?	DA __ ▒▒▒▒ 01 - Yes 02 - No 03 - Don't Remember

800 SERVICE EVALUATION
CALLER RECONTACT SURVEY

III. SURVEY QUESTIONS

IF THE PERSON CALLED BEFORE 7:00 AM, AFTER 7:00 PM, OR ON A WEEKEND, ASK QUESTIONS 4 - 8 BELOW.
OTHERWISE, GO TO QUESTION 9.

4. Our normal business hours are from 7:00 am to 7:00 pm on weekdays. Why did you call after hours?

DB

01 - Working
02 - More Convenient
03 - Line Busy
04 - Other (Explain in space at left.)

5. When you called, you heard a recording that gave you instructions on how to complete your call. Were those instructions easy to understand?

DB

01 - Don't remember
02 - Easy to understand
03 - Not easy to understand (Explain in space at left.)

6. Did you mind conducting business with a recording as opposed to speaking with someone in person?

DB

01 - Didn't mind
02 - Did mind (Ask why and explain in space at left.)

7. If you left a message for us to call you back, when did we return your call?

DC

01 - Same Day
02 - Next Day
03 - Two or More Days Later
04 - Call Not Returned
05 - Don't Remember

8. Would you call again after-hours to conduct business with SSA?

DE

01 - Yes
02 - Not Sure
03 - Would Not Call After Hours Again (Explain in space at left.)

800 SERVICE EVALUATION
CALLER RECONTACT SURVEY

III. SURVEY QUESTIONS	
9. (Ask this question only if questions 4 - 8 do not apply.) Do you feel the SSA employee with whom you recently spoke was courteous or discourteous?	DF 01 - Courteous 02 - Neither Courteous Nor Discourteous 03 - Discourteous (Explain in space at left.)
10. What was the reason for your recent contact with SSA? (Describe in space below and categorize answer.)	DG 01 - File a Claim 02 - General Inquiry 03 - Report a Post-adjudicative Event 04 - Complaint / Protest 05 - I & R Referral 06 - Other
11. Would you say you were satisfied or dissatisfied with the way the matter was or is being handled for you? IF "DISSATISFIED", PROCEED TO NEXT QUESTION. OTHERWISE, GO TO QUESTION 13.	DH 01 - Satisfied 02 - Neither Satisfied Nor Dissatisfied 03 - Dissatisfied
12. Why were you dissatisfied with the response you received? (Circle all applicable codes. Enter code corresponding to lowest entry.)	DI 01 - Failed to Take Action 02 - Representative Was Not Knowledgeable 03 - Representative Was Discourteous 04 - Representative Was Slow to Respond 05 - Telephone Lines Were Busy / Placed on Hold 06 - Other (Explain in space at left.)

800 SERVICE EVALUATION
CALLER RECONTACT SURVEY

III. SURVEY QUESTIONS	
13. If you have had prior contacts with SSA, were they usually by telephone, in person, or by mail? (Circle all applicable codes. Enter code corresponding to lowest entry.)	DJ ___ ▒▒▒▒ 01 - Telephone 02 - In Person 03 - Mail 04 - No Prior Contacts
14. Based on your recent experience with the 800 service, would you say your overall opinion of SSA has improved, worsened, or stayed the same? NOTE : IF RESPONDENT SAYS "STAYED THE SAME", ASK IF PRIOR OPINION WAS GOOD OR BAD AND SELECT CODE '03' OR '04'.	DK ___ ▒▒▒▒ 01 - Improved 02 - Worsened 03 - Was Good and Stayed That Way 04 - Was Bad and Stayed That Way 05 - No Opinion 06 - No Prior Contacts
15. Are you aware that almost all Social Security business can be handled over the telephone?	MP ___ 01 - Yes 02 - No
16. When you contact SSA the next time, would your first preference be to telephone, visit, or write? NOTE : IF THE RESPONDENT ANSWERS "02 - Visit" OR "03 - WRITE", ASK WHY AND SPECIFY BELOW.	MI ___ 01 - Telephone 02 - Visit 03 - Write
17. Would you say your overall opinion of SSA is favorable or unfavorable?	NR ___ 01 - Favorable 02 - Unfavorable 03 - No Opinion

800 SERVICE EVALUATION
CALLER RECONTACT SURVEY

IV. CONCLUDING STATEMENT	
That was the last of our survey questions. I want to thank you for participating in this survey and for taking the time to help us evaluate our new telephone service.	
THIS BLOCK MUST BE TRANSMITTED ON EVERY STUDY CASE.	ZH | 8 0 0 8 0 0

[FR Doc. 88-24288 Filed 10-20-88; 8:45 am]
BILLING CODE 4110-60-C

Centers for Disease Control

HIV Prevention Projects; Meeting

ACTION: Notice of meeting.

Time and Date: 8 a.m.–1:30 p.m., October 28, 1988.

Place: Center for Prevention Services Conference Room, Centers for Disease Control, Freeway Office Park, 1600 Tullie Circle N.E., Atlanta, GA 30329.

Status: Open to the public, limited only by the space available.

Matters to be considered: CDC is convening this meeting to discuss the Fiscal Year 1989 draft program announcement for HIV Prevention Projects with Community Based Organizations.

CONTACT PERSON FOR MORE INFORMATION: John Lehnherr, Office of the Director, Center for Prevention Services, Centers for Disease Control, Altanta, GA 30333; telephone—commercial: (404) 639–1823; FTS: 236–1823.

Dated: October 17, 1988.

Elvin Hilyer,

Associate Director for Policy Coordination, Centers for Disease Control.

[FR Doc. 88–24468 Filed 10–20–88; 8:45 am]

BILLING CODE 4160–18–M

Health Resources and Services Administration

Health Education Assistance Loan Program; "Maximum Interest Rates for Quarter Ending December 31, 1988"

Section 727 of the Public Health Service Act (42 U.S.C. 294) authorizes the Secretary of Health and Human Services to establish a Federal program of student loan insurance for graduate students in health professions schools.

A. Section 60.13(a)(4) of the program's implementing regulations (42 CFR Part 60, previously 45 CFR Part 126) provides that the Secretary will announce the interest rate in effect on a quarterly basis.

The Secretary announces that for the period ending December 31, 1988, three interest rates are in effect for loans executed through the Health Education Assistance Loan (HEAL) program.

1. For loans made before January 27, 1981, the variable interest rate is 10¾ percent. Using the regulatory formula (45 CFR 126.13(a)(2) and (3)) in effect prior to January 27, 1981, the Secretary would normally compute the variable rate for this quarter by finding the sum of the fixed annual rate (7 percent) and a variable component calculated by subtracting 3.50 percent from the average bond equivalent rate of 91-day U.S. Treasury bills for the preceding calendar quarter (7.24 percent); and rounding the result (10.74 percent) upward to the nearest ⅛ percent (10¾ percent). However, the regulatory formula also provides that the annual rate of the variable interest rate for a 3-month period shall be reduced to the highest one-eighth of 1 percent which would result in an average annual rate not in excess of 12 percent for the 12-month period concluded by those 3 months. Because the average rate of the 4 quarters ending December 31, 1988, is not in excess of 12 percent, there is no necessity for reducing the interest rate. For the previous 3 quarters the variable interest at the annual rate was as follows: 9¾ percent for the quarter ending March 31, 1988; 9½ percent for the quarter ending June 30, 1988, and 10 percent for the quarter ending September 30, 1988.

2. For variable rate loans executed during the period of January 27, 1981 through October 21, 1985, the interest rate is 10¾ percent. Using the regulatory formula (42 CFR 60.13 (a)(3)) in effect for that time period, the Secretary computes the maximum interest rate at the beginning of each calendar quarter by determining the average bond equivalent rate for the 91-day U.S. Treasury bills during the preceding quarter (7.24 percent); adding 3.50 percent (10.74 percent); and rounding that figure to the next higher one-eighth of 1 percent (10¾ percent).

3. For fixed rate loans executed during the period of October 1, 1988 through December 31, 1988, and for variable rate loans executed on or after October 22, 1985, the interest rate is 10¼ percent. The Health Professions Training Assistance Act of 1985 (Pub. L. 99–129), enacted October 22, 1985, amended the formula for calculating the interest rate by changing 3.5 percent to 3 percent. Using the regulatory formula (42 CFR 60.13(a)(2) and (3)) with the statutory change of 3 percent (42 CFR 60.13(a)(1)), the Secretary computes the maximum interest rate at the beginning of each calendar quarter by determining the average bond equivalent rate for the 91-day U.S. Treasury bills during the preceding quarter (7.24 percent); adding 3.0 percent (10.24 percent) and rounding that figure to the next higher one-eighth of 1 percent (10¼ percent).

Dated: October 17, 1988.

John H. Kelso,

Acting Administrator.

(Catalog of Federal Domestic Assistance No. 13.108, Health Education Assistance Loans)

[FR Doc. 88–24418 Filed 10–20–88; 8:45 am]

BILLING CODE 4160–15–M

Office of Human Development Services

[Program Announcement No. ACYF–HS 13.600–88–2]

Administration for Children, Youth and Families; Head Start Bureau

AGENCY: Administration for Children, Youth, and Families (ACYF), Office of Human Development Services (OHDS), Department of Health and Human Services (HHS).

ACTION: Extension of due date for receipt of applications for Head Start expansion funds.

SUMMARY: This notice amends Program Announcement No. ACYF–HS 13.600–88–2, published in the **Federal Register** on September 1, 1988, by extending the due date for submission of applications to January 6, 1989. It also extends the time period for State review of such applications under Executive Order 12372.

FOR FURTHER INFORMATION CONTACT: Doug Klafehn (202) 755–0590.

SUPPLEMENTARY INFORMATION: On September 1, 1988, the Head Start Bureau published an announcement in the **Federal Register** (53 FR 33861) soliciting applications from Head Start grantees that wish to compete for $10,000,000 in grant funds that are available to expand enrollment in current Head Start projects.

In order to allow prospective applicants more time to prepare and submit their applications, we are extending the due date for submission of applications from November 15, 1988 to January 6, 1989.

This action also extends the due date for comments from State Single Points of Contact under Executive Order 12372 from January 17, 1989 to March 7, 1989.

(Catalog of Federal Domestic Assistance Program Number 13.600, Project Head Start)

Dated: September 30, 1988.

Dodie Truman Borup,

Commissioner, Administration for Children, Youth and Families.

Approved: October 17, 1988.

W. Douglas Badger,

Acting Assistant Secretary for Human Development Services.

[FR Doc. 88-24428 Filed 10-20-88; 8:45 am]

BILLING CODE 4130-01-M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Endangered Species Permits Issued for the Months of July, August, and September 1988

Notice is hereby given that the U.S. Fish and Wildlife Service has taken the following action with regard to permit applications duly received according to section 10 of the Endangered Species Act of 1973, as amended, 16 U.S.C. 1539. Each permit listed as issued was granted only after it was determined that it was applied for in good faith, that by granting the permit it will not be to the disadvantage of the endangered species; and that it will be consistent with the purposes and policy set forth in the Endangered species Act of 1973, as amended.

Additional information on these permit actions may be requested by contacting the Office of Management Authority, P.O. Box 27329, Washington, DC, 20038-7239, telephone (202/343-4955) between the hours of 7:45 a.m. to 4:15 p.m. weekdays.

July		
Paulos, Peter Ernest	727509	07/07/88
San Diego Zoological Society	724304	07/07/88
J.C. Schulz, Inc.	727502	07/12/88
Baker, Rex	728166	07/13/88
Gordon, F. "Cotton" M.	727645	07/13/88
Ohio State University	729836	07/17/88
Oklahoma City Zoo	728140	07/17/88
Cactus by Dodie	720880	07/28/88
Surratt, Ron	725449	07/29/88
August		
Gruber, Steven C.	727624	08/03/88
The Peregrine Fund, Inc.	729955	08/03/88
Cleveland Metroparks Zoo	728604	08/05/88
Cleveland Metroparks Zoo	728605	08/08/88
San Diego Wild Animal Park	728452	08/09/88
Spencer, James W.	728694	08/08/88
Klauss, John G.	728768	08/10/88
Cincinnati Zoo	728935	08/11/88
E.G. & G. Energy Measurements	683011	08/11/88
Regional Director, Region #2	729031	08/11/88
San Antonio Zoological Gardens & Aquarium	727797	08/16/88
Martin, Merrill D.	729258	08/17/88
San Diego Zoological Society	727165	08/18/88
Trunks & Humps Inc.	729359	08/18/88
National Zoological Park	728824	08/21/88
Bogosian, Gregg	726222	08/22/88
Grater, Lee	729096	08/23/88
Niehaus, Leslie P.	729302	08/26/88
National Museum of Natural History	726397	08/31/88
September		
National Museum of Natural History	726400	09/02/88
National Zoological Park	729918	09/09/88
National Zoological Park	729917	09/09/88
National Zoological Park	729919	09/09/88
Patrick, Dauane L.	730091	09/09/88
Sanders, Clifford E.	728285	09/09/88
Carey, Neil	730325	09/14/88
Cincinnati Zoo	730153	09/14/88
Cito, Alfred	730473	09/14/88
Gibbon & Gallinaceous Bird Center	730930	09/14/88
National Wildlife Health Research Center	730152	09/14/88
Philadelphia Zoological Garden	730352	09/14/88
Martin, Steve E.	726734	09/15/88
International Wildlife Veterinary Svcs.	730329	09/16/88
Van Hulzen, Al & Jean	728172	09/16/88
New York Zoological Society	730381	09/20/88
Wildman, John M.	727512	09/20/88
Busch Gardens	731516	09/28/88
U.S. Fish & Wildlife (Maryland)	730447	09/28/88
Rigoletti, Martin J.	731581	09/30/88
Eberle, Richard W.	730558	09/30/88

Date: October 18, 1988.

R. K. Robinson,

Chief, Branch of Permits, Office of Management Authority.

[FR Doc. 88-24453 Filed 10-20-88; 8:45 am]

BILLING CODE 4310-AN-M

Receipt of Applications for Permits

The following applicants have applied for permits to conduct certain activities with endangered species. This notice is provided pursuant to section 10(c) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531, *et seq.*):

Applicant: Jack Oberly, Phillipsburg, NJ, PRT-727187.

The applicant requests a permit to import one sport-hunted trophy of a bontebok (*Damaliscus dorcas dorcas*) taken from the captive-herd of Phil van der Merwe, Skietkuil, Cape Province, Republic of South Africa for enhancement of propagation and survival of the herd.

Applicant: Cincinnati Zoo, Cincinnati, OH, PRT-732159.

The applicant requests a permit to sell one female snow leopard (*Panthera uncia*) in foreign commerce for the purpose of enhancement of propagation and survival of the species. The leopard will be transferred from Howletts and Port Lympne Estates, Port Lympne, Hythe, Kent, England, to Clubb-Chipperfield Ltd., Oxon, England.

Applicant: Cincinnati Zoo, Cincinnati, OH, PRT-732162.

The applicant requests a permit to purchase one female captive born ocelot (*Felis pardalis*) from Ms. Jean C. Hatfield, The Exotic Feline Farm, Davie, Florida, for purposes of educational display and captive propagation.

Applicant: Dr. Don W. Doty, Rogersville, TN, PRT-732181.

The applicant requests a permit to purchase one pair of captive-hatched Nile crocodiles (*Crocodylus niloticus*) from Busch Gardens, Tampa, Florida, for scientific research.

Applicant: James. A. Boulton, Mundelein, IL, PRT-732379.

The applicant requests a permit to import the personal sport-hunted trophy of one male bontebok (*Damaliscus dorcas dorcas*), culled from the captive-herd maintained by Mr. Phil Van Der Merwe, Hutchinson, Republic of South Africa, for the purpose of enhancement of survival of the species.

Documents and other information submitted with these applications are available to the public during normal business hours (7:45 am to 4:15 pm), Room 403, 1375 K Street NW., Washington DC 20005, or by writing to the Director, U.S. Office of Management Authority, P.O. Box 27329, Washington, DC 20038-7329.

Interested persons may comment on any of these applications within 30 days of the date of this publication by submitting written views, arguments, or data to the Director at the above address. Please refer to the appropriate applicant and PRT number when submitting comments.

Date: October 18, 1988.

R.K. Robinson,

Chief, Branch of Permits, U.S. Office of Management Authority.

[FR Doc. 88-24452 Filed 10-20-88; 8:45 am]

BILLING CODE 4310-AN-M

Bureau of Land Management

[(WY-920-08-4121-11); WYW-112149]

Coal Leases, Exploration Licenses, etc.; Cheyenne, WY

AGENCY: Bureau of Land Management, Interior.

ACTION: Invitation for coal exploration license.

SUMMARY: Kerr-McGee Coal Corporation hereby invites all interested parties to participate on a pro rata cost sharing basis in its coal exploration program concerning federally owned coal underlying the following described land in Campbell County, Wyoming:

T. 42 N., R. 70 W., 6th P.M., WY,
Sec. 33: Lots 1 thru 16 inclusive;
Sec. 34: Lots 1 thru 16 inclusive;
Sec. 35: Lots 1 thru 15 inclusive,
NW¼NE¼.
Containing 1,950.17 acres.

All of the coal in the above land consists of unleased Federal coal, within the Powder River Basin known coal leasing area. The purpose of the exploration is to evaluate the coal tonnage and quality.

ADDRESSES: A detailed description of the proposed drilling program is available for review during normal business hours in the following offices (under serial number W–112149): Bureau of Land Management, 2515 Warren Avenue, Cheyenne, Wyoming 82003; and Bureau of Land Management, 1701 East 'E' Street, Casper, Wyoming 82601.

SUPPLEMENTARY INFORMATION: This notice of invitation will be published in a newspaper once each week for two consecutive weeks beginning the week of October 24, 1988, and in the **Federal Register.** Any party electing to participate in this exploration program must send written notice to both the Bureau of Land Management and to Kerr-McGee Coal Corporation no later than 30 days after publication of this invitation in the **Federal Register.** The written notice should be sent to the following addresses: Mr. Richard Turpin, Kerr-McGee Coal Corporation, P.O. Box 25861, Oklahoma City, Oklahoma 73125 or Mr. Greg Todd, Jacobs Ranch Mine, Caller Box 3013, Gillette, Wyoming 82716 and the Bureau of Land Management, Wyoming State Office, Branch of Mining Law and Solid Minerals, P.O. Box 1828, Cheyenne, Wyoming 82003–1828.

The foregoing is published in the **Federal Register** pursuant to Title 43 Code of Federal Regulations, § 3410.2–1(c)(1).

F. William Eikenberry,

Associate, State Director.

[FR Doc. 88–24370 Filed 10–20–88; 8:45 am]

BILLING CODE 4310–22–M

[WY–920–08–411–15; W–105840]

Notice of Proposed Reinstatement of Terminated Oil and Gas Lease; Wyoming

October 13, 1988.

Pursuant to the provisions of Public Law 97–451, 96 Stat. 2462–2466, and Regulation 43 CFR 3108.2–3 (a) and (b)(1), a petition for reinstatement of oil and gas lease W–105840 for lands in Weston County, Wyoming, was timely filed and was accompanied by all the required rentals accruing from the date of termination.

The lessee has agreed to the amended lease terms for rentals and royalties at rates of $5 per acre, or fraction thereof, per year and 16⅔ percent, respectively.

The lessee has paid the required $500 administrative fee and $125 to reimburse the Department for the cost of this **Federal Register** notice. The lessee has met all the requirements for reinstatement of the lease as set out in section 31 (d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), and the Bureau of Land Management is proposing to reinstate lease W–105840 effective February 1, 1988, subject to the original terms and conditions of the lease and the increased rental and royalty rates cited above.

David A. Pomerinke,

Acting Chief, Leasing Section.

[FR Doc. 88–24359 Filed 10–20–88; 8:45 am]

BILLING CODE 4310–22–M

Utah; Proposed Reinstatement of Terminated Oil and Gas Lease

In accordance with Title IV of the Federal Oil and Gas Royalty Management Act (Pub. L. 97–451), a petition for reinstatement of oil and gas lease U–59008 for lands in Grand County, Utah, was timely filed and required rentals and royalties accurring from April 1, 1988, the date of termination, have been paid.

The lessee has agreed to new lease terms for rentals and royalties at rates of $5.00 per acre and 16–⅔ percent, respectively. The $500 administrative fee has been paid and the lessee has reimbursed the Bureau of Land Management for the cost of publishing this notice.

Having met all the requirements for reinstatement of lease U–59008 as set out in section 31 (d) and (e) of the Mineral Leasing Act of 1920 (30 U.S.C. 188), the Bureau of Land Management is proposing to reinstate the lease, effective April 1, 1988, subject to the original terms and conditions of the lease and the increased rental and royalty rates cited above.

J. Darwin Snell,

Acting Chief, Branch of Lands and Minerals Operations.

[FR Doc. 88–24368 Filed 10–20–88; 8:45 am]

BILLING CODE 4310–DQ–M

[ES–030–09–5101–YMKA; ES–00157–001]

Right-of-Way Grant; Hoosier National Forest and Camp Atterbury Military Reservation; Perry, Crawford, Orange, Jackson, Brown, Bartholomew, and Johnson Counties, Indiana; INES–37986

AGENCY: Bureau of Land Management, Department of the Interior.

ACTION: Issuance of Right-of-Way Grant.

SUMMARY: As the lead agency for the National Environmental Policy Act (NEPA) compliance, the Federal Energy Regulatory Commission (FERC), Department of Energy, in cooperation with Bureau of Land Managment (BLM), Forest Service (FS), and U.S. Army Corps of Engineers (ACOE), has prepared an environmental assessment (EA) Of a proposed 16- and 20-inch diameter natural gas pipeline and related facilities in northern Kentucky and southern Indiana. The EA, which was issued on August 29, 1988, served as the basis for BLM's right-of-way grant issuance decision relative to Federal lands.

FOR FURTHER INFORMATION CONTACT: Duane Marti, Archaeologist/Realty Specialist, Milwaukee District (BLM), P.O. Box 631, Milwaukee, Wisconsin 53201–0631, or telephone (414) 291–4429.

SUPPLEMENTAL INFORMATION: On February 29, 1988, Texas Gas Transmission Corporation (Texas Gas) applied for a right-of-way grant to cross 6.29 miles of Hoosier National Forest and 11.3 miles of Camp Atterbury Military Reservation. The former area is located in Perry, Crawford, Orange, Jackson, and Brown Counties; while the latter area is located in Bartholomew and Johnson Counties. BLM published a notice of that application in the **Federal Register** on March 11, 1988 at pages 7984 and 7985.

When a proposed oil or natural gas pipeline crosses Federal lands administered by two or more Federal agencies, it becomes the responsibility of BLM to issue a right-of-way grant across the Federal lands pursuant to 43 CFR 2882.2–2. In this case, the right-of-way will cross portions of the Hoosier National Forest and Camp Atterbury Military Reservation.

FERC is the lead agency for NEPA compliance on the proposed natural gas pipeline, including the proposed right-of-way. As the lead agency, FERC prepared an EA of the proposed pipeline. BLM, FS, and ACOE (for Camp Atterbury) participated in the preparation of the EA. The EA, which was issued by FERC on August 29, 1988, was adopted by BLM on October 17, 1988.

The EA served as the basis for BLM's decisions. Those decisions include: (1) That a Finding of No Significant Impacts is appropriate for the right-of-way grant, (2) that, with the concurrence of both the FS and ACOE, BLM should issue a right-of-way grant to Texas Gas, (3) that the grant will contain special terms and conditions identified by both the FS and ACOE, and (4) that the grant will not become effective until FERC has issued a certificate of Public Convenience and Necessity to Texas Gas for the pipeline *and* the completion of a 30 days public comment period on this decision. The public comment period will commence on the date of publication of this decision in the **Federal Register**.

Comments

Until November 23, 1988, interested parties may submit written comments on the proposed right-of-way grant to: District Manager, Milwaukee District, BLM, P.O. Box 631, Milwaukee, Wisconsin 53201–0631.

Bert Rodgers,

District Manager.

[FR Doc. 88–24369 Filed 10–20–88; 8:45 am]

BILLING CODE 4310–GJ–M

INTERSTATE COMMERCE COMMISSION

Agricultural Cooperative Notice to the Commission of Intent To Perform Interstate Transportation for Certain Nonmembers

Date: October 18, 1988.

The following Notices were filed in accordance with section 10526 (a)(5) of the Interstate Commerce Act. These rules provide that agricultural cooperative intending to perform nonmember, non-exempt, interstate transportation must file the Notice, Form BOP 102, with the Commission within 30 days of its annual meetings each year. Any subsequent change concerning officers, directors, and location of transportation records shall require the filing of a supplemental Notice within 30 days of such change.

The name and address of the agricultural cooperative (1) and (2), the location of the records (3), and the name and address of the person to whom inquiries and correspondence should be addressed (4), are published here for interested persons. Submission of information which could have bearing upon the propriety of a filing should be directed to the Commission's Office of Compliance and Consumer Assistance, Washington, DC 20423. The Notices are in a central file, and can be examined at the Office of the Secretary, Interstate Commerce Commission, Washington, DC.

(1) Riceland Foods, Inc.

(2) P.O. Box 927, Stuttgart, AR 72160.

(3) 22nd & Park Avenue, Stuttgart, AR 72160.

(4) Terry L. Richardson, P.O. Box 927, Stuttgart, AR 72160.

Noreta R. McGee,

Secretary.

[FR Doc. 88–24376 Filed 10–20–88; 8:45 am]

BILLING CODE 7035–01–M

Intent To Engage in Compensated Intercorporate Hauling Operations

This is to provide notice as required by 49 U.S.C. 10524(b)(1) that the named corporations intend to provide or use compensated intercorporate hauling operations as authorized in 49 U.S.C. 10524(b).

A. 1. Parent corporation and address of principal office: NCH Corporation, 2727 Chemsearch Blvd., Irving, Texas 75062.

2. Wholly-owned subsidiaries which will participate in the operations, and state of incorporation:

Subsidiary name	Primary business	State of incorporation
ACTRA Manufacturing, Inc	Plumbing supplies	Texas
American Allsafe Co	Safety products	Do.
American Display Products, Inc	Novelty merchandise	Do.
Aquaterra Biochemical Corp. of America	Chemicals	Do.
The Bramton Co	....do	Do.
Certified Laboratories International, Inc	....do	Do.
Cornerstone Direct Corp	Hardware	Do.
DM Resources, Inc	ICC property broker	Do.
Esachem Corp. Caribbean Ltd.	Chemicals	Do.
Grease Catch Corp	Industrial equipment	Do.
Hardware Junction, Inc	Hardware	Do.
The Heat Company	Chemicals	Do.
Lamba Systems, Inc	Safety products	Minnesota
LSP Specialty Products Co	Plumbing products	Texas
Membership Services, Inc	Computers	Do.
NCH Corp. Korea	Chemicals	Do.
NCH Corp. Pacific	....do	Do.
NCH Corp. Paraguay	....do	Do.
NCH Corp. Puerto Rico	....do	Do.
OUT! International, Inc	....do	Do.
Plumbmaster, Inc	Plumbing supplies	Do.
Plumbmaster International, Inc	....do	Do.
P-T Templet Co	Signs	Do.
Pure Solve, Inc	Chemicals	Do.
Spot Selling Aids, Inc	Novelty merchandise	Do.
Systems General Inc	Chemicals	Do.
Texas Westmont Products, Inc	....do	Do.
U.S. Contract Trucking, Inc	Trucking	Do.
X-Chem, Inc	Chemicals	Louisiana

B. 1. Parent corporation and address of principal office: La Farge Corporation, 1130 Sunrise Valley Drive, Suite 300, Reston, VA 22091, A Maryland Corporation.

2. Wholly-owned subsidiaries which will participate in the operations, their cities of domicile, and their state of incorporation:

(i) Transit-Mix Concrete Supply, Tyler, TX, A Texas Corporation.

(ii) La Farge Corporation Southern Region, Dallas, TX, A Texas Corporation.

(iii) Gen-Tex Trucking, Inc., Dallas, TX, A Texas Corporation.

(iiii) Trinity Construction Materials, Dallas, TX, A Texas Corporation.

(iiiii) Bryco, Bryan, TX, A Texas Corporation.

Noreta R. McGee,

Secretary.

[FR Doc. 88-24374 Filed 10-20-88; 8:45 am]

BILLING CODE 7035-01-M

Release of Waybill Data for Use By The Intermodal Policy Division (IPD) Association of American Railroads

The Commission has received a request from the Intermodal Policy Division (IPD) of the Association of American Railroads (AAR) for permission to use certain data from the Commission's 1987 ICC Waybill Sample. The data will be used exclusively as input data for the AAR Intermodal Competition Model. The model is the chief means by which the AAR and the rail industry predict the impact on rail traffic and revenue of changes in rail or truck costs. The data requested are the Public Use File augmented to include the six digit Standard Point Location Code (SPLC), the seven digit Standard Transportation Commodity Code (STCC), car types, and complete route.

The Commission requires rail carriers to file waybill sample information if in any of the past three years they terminated on their lines: (1) 4,500 revenue carloads or (2) 5 percent of revenue carloads in any one State (40 CFR Part 1244). From the waybill information, the Commission has developed a Public Use Waybill File that has satisfied the majority of all our waybill data request while protecting the confidentiality of proprietary data submitted by the railroads. However, if confidential waybill data are requested, as in this case, we will consider releasing the data only after certain protective conditions are met and public notice is given. More specifically, under the Commission's current policy for handling waybill requests, we will not release any confidential waybill data until after: (1) Public notice is provided so affected parties have an opportunity to object and (2) certain requirements designed to protect the data's confidentiality are agreed to by the requesting party [Ex Parte No. 385 (Sub-No. 2), 52 FR 12415, April 16, 1987].

Accordingly, if any parties object to this request, they should file their objections (an orginal and 2 copies) with the Director of the Commission's Office of Transportation Analysis (OTA) within 14 calendar days of the date of this notice. They should also include all grounds for objections to the full or partial disclosure of the requested data. The Director of OTA will consider these objections in determining whether to release the requested waybill data. Any parties who objected will be timely notified of the Director's decision.

Contact: James A. Nash (202) 275-6864.

Noreta R. McGee,

Secretary.

[FR Doc. 88-24441 Filed 10-20-88; 8:45 am]

BILLING CODE 7035-01-M

[Finance Docket No. 31322]

Tarantula Corp. et al.; Control Exemption

AGENCY: Interstate Commerce Commission.

ACTION: Notice of exemption.

SUMMARY: Pursuant to 49 U.S.C. 10505, the Interstate Commerce Commission exempts Tarantula Corporation (Tarantula) from the requirements of 49 U.S.C. 11343 to acquire control of the Fort Worth & Western Railroad Company (FWWR) and the Fort Worth & Dallas Railroad Company (FWDR). Tarantula, a non-carrier holding company, currently owns all of the outstanding shares of stock of FWWR and FWDR, both of which at the time of the petition were non-carriers. FWWR has filed a notice of exemption pursuant to 49 CFR 1150.31 in Finance Docket No. 31314, *Fort Worth & Western Railroad Company—Acquisition and Operation Exemption—Rail Line in Fort Worth, TX* (not printed), served September 23, 1988, to acquire a rail line in Fort Worth, TX from the Burlington Northern Railroad Company and incidental trackage rights to operate over a line owned by the St. Louis Southwestern Railway Company. FWDR plans to file a similar exemption petition to acquire a connecting rail line comprised of two non-contiguous segments in Fort Worth from the Missouri Pacific Railroad Company. Upon consummation of those transactions, Tarantula will control FWWR and FWDR, two connected rail carriers. The exemption is subject to employee protective conditions.

DATES: This exemption is effective on October 24, 1988. Petitions for reconsideration must be filed by November 10, 1988.

ADDRESSES: Send pleadings referring to Finance Docket No. 31322 to:

(1) Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423.

(2) Kevin M. Sheys, Weiner, McCaffrey, Brodsky and Kaplan, P.C., 1350 New York Avenue NW., Suite 800, Washington, DC 20005-4797.

FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar, (202) 275-7245, [TDD for hearing impaired (202) 275-1721].

SUPPLEMENTARY INFORMATION: Additional information is contained in the Commission's decision. To purchase a copy of the full decision, write to, call, or pick up in person from: Dynamic Concepts, Inc., Room 2229, Interstate Commerce Commission Building, Washington, DC 20423. Telephone: (202) 289-4357/4359. [Assistance for the hearing impaired is available through TDD services (202) 275-1721.].

Decided: October 14, 1988.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Simmons, Lamboley, and Phillips.

Noreta R. McGee,

Secretary.

[FR Doc. 88-24375 Filed 10-20-88; 8:45 am]

BILLING CODE 7035-01-M

DEPARTMENT OF JUSTICE

Lodging of Partial Consent Decree; Thomas Solvent Co. et al.

Notice is hereby given that a proposed Partial Consent Decree in *United States v. Thomas Solvent Company, et al.*, Civil Action No. K-86-167 (W.D. Mich.), between the United States, on behalf of the Environmental Protection Agency ("EPA"), and Grand Trunk Western Railroad Company ("Grand Trunk") has been lodged with the United States District Court for the Western District of Michigan. The Partial Consent Decree resolves the claims of the United States (as well as related claims of the State of Michigan which is also a party to the Decree) against Grand Trunk under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9601 et seq., for certain response costs incurred by the EPA in responding to the contamination of the Verona Well Field, the public drinking water supply for Battle Creek, Michigan. Under the settlement reflected in the Partial Consent Decree, Grand Trunk will pay $4,705,677 in reimbursement of

certain response costs incurred prior to July 1, 1988. The Partial Consent Decree also contains certain findings of fact and declarations of liability as to Grand Trunk's liability with respect to the continuing Verona Well Field response actions.

The Department of Justice will receive comments relating to the proposed Partial Consent Decree for 30 days following the publication of this Notice. Comments should be addressed to the Assistant Attorney General of the Land and Natural Resources Division, Department of Justice, Washington, DC 20530, and should refer to *United States v. Thomas Solvent Company*, D.J. Ref. No. 90–11–2–140. The proposed Partial Consent Decree may be examined at the Office of the United States Attorney for the Western District of Michigan, 399 Federal Building, Grand Rapids, Michigan 49503, and at the Environmental Enforcement Section, Land and Natural Resources Division of the Department of Justice, Room 6317, Tenth and Pennsylvania Avenue NW., Washington DC 20530. A copy of the proposed Partial Consent Decree may be obtained by mail from the Environmental Enforcement Section, Land and Natural Resources Division of the Department of Justice. In requesting a copy, please enclose a check payable in the amount of $2.70 (10 cents per page for reproduction costs), payable to the Treasurer of the United States.

Roger J. Marzulla,

Assistant Attorney General, Land and Natural Resources Division.

[FR Doc. 88–24360 Filed 10–20–88; 8:45 am]

BILLING CODE 4410–01–M

Antitrust Division

National Cooperative Research Notifications; Bus Emissions Technology Cooperative Industry Project

Notice is hereby given that, on September 27, 1988, pursuant to section 6(a) of the National Cooperative Research Act of 1984, 15 U.S.C. 4301 et seq. ("the Act"), Southwest Research Institute ("SwRI") filed a written notification simultaneously with the Attorney General and the Federal Trade Commission of a project entitled "Bus Emissions Technology Cooperative Industry Project." The notification discloses (1) the identities of the parties to the project and (2) the nature and objective of the project. The notification was filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Pursuant to section 6(b) of the Act, the identities of the parties to the project and its general areas of planned activities are given below.

The parties to the project are:

1. Southeastern Pennsylvania Transportation Authority;

2. Los Angeles County Transportation Commission;

3. Southern California Rapid Transit District.

The purpose of the project is to help make the transit bus system an environmentally acceptable transportation system. The three main areas which will be addressed are (1) the effects of fuel modifications, (2) the use of alternate fuels or supplemental fuels and/or additives, and (3) the use of exhaust aftertreatment to eliminate visible smoke and/or other components of bus exhaust.

Membership in this group research project remains open, and the parties intend to file additional written notification disclosing all changes in membership of this project.

Joseph H. Widmar,

Director of Operations, Antitrust Division.

[FR Doc. 88–24364 Filed 10–20–88; 8:45 am]

BILLING CODE 4410–01–M

Drug Enforcement Administration

Joseph J. Godorov, D.O.; Denial of Application for Registration

On August 23, 1988, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA), issued to Joseph J. Godorov, D.O., of 9055 SW. 87th Avenue, Suite 307, Miami, Florida, an Order to Show Cause proposing to deny his application, executed on December 15, 1986, for registration as a practitioner under 21 U.S.C. 823(f). The Order to Show Cause alleged that Dr. Godorov's registration would be inconsistent with the public interest, as that term is used in 21 U.S.C. 823(f) and 824(a)(4).

The Order to Show Cause was sent to Dr. Godorov by registered mail, return-receipt requested. The returned receipt indicates that the Order to Show Cause was received on August 29, 1988. Dr. Godorov has not responded to the Order to Show Cause. Thus, the Administrator concludes that Dr. Godorov has waived his opportunity for a hearing on the issues raised in the Order to Show Cause and, pursuant to 21 CFR 1301.54(d) and 1301.54(e), he enters this final order without a hearing and based upon the information contained in the investigative file. 21 CFR 1301.57.

The Administrator finds that on March 1, 1978, in the Circuit Court for the Sixth Judicial Circuit of Florida, in and for Pinellas County, Dr. Godorov, following a jury trial, was convicted of nineteen felony counts of prescribing controlled substances not in good faith and not in the usual course of his professional practice, in violation of § 893.13 of the Florida Comprehensive Drug Abuse Prevention and Control Act. Dr. Godorov appealed the verdict. On December 13, 1978, the District Court of Appeal for the Second Appellate District of Florida vacated the conviction and remanded the case for a new trial.

On January 9, 1980, in the Circuit Court for the Sixth Judicial Circuit of Florida, in and for Pinellas County, Dr. Godorov was convicted, following a new jury trial, of nineteen felony counts of prescribing controlled substances not in good faith and not in the usual course of his professional practice. He was sentenced to a three-year period of incarceration, but was released from the Florida Department of Corrections on August 27, 1981, after serving twenty months of his sentence.

On August 14, 1978, the Administrator of the Drug Enforcement Administration ordered the revocation of Dr. Godorov's previously held DEA Certificate of Registration following an administrative hearing. The revocation, which was based upon Dr. Godorov's felony convictions relating to controlled substances, was to take effect on September 18, 1978. See *Joseph J. Godorov, D.O.*, Docket No. 78–8, 43 FR 36702 (1978).

On September 19, 1978, the Administrator granted Dr. Godorov's application for a stay of the revocation pending appellate review by the United States Court of Appeals for the Fifth Circuit. The appeal was not heard by the court. In the interim, Dr. Godorov's registration expired.

The Administrator also finds that on April 18, 1979, the Florida Department of Professional and Occupational Regulation, State Board of Osteopathic Examiners, issued a final order suspending Dr. Godorov's osteopathic license in that state for a period of three years based upon evidence that he improperly handled controlled substances. The Board found that during a period from April to August 1977, Dr. Godorov issued controlled substance prescriptions to an undercover St. Petersburg police officer for other than legitimate medical purposes. After issuing the officer unlawful prescriptions on one occasion, Dr. Godorov told her to "* * * stay happy and not to get too high." The evidence presented at the Board hearing demonstrated Dr. Godorov's disregard of controlled

substance laws and regulations and an absolute lack of concern for the abuse potential for the drugs he handled. Dr. Godorov appealed the Board's decision to the District Court of Appeal for the Second Appellate District of Florida. That court upheld the Board's suspension of Dr. Godorov's state osteopathic license.

On April 10, 1980, the Florida Department of Professional and Occupational Regulation, Board of Osteopathic Examiners, revoked Dr. Godorov's osteopathic license in that state, based upon his conviction of felony offenses relating to controlled substances. His license was reinstated on August 16, 1983.

In evaluating whether Dr. Godorov's pending application for registration should be granted, the Administrator must consider whether his registration would be consistent with the public interest. In making that determination, the Administrator must consider the following factors enumerated in 21 U.S.C. 823(f):

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority;

(2) The applicant's experience in dispensing, or conducting research with respect to controlled substances;

(3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances;

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances;

(5) Such other conduct which may threaten the public health and safety.

The Administrator is not required to make findings with respect to all of the factors listed above. Instead, the Administrator has the discretion to give each factor the weight he deems appropriate, depending upon the facts and circumstances of each case. See *David E. Trawick, D.D.S.*, Docket No. 86–69, 53 FR 5326 (1988).

Dr. Godorov has not presented any evidence to demonstrate that he is now prepared and willing to handle controlled substances responsibly and in compliance with Federal, State, and local laws relating to controlled substances. Thus, the only evidence before the Administrator, on which he can base this final order, is that concerning Dr. Godorov's previous convictions and past experience in handling controlled substances.

The evidence in this case relates primarily to the second, third, fourth and fith factors listed under 21 U.S.C. 823(f). Dr. Godorov has been convicted of felony offenses relating to controlled substances. By issuing controlled substance prescriptions for other than legitimate medical purposes, he has demonstrated a lack of compliance wth applicable state laws relating to controlled substances. His actions and disregard for the dangerous consequences of his prescribing practices also constitute conduct which may threaten the public health and safety.

Although the Florida Department of Professional and Occupational Regulation, Board of Osteopathic Examiners, reinstated Dr. Godorov's osteopathic license, there is no evidence that the Board recommended that he be given a DEA registration and no evidence to support the granting of a registration in this case.

Based upon the totality of the evidence, the Administrator concludes that the grant of Dr. Godorov's application for registration would be contrary to the public interest, and must, therefore, be denied.

Accordingly, the Administrator of the Drug Enforcement Administration, pursuant to the authority vested in him by 21 U.S.C. 823 and 824 and 28 CFR 0.100(b), orders that the pending application for registration, executed on December 15, 1986, by Joseph J. Godorov, D.O., be, and it hereby is, denied.

This order is effective October 21, 1988.

Dated: October 14, 1988.

John C. Lawn,

Administrator.

[FR Doc. 88–24415 Filed 10–20–88; 8:45 am]

BILLING CODE 4410-09-M

DEPARTMENT OF LABOR

Employment Standards Administration, Wage and Hour Division

Minimum Wages for Federal and Federally Assisted Construction; General Wage Determination Decisions

General wage determination decisions of the Secretary of Labor are issued in accordance with applicable law and are based on the information obtained by the Department of Labor from its study of local wage conditions and data made available from other sources. They specify the basic hourly wage rates and fringe benefits which are determined to be prevailing for the described classes of laborers and mechanics employed on construction projects of a similar character and in the localities specified therein.

The determinations in these decisions of prevailing rates and fringe benefits have been made in accordance with 29 CFR Part 1, by authority of the Secretary of Labor pursuant to the provisions of the Davis-Bacon Act of March 3, 1931, as amended (46 Stat. 1494, as amended, 40 U.S.C. 276a) and of other Federal statutes referred to in 29 CFR Part 1, Appendix, as well as such additional statutes as may from time to time be enacted containing provisions for the payment of wages determined to be prevailing by the Secretary of Labor in accordance with the Davis-Bacon Act. The prevailing rates and fringe benefits determined in these decisions shall, in accordance with the provisions of the foregoing statutes, constitute the minimum wages payable on Federal and federally assisted construction projects to laborers and mechanics of the specified classes engaged on contract work of the charter and in the localities described therein.

Good cause is hereby found for not utilizing notice and public comment procedure thereon prior to the issuance of these determinations as prescribed in 5 U.S.C. 553 and not providing for delay in the effective date as prescribed in that section, because the necessity to issue current construction industry wage determinations frequently and in large volume causes procedures to be impractical and contrary to the public interest.

General wage determination decisions, and modifications and supersedes decisions thereto, contain no expiration dates and are effective from their date of notice in the **Federal Register**, or on the date written notice is received by the agency, whichever is earlier. These decisions are to be used in accordance with the provisions of 29 CFR Parts 1 and 5. Accordingly, the applicable decision, together with any modifications issued, must be made a part of every contract for performance of the described work within the geographic area indicated as required by an applicable Federal prevailing wage law and 29 CFR Part 5. The wage rates and fringe benefits, notice of which is published herein, and which are contained in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under The Davis-Bacon And Related Acts," shall be the minimum paid by contractors and subcontractors to laborers and mechanics.

Any person, organization, or governmental agency having an interest in the rates determined as prevailing is encouraged to submit wage rate and fringe benefit information for

consideration by the Department. Further information and self-explanatory forms for the purpose of submitting this data may be obtained by writing to the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Division of Wage Determinations, 200 Constitution Avenue NW., Room S-3504, Washington, DC 20210.

New General Wage Determination Decisions

The numbers of the decisions being added to the Government Printing Office document entitled "General Wage Determinations Issued Under the Davis-Bacon and Related Acts" are listed by Volume, State, and page number(s).

Volume II

Nebraska:
NE88-10 ..... pp. 692a-692b.
NE88-11 ..... pp. 692c-692d.

Modifications to General Wage Determination Decisions

The numbers of the decisions listed in the Government Printing Office document entitled "General Wage Determinations Issued Under the Davis-Bacon and Related Acts" being modified are listed by Volume, State, and page number(s). Dates of publication in the **Federal Register** are in parentheses following the decisions being modified.

Volume I

District of Columbia:
DC88-1 (JAN. 8, 1988) ..... pp. 78-79, 81-82, 84.
New Jersey:
NJ88-2 (JAN. 8, 1988) ..... pp. 614-620, 623-631.
NJ88-3 (JAN. 8, 1988) ..... pp. 634-656.
NJ88-4 (JAN. 8, 1988) ..... pp. 658-660.
New York: NY88-4 (JAN. 8, 1988). p. 712.
West Virginia: WV88-3 (JAN. 8, 1988). pp. 1207-1208.

Volume II

Kansas: KS88-6 (JAN. 8, 1988). p. 347.
Missouri: MO88-1 (JAN. 8, 1988). p. 586.
Nebraska:
NE88-1 (JAN. 8, 1988) ..... p. 670.
NE88-3 (JAN. 8, 1988) ..... p. 677.
Listing by location (index) ..... pp. xxxix-xl.
Listing by decision (index) ..... pp. lvii-lviii.

Volume III

Alaska: AK88-1 (JAN. 8, 1988). pp. 2, 5, 7.
Hawaii: HI88-1 (JAN. 8, 1988). pp. 132-133.
Oregon: OR88-1 (JAN. 8, 1988). p. 307.
Washington: WA88-1 (JAN. 8, 1988). p. 365.

General Wage Determination Publication

General wage determinations issued under the Davis-Bacon and Related Acts, including those noted above, may be found in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under The Davis-Bacon And Related Acts". This publication is available at each of the 50 Regional Government Depository Libraries and many of the 1,400 Government Depository Libraries across the country. Subscriptions may be purchased from:

Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, (202) 783-3238.

When ordering subscription(s), be sure to specify the State(s) of interest, since subscriptions may be ordered for any or all of the three separate volumes, arranged by State. Subscriptions include an annual edition (issued on or about January 1) which includes all current general wage determinations for the States covered by each volume. Throughout the remainder of the year, regular weekly updates will be distributed to subscribers.

Signed at Washington, DC, this 14th Day of October 1988.

Alan L. Moss,

Director, Division of Wage Determinations.

[FR Doc. 88-24107 Filed 10-20-88; 8:45 am]

BILLING CODE 4510-27-M

Employment and Training Administration

Investigations Regarding Certifications of Eligibility To Apply for Worker Adjustment Assistance

Petitions have been filed with the Secretary of Labor under section 221(a) of the Trade Act of 1974 ("the Act") and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Office of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to section 221(a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than October 31, 1988.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than October 31, 1988.

The petitions filed in this case are available for inspection at the Office of the Director, Office of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, 601 D Street NW., Washington, DC 20213.

Signed at Washington, DC, this 3rd day of October 1988.

Marvin M. Fooks,

Director, Office of Trade Adjustment Assistance.

APPENDIX

Petitioner (union/workers/firm—	Location	Date received	Date of petition	Petition No.	Articles produced
Abex (Workers	Mahwah, NJ	10/3/88	9/22/88	21,154	Research & Experimental Foundry Castings.
Adorence Co., Inc., (Workers)	Secaucus, NJ	10/3/88	8/31/88	21,155	Men's & Ladie's Sportswear.
Airlanta (Company)	Gloucester City, NJ	10/3/88	9/22/88	21,156	Sheet Metal Ducts.
Al's Oilfield Service (Workers)	Williston, ND	10/3/88	9/17/88	21,157	Oil & Gas.
Armadillo Roustabout Serv. (Company)	Abilene, TX	10/3/88	9/23/88	21,158	Oil & Gas.
BHP Engineering (Workers)	Corpus Christi, TX	10/3/88	9/17/88	21,159	Oil & Gas.

APPENDIX—Continued

Petitioner (union/workers/firm—	Location	Date received	Date of petition	Petition No.	Articles produced
B.J. Titan Service (Workers)	Roosevelt, UT	10/3/88	9/20/88	21,160	Oil & Gas.
Baggett Drilling Co. (Workers)	Eagle Pass, TX	10/3/88	9/19/88	21,161	Oil & Gas.
BethEnergy Mines, Inc. Marianna Mine No. 58 (UMWA).	Marianna, PA	10/3/88	9/16/88	21,162	Coal.
Caren Lynn (Workers)	New York, NY	10/3/88	9/14/88	21,163	Ladies' Apparel & Children's Apparel.
Celeron Oil & Gas, Co. (Workers)	Englewood, CO	10/3/88	9/21/88	21,164	Oil & Gas.
CENEX (Workers)	Billings, MT	10/3/88	9/21/88	21,165	Oil & Gas.
Charles E. Mayfield (Company)	Princeton, LA	10/3/88	9/20/88	21,166	Oil & Gas.
Chevron USA, Inc. (Workers)	Houston, TX	10/3/88	9/21/88	21,167	Oil & Gas.
Colonial Corp. (Workers)	Woodbury, TN	10/3/88	9/19/88	21,168	Ladie's Blouses & Men's Shirts.
Comet Drilling Co. (Workers)	Eunice, LA	10/3/88	9/15/88	21,169	Oilfield Services.
Control & Valve Equip. Co. (Company)	Tulsa, OK	10/3/88	9/19/88	21,170	Oil & Gas.
Courtland Mfg. (Workers)	New York, NY	10/3/88	9/14/88	21,171	Ladie's & Children's Apparel.
DeKalb Industries (Workers)	Smithville, TN	10/3/88	9/19/88	21,172	Ladie's Blouses & Men's Shirts.
Diamond Tool & Horseshoe Co.	Duluth, MN	10/3/88	9/20/88	21,173	Hand Tools.
Discovery, Inc. (Company)	Great Bend, KS	10/3/88	9/21/88	21,174	Oil & Gas.
Discovery Mud Co. (Company)	Midland, TX	10/3/88	9/20/88	21,175	Oil & Gas.
Dowell Schlumberger (Workers)	Senora, TX	10/3/88	9/12/88	21,176	Oil & Gas.
Dreiling Oil, Inc. (Workers)	Victoria, KS	10/3/88	9/21/88	21,177	Oil & Gas.
Dynamic Exploration (Company)	Lafayette, LA	10/3/88	9/20/88	21,178	Oil & Gas.
Exploration Employment Services, Inc. (Workers).	Livingston, TX	10/3/88	9/20/88	21,179	Oil & Gas.
Florsheim Shoe Co. (UFCW)	Jackson, MO	10/3/88	9/15/88	21,180	Women's Shoes.
Ford Motor Co. (Workers)	Troy, MI	10/3/88	9/20/88	21,181	Tractors.
G&A Contract Services, Inc. (Company)	Houston, TX	10/3/88	9/20/88	21,182	Oil & Gas.
Garden State Knitting Mills, Inc. (ILGWU)	Linden, NJ	10/3/88	9/21/88	21,183	Men's & Women's Sweaters.
Geosource Inc. (Company)	Houston, TX	10/3/88	9/21/88	21,184	Oil & Gas.
Gibson Association, Inc. (UAW)	Cranford, NJ	10/3/88	9/22/88	21,185	Plastic Bottle Caps.
Gib-Son Cementing Co., Inc. (Workers)	Kilgore, TX	10/3/88	9/19/88	21,186	Oil & Gas.
Gibson Drilling Co. (Workers)	Kilgore, TX	10/3/88	9/20/88	21,187	Oil & Gas.
Griffin Alexander Drilling Co. (Company)	Houston, TX	10/3/88	9/20/88	21,188	Oil & Gas.
Hembree Well Service, Inc. (Workers)	Ness City, KS	10/3/88	9/23/88	21,189	Oil & Gas.
Hembree Well Service, Inc. (Workers)	Garden City, KS	10/3/88	9/23/88	21,190	Oil & Gas.
Hembree Well Service, Inc. (Workers)	Ellis, KS	10/3/88	9/23/88	21,191	Oil & Gas.
Hembree Well Service, Inc. (Workers)	Great Bend, KS	10/3/88	9/23/88	21,192	Oil & Gas.
High Sky Drilling, Inc. (Workers)	Midland, TX	10/3/88	9/12/88	21,193	Oil & Gas.
Hinkle Oil Co. (Company)	Wichita, KS	10/3/88	9/21/88	21,194	Oil & Gas.
Hondo Drilling Co. (Workers)	Midland, TX	10/3/88	9/16/88	21,195	Oil & Gas.
Hydrocarb Logging, Inc. (Company)	Florence, MS	10/3/88	9/22/88	21,196	Oil & Gas.
J&C Mfg. (Workers)	New York, NY	10/3/88	9/14/88	21,197	Ladie's & Children's Apparel.
L&H Shirt Co. (Workers)	Cochran, GA	9/26/88	9/12/88	21,198	Men's & Boys Shirts.
Lambert Construction (Workers)	Odessa, TX	10/3/88	9/19/88	21,199	Oil & Gas.
Lon O. Willer, Inc. (Company)	Grafton, ND	10/3/88	9/19/88	21,200	Oil & Gas.
Magnatex (Workers)	Midland, TX	10/3/88	9/14/88	21,201	Oil & Gas.
Pennzoil Exploration & Production Co. (Workers).	Corpus Christi, TX	10/3/88	9/9/88	21,214	Oil & Gas.
R.K. McLeroy, Inc. (Workers)	Abilene, TX	10/3/88	9/10/88	21,215	Oil & Gas.
Rankin Oil Co. (Company)	Midland, TX	10/3/88	9/12/88	21,216	Oil & Gas.
Ravanna Oil Co. (Workers)	Beattyville, KY	10/3/88	9/20/88	21,217	Oil & Gas.
Reed Transportation (Workers)	Casper, WY	10/3/88	9/13/88	21,218	Oil & Gas.
Reed Transportation (Workers)	Evanston, WY	10/3/88	9/13/88	21,218	Oil & Gas.
Reed Transportation (Workers)	Gilette, WY	10/3/88	9/13/88	21,220	Oil & Gas.
Rock Island Drilling Corp. (Workers)	Midland, TX	10/3/88	9/12/88	21,221	Oil & Gas.
Rogers Exploration (Workers)	Midland, TX	10/3/88	9/19/88	21,222	Oil & Gas.
Roughrider Drilling Fluids, Inc. (Workers)	Denver, CO	10/3/88	9/12/88	21,223	Oil & Gas.
Sarita Energy (Company)	Austin, TX	10/3/88	9/18/88	21,224	Oil & Gas.
Saw Drilling, Inc. (Company)	Victoria, TX	10/3/88	9/20/88	21,225	Oil & Gas.
Manhattan Plaza (Workers)	New York, NY	10/3/88	9/14/88	21,202	Ladies' Apparel & Children's Apparel.
McNeese Logging Service, Inc. (Company)	Midland, TX	10/3/88	9/13/88	21,203	Oil & Gas.
Merritt Trucking Co., Inc. (Workers)	Tye, TX	10/3/88	9/20/88	21,204	Oil & Gas.
Mesa Drilling Co. (Workers)	Abilene, TX	10/3/88	9/20/88	21,205	Oil & Gas.
Mid-Coast Drilling, Inc. (Workers)	Victoria, TX	10/3/88	9/20/88	21,206	Oil & Gas.
Midwest Equipment Co., Inc. (Workers)	Odessa, TX	10/3/88	9/19/88	21,207	Oil & Gas.
Milpark Drilling Fluids (Workers)	Houston, TX	10/3/88	9/11/88	21,208	Oil & Gas.
Missouri Valley Perforating, Inc. (Workers)	Williston, ND	10/3/88	9/17/88	21,209	Oil & Gas.
North American Oil & Gas. Inc. (Company)	Austin, TX	10/3/88	9/18/88	21,210	Oil & Gas.
Ontario Forge Corp. (IAM)	Muncie, IN	10/3/88	9/20/88	21,211	Forgings for Jet Engine Parts.
Oxford Drapery Co. (Workers)	S. Boston, MA	10/3/88	9/14/88	21,212	Drapery's, Panels, Shams & Bedspreads.
Peerless Footwear, Inc. (Company)	New York, NY	10/3/88	8/29/88	21,213	Shoes.
Signal Oilfield Service, Inc. (Workers)	Sidney, MT	10/3/88	9/21/88	21,226	Oil & Gas.
Sigri Carbon Corp. (Workers)	Hickman, KY	10/3/88	9/20/88	21,227	Graphite Electrodes Used to Melt Steel.
Smith Energy Services (Company)	Golden, CO	10/3/88	9/20/88	21,228	Oil & Gas.
Smith Energy Services (Company)	Brighton, CO	10/3/88	9/20/88	21,229	Oil & Gas.
Smith Energy Services (Company)	Rangely, CO	10/3/88	9/20/88	21,230	Oil & Gas.
Smith Energy Services (Company)	Williston, ND	10/3/88	9/20/88	21,231	Oil & Gas.
Smith Energy Services (Company)	Fruita, CO	10/3/88	9/20/88	21,232	Oil & Gas.
Smith Energy Services (Company)	Casper, WY	10/3/88	9/20/88	21,233	Oil & Gas.
Smith Energy Services (Company)	Farmington, NM	10/3/88	9/20/88	21,234	Oil & Gas.
Smith Energy Services (Company)	Midland, TX	10/3/88	9/20/88	21,235	Oil & Gas.

APPENDIX—Continued

Petitioner (union/workers/firm—	Location	Date received	Date of petition	Petition No.	Articles produced
Sun Exploration & Production Co. (Workers)	Dallas, TX	10/3/88	9/14/88	21,236	Oil & Gas.
Sundown Well Service (Workers)	Andrews, TX	10/3/88	9/19/88	21,237	Oil & Gas.
TXO Production Corp. (Workers)	Beaumont, TX	10/3/88	9/20/88	21,239	Oil & Gas.
Texas Pipe and Coupling (Workers)	Hughes Springs, TX	10/3/88	9/16/88	21,240	Oil & Gas.
Transamerican Natural Gas Corp. (Workers)	Laredo, TX	10/3/88	9/19/88	21,241	Oil & Gas.
Transwestern Mining Co. (Workers)	Claremore, OK	10/3/88	9/14/88	21,242	Coal.
Toland & Johnston (Workers)	Oklahoma City, OK	10/3/88	9/13/88	21,243	Oil & Gas.
Tuboscope, Inc. (Workers)	Houston, TX	10/3/88	9/13/88	21,244	Oil & Gas.
United Technologies (Workers)	Dearborn, MI	10/3/88	9/20/88	21,245	Wire Harnesses.
V&B Drilling Co. (Workers)	Adessa, TX	10/3/88	9/22/88	21,246	Oil & Gas.
Vandrill, Inc. (Workers)	Edmond, OK	10/3/88	9/13/88	21,247	Oil & Gas.
Vans Well Service (Workers)	Forsan, TX	10/3/88	9/22/88	21,248	Oil & Gas.
Walverine World Wide, Inc. (Workers)	Big Rapids, MI	10/3/88	9/22/88	21,249	Shoes.
Wills Enterprises Inc. (Workers)	Abilene, TX	10/3/88	9/10/88	21,250	Oil & Gas.

[FR Doc. 88-24383 Filed 10-20-88; 8:45 am]
BILLING CODE 4510-30-M

Bureau of Labor Statistics

Business Research Advisory Committee; Meeting and Agenda

The regular Fall meeting of the Committee on Occupational Safety and Health Statistics of the Business Research Advisory Council will be held on November 17, 1988. The Business Research Advisory Council advises the Bureau of Labor Statistics with respect to technical matters associated with the Bureau's programs. Membership consists of technical officers from American business and industry.

The schedule and agenda for the meeting is as follows:

Thursday, November 17, 1988

1 p.m.—Committee on Occupational Safety and Health Statistics, Room S-4215 A and B, Frances Perkins Building, 200 Constitution Avenue NW., Washington, DC.

1. Annual Survey, results for 1987.
2. SDS status, budget and state participation.
3. Keystone Report.
4. Statistical System Revision.
   a. Data System.
   b. Recordkeeping concepts and timetable for new guidelines.
5. Results of Revision Feasibility Tests (FY 1988).
6. FY 1989 Revision Pilot Tests.
7. Fatality Reporting Project.
8. Recordkeeping Assessment Projects.
9. Industry Fact Sheet Project.
10. Inhalation Report.
11. Other business.

The meeting is open to the public. It is suggested that persons planning to attend the meeting as observers contact Janice D. Murphey, Liasion, Business Research Advisory Council on Area Code (202) 523-1347.

Signed at Washington, DC, the 14th day of October 1988.

Janet L. Norwood,

Commissiner of Labor Statistics.

[FR Doc. 88-24384 Filed 10-20-88; 8:45 am]
BILLING CODE 4510-24-M

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Federal Advisory Committee on International Exhibition; Establishment

In accordance with provisions of the Federal Advisory Committee Act (Pub. L. 92-463) and General Services Administration regulations issued pursuant thereto (41 CFR Paragraph 101-6), and under the authority of section 10(a)(4) of the National Foundation on the Arts and the Humanities Act of 1965, as amended [20 U.S.C. 959(a)(4)], notice is hereby given that establishment of the Federal Advisory Committee on International Exhibitions has been approved by the Chairman of the National Endowment for the Arts for a period of two years from the date this Charter is filed. This committee will make recommendations on the selection of significant, contemporary American visual art, for presentation internationally in the context of major exhibitions, including multinational festivals, periodic exhibitions, and other major cultural events. The committee will also advise on the significance of participation by the United States Government in both existing and new exhibition opportunities and venues outside the United States.

The committee will report its recommendations to the Chairman of the Arts Endowment, for transmittal by the Chairman or the Chairman's designee to the Director of the United States Information Agency (USIA) or the Director's designee.

The function of this advisory committee cannot be performed by the USIA, the Arts Endowment, an existing advisory committee or other means, such as public hearing. Neither agency nor any existing advisory committee possesses sufficient expertise regarding major international art exhibition venues or breadth of representation to offer such advice. Other means, such as public hearings, are not suitable for obtaining the necessary advice. Therefore, the establishment and use of this advisory committee is in the public interest.

This charter will be filed with the standing Committees of the Senate and the House of Representatives having legislative jurisdiction over the Endowment and over the USIA and with the Library of Congress.

Yvonne Sabine,

Director, Council and Panel Operations, National Endowment for the Arts.

[FR Doc. 88-24389 Filed 10-20-88; 8:45 am]
BILLING CODE 7537-01-M

International Exhibitions Federal Advisory Committee; 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 Federal Advisory Committee on International Exhibitions will be held on November 7, 1988, from 10:00 a.m.-4:00 p.m. at the Carnegie Museum of Art, 4400 Forbes Avenue, Pittsburgh, PA 15213.

A portion of this meeting will be open to the public on November 7, from 2:00-4:00 p.m. The topics for discussion will include future role of the committee and guidelines.

The remaining session of this meeting on November 7, from 10:00 a.m.-2:00 p.m., is 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, this session 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.

[FR Doc. 88–24390 Filed 10–20–88; 8:45 am]

BILLING CODE 7537–01–M

Visual Arts Advisory Panel; 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 Visual Arts Advisory Panel (Visual Artists Organizations Section) to the National Council on the Arts will be held on November 7–10, 1988, from 9:00 a.m.–9:00 p.m.; and on November 11, from 9:15 a.m.–4:45 p.m. in room 730 of the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW., Washington, DC 20506.

This meeting is 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 discussion of 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 subsections (c)(4), (6) and (9)(B) of section 552b of Title 5, United States Code.

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.

October 17, 1988.

[FR Doc. 88–24391 Filed 10–20–88; 8:45 am]

BILLING CODE 7537–01–M

NUCLEAR REGULATORY COMMISSION

Issuance and Availability NUREG–0844, "NRC Integrated Program for the Resolution of Unresolved Safety Issues A–3, A–4, and A–5 Regarding Steam Generator Tube Integrity"

The U.S. Nuclear Regulatory Commission is issuing NUREG–0844, "NRC Integrated Program for the Resolution of Unresolved Safety Issues A–3, A–4, and A–5 Regarding Steam Generator Tube Integrity." This report documents resolution of the subject unresolved safety issues (USIs).

Steam generator tube integrity was designated an unresolved safety issue in 1978 after it became apparent that steam generator tubes were subject to widespread degradation, frequent leaks, and occasional ruptures (i.e., gross failures). Task Action Plans A–3, A–4, and A–5 were established to evaluate the safety significance of these problems in Westinghouse, Combustion Engineering, and Babcock & Wilcox steam generators, respectively. These studies were later combined into one effort because many problems being experienced by the different pressurized-water reactor (PWR) vendors were similar.

NUREG–0844 provides a generic risk assessment which indicates that risk from steam generator tube rupture (SGTR) events is not a significant contributor to the total risk at a given site, nor to the total risk to which the general public is routinely exposed. This finding is considered indicative of the effectiveness of licensee programs and regulatory requirements for ensuring steam generator tube integrity in accordance with 10 CFR Part 50, Appendices A and B.

NUREG–0844 also identifies a number of staff-recommended actions that can further improve the effectiveness of licensee programs in ensuring the integrity of steam generator tubes and in mitigating the consequences of a steam generator tube rupture. As part of the integrated program, the staff issued Generic Letter 85–02 encouraging licensees of PWRs to upgrade their programs, as necessary, to meet the intent of the staff-recommended actions; however, such actions do not constitute NRC requirements. In addition, this report describes a number of ongoing staff actions and studies involving steam generator issues that are being pursued to provide added assurance that risk from SGTR events will continue to be small.

The staff will continue to monitor steam generator operating experiences as an indicator of the effectiveness of licensee programs for ensuring steam generator tube integrity. As has been true in the past, the staff may impose additional requirements (pursuant to applicable regulations) to continue to assure that licensees are implementing adequately effective programs where and if such action is determined to be necessary on the basis of operating experience or as a result of ongoing staff actions and studies.

Copies of these documents will be available after October 13, 1988. Copies will be sent directly to utilities, utility industry groups and associations and environmental and public interest groups. Other copies will be available for review and copying for a fee at the NRC Public Document Room, 2120 L Street NW., Washington, DC 20555. Copies of NUREG–0844 may be requested from the U.S. Government Printing Office (GPO) by calling (202) 275–2060 or (202) 782–3238; or by writing to the Superintendant of Documents, U.S. Government Printing Office, P.O. Box 37082, Washington, DC 20013–7082; or by writing to the National Technical Information Service, Springfield, Virginia, 22111.

Dated at Rockville, Maryland, this 11th day of October 1988.

For the Nuclear Regulatory Commission.

Gary M. Holahan,

Acting Director, Division of Reactor Projects III, IV, V and Special Projects, Office of Nuclear Reactor Regulation.

[FR Doc. 88–24402 Filed 10–20–88; 8:45 am]

BILLING CODE 7590–01–M

[Docket No. 50–354]

Public Service Electric & Gas Co. 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–57 issued to Public Service Electric & Gas Company and Atlantic City Electric Company (the licensees) for operation of the Hope Creek Generating Station, located in Salem County, New Jersey.

The proposed amendment would revise Technical Specification Table 3.3.3–3 to change the maximum allowed response time for the high pressure coolant injection system. The subject response time is the time allowed for the system to achieve rated flow following receipt of an initiation signal. The proposed change would increase the currently allowed maximum response time of 27 seconds to a new value of 35 seconds.

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 November 21, 1988, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written 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 intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which much include a list of the contentions which are sought to be litigated in the matter, and the bases for each contention set forth with reasonable specificity. Contentions shall be limited to matters within the scope of the amendment under consideration. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the oppportunity to participate fully in the conduct of the hearing, including the oppportunity 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, Att: Docketing and Service Branch, or may be delivered to the Commission's Public Document Room, 2120 L 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 Walter R. Butler: 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 Conner and Wetterhahn, 1747 Pennsylvania Avenue NW., Washington, DC 20006, 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 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 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 August 13, 1987 as supplemented August 12, 1988, which is available for public inspection at the Commission's Public Document Room, 2120 L Street NW., Washington, DC 20555, and at the Pennsville Public Library, 190 S. Broadway, Pennsville, New Jersey 08070.

Dated at Rockville, Maryland, this 13th day of October 1988.

For the Nuclear Regulatory Commission.

Walter R. Butler,

Director, Project Directorate I–2, Division of Reactor Projects I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 88–24403 Filed 10–20–88; 8:45 am]

BILLING CODE 7590–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–26192; File No. SR–NASD–84–10]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Amendment of Proposed Rule Change Relating to Subsection 5(b)(5) of Appendix F to Article III, Section 34 of the NASD's Rules of Fair Practice To Permit Indeterminate Compensation

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] notice is hereby given that on August 10, 1987, the National Association of Securities Dealers, Inc. ("NASD"), filed with the Securities and Exchange Commission ("Commission") the proposed rule change [2] 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.

[1] 15 U.S.C. 78s(b)(1).

[2] Notice of the original filing was given by Securities Exchange Act Release No. 21468, November 11, 1984, and by publication in the **Federal Register**, 49 FR 44966, November 13, 1984.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The following is the amended text of the proposed rule change to subsection 5(b)(5) of Appendix F to Article III, section 34 of the NASD's Rules of Fair Practice ("Appendix F"). Additions are underlined; deletions are in brackets. Attached as Exhibit 2 is a copy of the proposed rule change originally filed, marked to show the amendments filed herein to the proposed rule change.

Section 5—Organization and Offering Expenses

(b) In determining the fairness and reasonableness of organization and offering expenses for purposes of subsection (a) hereof,[3] the arrangements shall be presumed to be unfair and unreasonable if:

(5) The program provides for compensation of an indeterminate nature to be paid to members or persons associated with members for sales or program units, or for services of any kind rendered in connection with or related to the distribution thereof, including but not necessarily limited to, the following: A percentage of the management fee, a profit sharing arrangement, brokerage commissions, an overriding royalty interest, a net profits interest, a percentage of revenues, a reversionary interest, a working interest, a security or right to acquire a security having an indeterminate value, or other similar incentive items; *provided however, that an arrangement which provides for continuing compensation to a member or person associated with a member in connection with a public offering shall not be presumed to be unfair and unreasonable if all of the following conditions are satisfied:*

(i) The continuing compensation is to be received only after each investor in the program has received cash distributions from the program aggregating an amount equal to his cash investment plus a six percent cumulative annual return on his adjusted investment;

(ii) The continuing compensation is to be calculated as a percentage of program cash distributions;

(iii) The amount of continuing compensation does not exceed three percent for each one percentage point that the total of all compensation pursuant to subsection (b)(1) of this section [4] received at the time of the offering and at the time any installment payment is made fall below nine percent; provided, however, that in no event shall the amount of continuing compensation exceed 12 percent of program cash distributions; and

(iv) If any of the continuing compensation is to be derived from the limited partners' interest in the program cash distributions, the percentage of the continuing compensation shall be no greater than the percentage of program cash distributions to which limited partners are entitled at the time of the payment.

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 statutory 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

On October 15, 1984, the NASD filed with the Commission SR–NASD–84–10 pursuant to Rule 19b–4 (the "original rule change"). This filing proposed to amend subsection 5(b)(5) of Appendix F to permit a member to receive a back-end indeterminate interest in program distributions as compensation for distribution of a direct participation program ("DPP") if four conditions are satisfied.[5] Subsection 5(b)(5) of Appendix F currently prohibits any NASD member or person associated with a member from receiving indeterminate compensation in connection with the public offering of a DPP.[6]

Appendix F only applies to public offerings of DPPs. Accordingly, private program offerings reportedly frequently are sold with an underwriting compensation arrangement that includes a percentage interest in program distributions. The original rule change was developed because NASD members believed that the prohibition with respect to public programs was of questionable value in protecting investors in those instances where the member was willing to forego front-end compensation in a program in exchange for a possible participation in future cash distributions and dissolution proceeds of the DPP.

Original Rule Change

The original rule change to Appendix F permits indeterminate compensation to be paid to a member or person associated with a member in connection with a pubic offering of a DPP if four conditions are satisfied. The first condition, Item (i) of subsection 5(b)(5), is that the member's continuing compensation may be received only after all investors have received cash distributions from the program equal to 100 percent of their cash investment [7] plus a six percent cumulative annual return on their adjusted investment.[8] The six percent cumulative annual return, chosen as a prerequisite to the receipt by broker/dealers of continuing compensation, was adopted in response to concerns raised by the North American Securities Administrators Association ("NASAA"). NASAA argued that some recognition of present value should be made in computing investor's return of capital. The particular amount of six percent was chosen to coincide with a similar provision in NASAA guidelines.

Item (ii) of the proposed amendment requires that the member's continuing compensation be calculated as a percentage of cash distributions from

[3] Subsection 5(a) provides: No member or person associated with a member shall underwrite or participate in a public offering of a direct participation program if the organization and offering expenses are not fair and reasonable, taking into consideration all relevant factors.

[4] Subsection 5(b)(1) provides that an arrangement is unfair and unreasonable if the total amount of compensation in connection with the distribution of a public offering exceeds current effective compensation guidelines (10% of proceeds received, plus a maximum of .5% for reimbursement of bona fide due diligence expenses, published in NASD Notice to Members 82–51 (October 19, 1982)).

[5] Section 5 of Appendix F requires that compensation received by members and associated persons in connection with the public offering of DPPs be fair and reasonable and specifies certain arrangements which are presumed to be unreasonable. *See* NASD Rules of Fair Practice, Article III, Appendix F, § 5.

[6] "Indeterminate compensation" refers to any item of compensation which is on-going in nature and for which a value cannot be determined at the time of the offering, including a percentage of the general partner's management fee, a profit sharing arrangement, an overriding royalty interest, a net profits interest, a percentage of revenues and similar on-going compensation with an indeterminate dollar value.

[7] "Cash investment" includes the amount paid by the investor for the security in cash, payments of assessments, and reinvestments of limited partners' income in the same program. Cash investment does not include any amounts represented by an outstanding promissory note on unpaid installations.

[8] "Adjusted investment" is the investor's cash investment less cash distributions from the program.

the operation or dissolution of the program. Thus, a member may receive continuing compensation from operations, from the sale of program assets, and from dissolution of the program.

Item (iii) restricts the amount of back-end compensation that a member may receive to three percent of the partnerships's annual distributions from operations or liquidation for each one percent that front-end retail and wholesale cash commissions fall below nine percent. Members normally are permitted maximum front-end compensation of ten percent pursuant to Appendix F.[9] Where a program is providing continuing compensation to a member, the amendment requires that the reduction in front-end compensation be calculated from a nine percent base. This decision was based on the NASD's experience that a majority of DPPs provide for underwriting compensation of at least nine to ten percent. Therefore, the NASD believed that by establishing a nine percent base from which the member must reduce front-end compensation in order to receive continuing compensation in the program, the NASD would be able to assure an actual reduction in front-end compensation.

The trade-off ration of three-to-one was based on an analysis which indicates that broker/dealers will realize a meaningful benefit by deferring compensation only if the program provides an attractive return to investors. It was determined that such a ratio was necessary to assure that members have the necessary incentive to give up front-end compensation and that a three-to-one ratio would focus the sales efforts of broker/dealers on quality programs to the benefit of investors.

Item (iii) also restricts the total amount of continuing compensation that a member may receive to twelve percent of the cash distributions from the operation or dissolution of the program. The limit on continuing compensation was intended to assure some consistency in the structure of public programs in order to prevent widely differing compensation levels from outweighing relevant suitabilty standards. It was also intended to prevent undue discrimination against smaller member firms that might not be able to absorb all the cost of the distribution of a program in exchange for deferred compensation.

Item (iv) provides that the percentage of broker/dealers' continuing compensation from the limited partners' interest in program distributions cannot exceed the percentage that limited partners are entitled to receive. The purpose of this provision is to ensure that if any of the distributions from operation or dissolution of a program payable to limited partners is to be used to pay the member's continuing compensation, the percentage of the compensation paid from the limited partners' distributions cannot exceed the percentage of program distributions payable to the limited partners.

Interim NASD Action

The Commission published the original rule change for public comment on November 5, 1984.[10] On November 15, 1984, the Commission submitted a letter to the NASD requesting further explanation of certain aspects of the original rule change. At the same time, Commission staff requested the NASD to meet with representatives of NASAA to resolve concerns expressed by the state administrators with regard to the original rule change. The staff of the NASD held several discussions with NASAA representatives and submitted letters in response to NASAA's request with respect to the original rule change on March 27, 1985, and January 27, 1986. The NASD submitted a response to the Commission's letter on July 27, 1987, requesting that the Commission go forward with its consideration of the proposed rule change and attached its prior correspondence with NASAA.[11]

Proposed Amendments

In its November 15, 1984, letter, the Commission raised a number of issues. With respect to three of the issues raised by the Commission, the NASD is proposing to amend the original rule change. The NASD is also proposing to amend the original rule change with respect to a fourth issue.

Cash commissions: Item (iii) provides that continuing compensation may not "exceed three percent for each one percentage point that the retail and wholesale cash commissions received at the time of the offering fall below nine percent." The terms "retail" and "wholesale" commissions are not defined in Appendix F, as expressed by the Commission in its letter of November 15, 1984, at Question 4(a). Retail and wholesale commissions represent only a portion of all underwriting compensation that could be paid in connection with the distribution of a DPP and do not include due diligence expense reimbursements, expense reimbursements to the underwriter, sales incentive compensation and other items of compensation that are enumerated in section 5(c) of Appendix F.[12] Thus, underwriting compensation may be structured for members to receive eight percent retail and wholesale commissions, which would permit members to receive back-end compensation of three percent of program cash distributions, as well as to receive front-end expense reimbursement of two percent of offering proceeds. This results in total front-end compensation of ten percent and back-end compensation of three percent.

The NASD's intention in proposing this provision was to permit continuing compensation only when the aggregate of *all* categories of front-end compensation was below nine percent. Therefore, the NASD proposes to amend Item (iii) to provide that the amount of continuing compensation cannot "exceed three percent for each one percentage point that the [retail and wholesale] *total of all compensation pursuant to subsection (b)(1) of this section* received at the time of the offering * * * fall below nine percent."[13]

Installment payments: At Question 4(c) of the Commission's letter of November 15, 1984, the Commission requested details as to how continuing compensation would be treated for programs providing for installment payments for the purchase of units. In particular, the Commission noted that Item (iii) prohibits continuing compensation from exceeding three percent for each one percentage point that front-end commissions "received at the time of the offering" fall below nine percent. If a program is sold on an installment basis, which is permitted under Rule 3a12–9 of the Act,[14] the commission portion of underwriter's compensation would be structured to only be payable proportionally with respect to each installment paid. Thus,

[9] *See supra* note 4.

[10] *See* Securities Exchange Act Release No. 21468 (December 5, 1984, 49 FR 44966 (November 13, 1984).

[11] The discussions with NASAA have not led to a resolution of all of NASAA's concerns. A copy of the Commission's November 15, 1984, letter and the NASD's response of July 27, 1987, with attached NASD correspondence to NASAA, are available in File No. SR–NASD–84–10.

[12] Items of compensation include, but are not limited to: sales commissions, wholesaling fees, due diligence expenses, other underwriter's expenses, underwriter's counsel's fees, securities or rights to acquire securities, rights of first refusal, consulting fees, finder's fees and investor relations fees. *See* Appendix F. § 5(c).

[13] Deletions are in brackets; additions are underlined.

[14] 17 CFR 240.3a12–9(a).

because Rule 3a12–9 requires not less than 50 percent of the purchase price of a program interest to be paid initially,[15] 50 percent of the commission on the full purchase price of the program interests sold would be paid at the time of the offering. The remainder of the underwriter's commission would be paid if and when each installment is paid by the participating member's customers. It is anticipated that any non-commission compensation in the form of expense reimbursements and due diligence fees would be paid at the time of the offering and would not be prorated over the installments.

Therefore, the NASD proposes that Item (iii) be amended to include language that would relate the amount of continuing compensation to underwriting compensation received by participating members "at the time of the offering *and at the time any installment payment is made* * * *"

Cash distributions: At Questions 4(d) and 5(b) of the Commission's letter of November 15, 1984, the Commission requested clarification of certain language in Items (i), (iii) and (iv) of the amendment. Item (i) references "cash distributions from the program," in comparison to Items (iii) and (iv) which refer only to "distributions" from the program. The word "cash" was not intended to be omitted from these provisions. Therefore, the NASD proposes that Item (iii) be amended to read "exceeds 12 percent of program *cash* distributions" and that Item (iv) be amended to read "program *cash* distributions," in order to provide consistency in the text.[16]

Program cash distributions: In addition, Items (ii), (iii) and (iv) reference investors' cash distributions "from the operation or dissolution of the program." The NASD is concerned that this language may be unintentionally restrictive, as cash distributions may also be made from program investments and financing. Therefore, the NASD proposes that the language of the three provisions be amended to reference "program cash distributions" with no reference to the particular program activity generating these distributions.

The NASD believes that the amended proposed rule change is consistent with the provisions of section 15A(b)(2) of the Act, which require the NASD to adopt rules that promote just and equitable principles of trade, remove impediments to and perfect the mechanisms of a free and open market and generally protect investors, on the basis that the proposed rule change establishes objective criteria for limiting underwriting compensation, while helping to focus the selling efforts of members on the qualitative nature of the public programs.

B. Self-Regulatory Organization's Statement on Burden on Competition

The NASD believes that the amended proposed rule change does not result in any impact on competition that is not necessary in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on the Proposed Rule Change Received from Members, Participants, or Others

No comments were requested or received with respect to the proposed amendments to the original rule change. The original rule change was proposed for comment in NASD Notice to Members 82–14 (March 9, 1982).[17]

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 the proposed rule change, or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

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 changes 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 Room. Copies of the filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to File No. SR–NASD–84–10 and should be submitted by November 14, 1988.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority, 17 CFR 200.30–3(a)(12).

Jonathan G. Katz,

Secretary.

Dated: October 18, 1988.

Shirley E. Hollis,

Assistant Secretary.

[FR Doc. 88–24432 Filed 10–20–88; 8:45 am]

BILLING CODE 8010–01–M

[15] *See* Rule 3a12–9(a)(3).

[16] The NASD also proposes that Item (ii) be amended to read "*program* cash distributions," in order to provide consistency in the text.

[17] *See* SR–NASD–84–10, at 11–12.

[Release No. 34–26190; File No. SR–NASD–88–19]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Extension of Public Comment Period of Proposed Rule Change To Create an OTC Bulletin Board Display

On June 9, 1988, the National Association of Securities Dealers, Inc. ("NASD") submitted a proposed change pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1) and Rule 19b–4 thereunder, to establish a quotation service, the OTC Bulletin Board Display Service, for OTC securities that are not included in the NASDAQ System nor listed on a national securities exchange. Notice of the proposed rule change was provided by the issuance of a Commission release (Securities Exchange Act Release No. 25949, July 28, 1988) and by publication in the **Federal Register** (53 FR 29096, August 2, 1988).

The NASD originally consented to an extension of the period for public comment on the proposed rule change for forty-five days, until October 7, 1988,[1] and, on October 14, 1988, consented to an additional fourteen day extension on the comment period, until October 28, 1988.[2]

The Commission hereby extends the period for public comment on the proposed rule change for a period of fourteen days, until October 28, 1988.

[1] *See* letter to Jonathan G. Katz, Secretary, Securities and Exchange Commission, from Frank J. Wilson, Executive Vice President and General Counsel, NASD, dated August 22, 1988.

[2] *See* letter to Jonathan G. Katz, Secretary, Securities and Exchange Commission, from Robert E. Aber, Vice President and Deputy General Counsel, Corporate Subsidiaries, dated October 14, 1988.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Dated: October 17, 1988.

Shirley E. Hollis,

Assistant Secretary.

[FR Doc. 88-24382 Filed 10-20-88; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-26189; File No. SR-PSE-88-22]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by Pacific Stock Exchange, Inc. Relating to a Charge for Drop Phones on the Options Floor

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 September 28, 1988, the Pacific Stock Exchange Inc. ("PSE" or "Exchange") filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II and III below, which items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange, pursuant to Rule 19b-4 of the Act, submits this rule filing relating to an options member's use of another options member's booth space for phone or drop lines. The Exchange proposes to charge a member using the phone or drop line installed in another member's booth space $100 per month for each phone or drop line.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections 2 (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

Within the PSE's policy for allocating booth space on the options floor among member firms, clearing firms, and retail stock execution firms, provision is made for a member to install either a single phone or a drop line in another member firm's booth. The PSE prohibits subleasing or exchanging of booths among members. The drop phones or lines are being used by members either in lieu of renting booth space, or in addition to phones in their own booth space. In either instance, the member utilizing the phone or line pays no charge to the PSE, even though it is utilizing a service provided by the PSE. The purpose of this rule filing is to establish a charge of $100 per month for each single phone or drop line that a member uses in another member's booth space.

The charge was proposed by the Options Committee. The Options Committee was established to examine revenues and costs on the options floor. The Options Committee is composed of three members of the Exchange's Board of Governors who are also options members, the President, and the Chief Financial Officer of the PSE.

The proposed rule filing is consistent with section 6(b)(4) of the Act in that it provides an equitable allocation of reasonable dues, fees, and other charges among the members using the facilities of the PSE. In addition, the proposed rule change is consistent with section 6(b)(5) of the Act in that it will enable the PSE to enhance its ability to facilitate transactions.

(B) Self-Regulatory Organization's Statement on Burden on Competition

PSE does not believe that the proposed rule changes impose a burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The charge was proposed by the Options Committee which is composed of three options members who are also Governors of the PSE, the President, and the Chief Financial Officer of the PSE.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective on filing pursuant to section 19(b)(3)(A) of the Act and Rule 19b-4(e) thereunder because it establishes a due, fee, or other charge imposed by the Exchange. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC, 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission and all written communications relating to the proposed rule change between the Commission and any persons, 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 office of the PSE. All submissions should refer to File No. SR-PSE-88-22 and should be submitted by November 14, 1988.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Dated: October 14, 1988.

Shirley E. Hollis,

Assistant Secretary.

[FR Doc. 88-24381 Filed 10-20-88; 8:45 am]

BILLING CODE 8010-01-M

DEPARTMENT OF TRANSPORTATION

Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart Q During the Week Ended October 14, 1988

The following applications for certificates of public convenience and necessity and foreign air carrier permits were filed under Subpart Q of the Department of Transportation's Procedural Regulations (See 14 CFR 302.1701 *et seq.*). The due date for answers, conforming application, or motion to modify scope are set forth below for each application. Following the answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

Docket No. 45870

Date Filed: October 11, 1988.
Due Date for Answers, Conforming Applications, or Motion to Modify Scope: November 8, 1988.
Description: Application of Executive Air Charter pursuant to section 401 of the Act and Subpart Q of the Regulations, requests that its certificate of public convenience and necessity for scheduled and charter foreign air transportation of persons, property and mail be amended to include the points Castries and Beaufort, St. Lucia, West Indies.

Docket No. 45876

Date Filed: October 13, 1988.
Due Date for Answers, Conforming Applications, or Motion to Modify Scope: October 27, 1988.
Description: Conforming Application of American Airlines, Inc. pursuant to section 401 of the Act and Subpart Q of the Regulations, and with respect to Docket 45829, applies for a certificate of public convenience and necessity authorizing service between Dallas/Ft. Worth, Texas, and Sydney, Australia, via Honolulu, Hawaii.

Docket No. 45878

Date Filed: October 13, 1988.
Due Date for Answers, Conforming Applications, or Motion to Modify Scope: November 10, 1988.
Description: Application of Delta Air Lines, Inc. pursuant to section 401 of the Act and Subpart Q of the Regulations applies for a new or amended certificate of public convenience and necessity to permit Delta to provide nonstop air transportation between the U.S. and Australia.

Phyllis T. Kaylor,
Chief, Documentary Services Division.

[FR Doc. 88-24454 Filed 10-20-88; 8:45 am]
BILLING CODE 4910-62-M

Office of the Secretary

Privacy Act of 1974

The Department of Transportation (DOT) herewith publishes a proposal to establish one system of records and delete six systems of records.

Any person or agency may submit written comments on the proposed establishment of the system of records to the U.S. Coast Guard, Office of Personnel and Training (G-PIM), ATTN: Mr. David M. Swatloski, 2100 2nd Street SW., Washington, DC 20593. Comments must be received within 30 days to be considered.

If no comments are received, the proposed changes will become effective on November 16, 1988. If comments are received, the comments will be considered and where adopted, the document will be republished with the changes.

Issued in Washington, DC, October 17, 1988.

Jon H. Seymour,
Assistant Secretary for Administration.

Narrative Statement, Department of Transportation, Office of the Secretary, On Behalf of the United States Coast Guard, For the Establishment and Deletion of Systems of Records

The Office of the Secretary, on behalf of the Coast Guard, proposes to establish the Military Pay and Personnel System—DOT/CG 623, by combining six existing systems (Personnel Management Information System—DOT/CG 624, Active Duty Military Payroll System—DOT/CG 525, Allotment System—DOT/CG 527, Closed Out Military Pay Record System—DOT/CG 530, FICA Wage and Tax System for Military Pay—DOT/CG 532, and Reserve Personnel Management Information System—DOT/CG 678) into one system of records covering all automated and some manual pay and personnel records maintained on regular and reserve Coast Guard military personnel and commissioned officers of the National Oceanic and Atmospheric Administration.

The purpose of this notice is to more accurately reflect current agency organization and practices and to include new categories of records in the system of records.

Since this proposal will combine existing record systems, the probable effects of this proposal on the privacy interests of the general public are minimal.

Routine use of system information is compatible under Subsection (a)(7) of the Privacy Act of 1974, 5 U.S.C. 522a, for the following reasons:

Routine Uses A, B, F, J, L, M, N & P are for payment of Coast Guard members' salaries, and collection and recording of government and private obligations.

Routine Uses C, D, H, & J are for administration of Federal Entitlement programs.

Routine Uses E & O are for Defense and Readiness Planning of the United States.

Routine Uses I & K are to provide information for the operation of other legislatively mandated government agency operations.

Routine Use G is necessary to allow maintenance and operation of the system of records.

A description of the steps taken to safeguard these records is given under the appropriate heading of the attached **Federal Register** system of records notice.

Statutory authorities for maintaining this system of records are Title 37 U.S.C. as implemented in GAO Manual for Guidance of Federal Agencies, Title 2 GAO, & Title 6 GAO, and Title 14 U.S.C. 92 (i).

The purpose of this report is to comply with the Office of Management and Budget Circular, A-130, Appendix I, dated December 12, 1985.

SYSTEM NAME:

Military Pay and Personnel System.

SYSTEM LOCATION:

Department of Transportation (DOT),

a. U.S. Coast Guard (CG), Department of Transportation Computer Center, 400 7th Street SW., Washington, DC 20590.

b. U.S. Coast Guard Pay and Personnel Center, 444 S.E. Quincy Street, Topeka, KS 66683.

c. U.S. Coast Guard, 2100 2nd Street SW., Washington, DC 20593.

d. Decentralized data segments are located at the unit maintaining the individual's pay and personnel record.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

a. All Coast Guard military personnel, active duty and reserve.

b. Retired reserve Coast Guard military personnel waiting for pay at age 60.

c. Active Duty National Oceanic and Atmospheric Administration (NOAA) Officers.

d. Personnel separated from service in all the preceding categories.

CATEGORIES OF RECORDS IN THE SYSTEM:

All categories of records may include identifying information, such as name(s), date of birth, home residence, mailing address, social security number, payroll information, and home telephone. Record reflect.

a. Work experience, education level achieved, and specialized education or training obtained in and outside of military service,

b. Military duty assignments, ranks held, pay and allowance, personnel actions such as promotions, demotions, or separations,

c. Enrollment or declination of enrollment in insurance programs,

d. Performance evaluation,

e. The individual's desire for future assignments, training requested, and notation by assignment officers.

f. Information for determinations of waivers and remissions of indebtedness to the U.S. Government, and

g. Information for the purpose of validating legal requirements for garnishment of wages.

ROUTINE USE OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

a. To the Department of Treasury for the purpose of disbursement of salary, U.S. Savings Bonds, and allotments,

b. To government agencies to disclose earnings and tax information,

c. To the Department of Defense and Veterans Administration for determinations of benefit eligibility for military members and their dependents,

d. To contractors to manage payment and collection of benefit claims,

e. To the Department of Defense for manpower and readiness planning,

f. To the Comptroller General for the purpose of processing waivers and remissions,

g. To contractors for the purpose of system enhancement, maintenance, and operations,

h. To Federal, state, and local agencies for determination of eligibility for benefits connected with the Federal Housing Administration program,

i. To provide an official of another Federal agency information needed in the performance of official duties to reconcile or reconstruct data files in support of functions for which the records were collected and maintained,

j. To an indivudual's spouse, or person responsible for the care of the individual concerned when the individual to whom the record pertains is mentally imcompetent, critically ill, or under other legal disability for the purpose of assuring the individual is receiving benefits or compensation they are entitled to receive,

k. To a requesting government agency, organization, or individual the home address and other relevant information on those individuals who, it is reasonably believed, might have contracted an illness, been exposed to, or suffered from a health hazard while a member of government service,

l. To businesses for the purpose of electronic fund transfers or allotted pay transactions authorized by the individual concerned,

m. To credit agencies and financial institutions for the purpose of processing credit arrangements authorized by the individual concerned,

n. To other government agencies for the purpose of earning garnishment,

o. To prepare the Officer Register and Reserve Officer Register which is provided to all Coast Guard officers and the Department of Defense,

p. To other federal agencies and collections agencies for the collection of indebtedness to the Federal Government.

See Prefatory Satement of General Routine Uses.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

The storage is on computer disks, magnetic tape, microfilm, and paper forms in file folders.

RETRIEVABILITY:

Retrieval from the system is by name or social security number and can be accessed by employees in pay and personnel offices and other pay and personnel employees located elsewhere who have a need for the record in the performance of their duties.

SAFEGUARDS:

Computers provide privacy and access limitation by requring a user name and password match. Access to decentralized segments are similarly controlled. Only those personnel with a need to have access to the system are given user names and passwords. The magnetic tape backups have limited access in that users must justify the need and obtain tape numbers and volume identifers from a central source before they are provided data tapes. Paper record and microfilm records are in limited access areas in locking storage cabinets.

RETENTION AND DISPOSAL:

Leave and Earnings Statements, pay records, are microfilmed and retained on site four years, then archived at the Federal Records Center, and destroyed when 50 years old. The official copy of the personnel record is maintained in the Official Service Records, DOT/CG 626 for active duty officers, the Enlisted Personnel Record System, DOT/CG 629 for active duty enlisted personnel or the Official Coast Guard Reserve Service Record, OST/CG 576 for inactive duty reservists. Duplicate magnetic copies of the pay and personnel record are retained at an off site facility for a useful life of seven years. Paper records for waivers and remissions are retained on site six years three months after the determination and then destroyed. Paper records to determine legal sufficiency for garnishment are retained on site six years three months after the member separates from the service or the garnishment is terminated and then destroyed.

SYSTEM MANAGERS AND ADDRESS:

a. All information on Coast Guard members and other than b., c., and d. below:

(1) For active duty members of the Coast Guard:

Chief, Office of Personnel, Department of Transportation, U.S. Coast Guard Headquarters, 2100 2nd Street, SW., Washington, DC 20593

(2) For Coast Guard inactive duty reserve members and retired Coast Guard reservists awaiting pay at age 60:

Chief, Office of Readiness and Reserve, Department of Transporation, U.S. Coast Guard Headquarters, 2100 2nd Street, SW., Washington, DC 20593.

b. For Coast Guard Waivers and Remissions:

Chief, Personnel Services Division (G-PS), Office of Personnel, U.S. Coast Guard Headquarters, 2100 2nd Street, SW., Washington, DC 20593.

c. For records used to determine legal sufficiency for garnishment of wages and pay records:

Commanding Officer (LGL), U.S. Coast Guard Pay and Personnel Center, 444 SE. Quincy Street, Topeka, KS 66683.

d. For data added to the decentralized data segment the commanding officer, officer-in-charge of the unit handling the individual's pay and personnel record, or Chief, Administrative Services Division, for individuals whose records are handled by Coast Guard Headquarters.

e. For NOAA members:

National Oceanic and Atmospheric Administration, Commissioned Personnel Division, 11400 Rockville Pike, Rockville, MD 20852.

NOTIFICATION PROCEDURE:

Inquiries should be directed to:

a. For all information on Coast Guard members other than b., c., and d. below:

Department of Transportation, U.S. Coast Guard Headquarters (G-TIS), 2100 2nd Street, SW., Washington, DC 20593.

b. For records used to determine legal sufficiency for garnishment of wages and pay records.

Commanding Officer, U.S. Coast Guard Pay and Personnel Center, 444 SE. Quincy Street, Topeka, KS 66683.

c. For data added to the decentralized data segment the commanding officer, officer-in-charge of the unit handling the individual's pay and personnel record, or Chief, Administrative Services Division, for individuals whose records are handled by Coast Guard Headquarters. Addresses for the units handling the individual's pay and personnel record are available from the individual's commanding officer.

d. For all information on NOAA members:

National Oceanic and Atmospheric Administration, Commissioned Personnel Division, 11400 Rockville Pike, Rockville, MD 20852.

RECORD ACCESS PROCEDURES:

Contact the addressee under notification procedures and specify the exact information you desire. Requests must include the full name and social security number of the individual concerned. Prior written notification of personal visits is required to insure that the records will be available at the time of visit. Photographic proof of identity will be required prior to release of records. A military identification card, driver's license or similar document will be considered suitable indentification.

CONTESTING RECORD PROCEDURES:

Contact the addressee under notification procedures and specify the exact information or items you are contesting and provide any documentation that justifies your claim. Correspondence contesting records must include the full name and social security number of the individual concerned.

RECORD SOURCE CATEGORIES:

a. The individual's record from the following systems of records:

(1) Official Officer Service Records, DOT/CG 626.

(2) Enlisted Personnel Record System, DOT/CG 629.

(3) Official Coast Guard Reserve Service Record, OST/CG 676.

b. Information is obtained from the individual, Coast Guard personnel officials, National Oceanic and Atmospheric Administration personnel officials, and the Department of Defense.

[FR Doc. 88-24455 Filed 10-20-88; 8:45 am]

BILLING CODE 4910-62-M

Federal Aviation Administration

[Docket No. 25724; Summary Notice No. PE-88-41]

Summary of Petition for Exemption Received From Jet Express, Inc.

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petition for exemption.

SUMMARY: Pursuant to FAA's rulemaking provisions governing the application, processing, and disposition of petitions for exemption (14 CFR Part 11), this notice contains a summary of a petition by Jet Express, Inc., for an exemption from the Federal Aviation Regulations in order to conduct two additional commuter operations in two of the five high density hours at John F. Kennedy International Airport. The additional slots would be used only by short takeoff and landing (STOL) aircraft using separate access procedures. the purpose of this notice is to improve the public's awareness of this aspect of FAA's regulatory activities. Neither the publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on petitions received must identify the petition docket number involved and be received on or before November 14, 1988.

ADDRESSES: Send comments on the petition in triplicate to: Federal Aviation Administration, Office of the Chief Counsel, Attn: Rules Docket (AGC-10). Docket No. 25724, 800 Independence Avenue SW., Washington, DC 20591.

FOR FURTHER INFORMATION CONTACT: David L. Bennett, Office of the Chief Counsel, AGC-230, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591, (202) 267-3491.

SUPPLEMENTARY INFORMATION: The Petition, any comments received and a copy of any final disposition are filed in the assigned regulatory docket and are available for examination in the Rules Docket (AGC-10), Room 915, FAA Headquarters Building (FOB-10A), Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; Telephone (202) 267-3132.

Petitioner has requested a limited exemption from the requirements of the High Density Traffic Airport Rule, Part 93, Subparts K and S of the Federal Aviation Regulations (14 CFR Part 93, Subparts K and S) which restrict the number of daily operations which can take place at 4 airports—O'Hare International, Washington National, Kennedy International, and La Guardia Airports. Specifically, petitioner has requested an exemption to conduct two operations per day, requireing two slots, at Kennedy Airport using STOL aircraft under separate access landing procedures on stub end runways. Petitioner seeks to begin the requested operation on November 15, 1988.

Issued in Washington, DC, on October 18, 1988.

Donald P. Byrne,

Acting Assistant Chief Counsel, Regulations and Enforcement Divison.

[FR Doc. 88-24423 Filed 10-20-88; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF THE TREASURY

Public Information Collection Requirements Submitted to OMB for Review

Date: October 17, 1988.

The Department of Treasury has made revisions and resubmitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Pub. L. 96-511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information 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: 1545-0121

Form Number: 1116

Type of Review: Resubmission

Title: Computation of Foreign Tax Credit—Individual, Fiduciary, or Nonresident Alien Individual

Description: Form 1116 is used by individuals (including nonresident aliens) and fiduciaries who paid foreign income taxes on U.S. taxable income, to compute the foreign tax credit. This information is used by IRS to verify the foreign tax credit

Respondents: Individuals or households

Estimated Number of Respondents: 496,319

Estimated Burden Hours Per Response:

Recordkeeping: 2 hours 37 minutes

Learning about the law or the form: 25 minutes

Preparing the form: 1 hour 10 minutes

Copying, assembling, and sending the form to IRS: 35 minutes

Frequency of Response: Annually

Estimated Total Reporting Burden: 5,122,012 hours

Clearance 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 3001, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Departmental Reports Management Officer.

[FR Doc. 88-24362 Filed 10-20-88; 8:45 am]

BILLING CODE 4810-25-M

Public Information Collection Requirements Submitted to OMB for Review

Date: October 17, 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, P.L. 96–511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information 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: 1545–0940
Form Number: None
Type of Review: Extension
Title: Election of $10 Million Limitation on Exempt Small Issues of Industrial Development Bonds; Supplemental Capital Expenditure Statements
Description: The regulations liberalize the procedure by which the state or local government issuer of an exempt small issue of tax-exempt bonds elects the $10 million limitation upon the size of such issue and delete the requirement to file certain supplemental capital expenditure statements.
Respondents: State or local governments, Small businesses or organizations
Estimated Number of Recordkeepers: 10,000
Estimated Burden Hours Per Recordkeeper: 6 minutes
Frequency of Response: Annually
Estimated Total Recordkeeper Burden: 1,000 hours

Clearance 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 3001, New Executive Office Building, Washington, DC 20503.

Dale A. Morgan,
Departmental Reports Management Officer.
[FR Doc. 88–24363 Filed 10–20–88; 8:45 am]
BILLING CODE 4810–25–M

VETERANS ADMINISTRATION

Meeting of the Veterans' Advisory Committee on Environmental Hazards; Change of Time

The meeting of the Advisory Committee on Environmental Hazards which is scheduled for November 3 and 4, 1988, as set forth in the **Federal Register** of September 30, 1988 (53 FR 38407–08) will convene at 9:00 a.m. instead of 10:30 a.m. on November 3, 1988.

Date: October 18, 1988.

By direction of the Administrator.

Rosa Maria Fontanez,
Committee Management Officer.
[FR Doc. 88–24404 Filed 10–20–88; 8:45 am]
BILLING CODE 8320–01–M

Scientific Advisory Committee to the National Vietnam Veterans Readjustment Study; Meeting

In accordance with Pub. L. 92–463, the Veterans Administration gives notice that a meeting of the Scientific Advisory Committee to the National Vietnam Veterans Readjustment Study will be held at the Stouffer Concourse in Crystal City, Virginia, on November 9, 1988, beginning at 9 a.m. The purpose of this meeting is to review the progress, to date, of the National Vietnam Veterans Readjustment Study, mandated by Pub. L. 98–160, and provide recommendations as the Committee deems appropriate.

The meeting will be open to the public (to the seating capacity of the room) at the beginning of the meeting for approximately one hour to cover administrative matters and to discuss the general status of the study. During the closed session, the Committee will be reviewing preliminary research findings and survey research procedures. Disclosure of these findings and specific survey techniques could serve as a source of sample contamination that could invalidate the total research effort. In addition, the qualifications and performance of involved staff will be open to review. Disclosure of such information would be a clearly unwarranted invasion of personal privacy.

Thus, the closing is in accordance with Section 552b, subsections (c)(6) and (c)(9)(B), 5 U.S.C., and the determination of the Administrator of Veterans Affairs under section 10(d) of Pub. L. 92–463 as amended by section 5(c) of Pub. L. 94–409.

Due to the limited seating capacity of the room, those who plan to attend the open session should contact Dr. Thomas L. Murtaugh, Project Officer, National Vietnam Veterans Readjustment Study, 1521 A South Edgewood St., Baltimore, MD 21227 (Phone—301/646–5604) at least 5 days before the meeting.

Dated: October 18, 1988.

By direction of the Administrator.

Rosa Maria Fontanez,
Committee Management Officer.
[FR Doc. 88–24405 Filed 10–20–88; 8:45 am]
BILLING CODE 8320–01–M

Sunshine Act Meetings

Federal Register
Vol. 53, No. 204
Friday, October 21, 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).

FEDERAL RESERVE SYSTEM BOARD OF GOVERNORS

TIME AND DATE: 10:00 a.m., Wednesday, October 26, 1988.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets NW., Washington, DC 20551.

STATUS: Open.

MATTERS TO BE CONSIDERED:

Summary Agenda

Because of its routine nature, no substantive discussion of the following item is anticipated. This matter will be voted on without discussion unless a member of the Board requests that the item be moved to the discussion agenda.

1. Proposed 1989 Private Sector Adjustment Factor for priced services.

Discussion Agenda

2. Proposed 1989 fee schedules for Federal Reserve check payor bank, automated clearinghouse, wire transfer of funds and net settlement, definitive safekeeping, noncash collection, and book-entry services.

3. Any items carried forward from a previously announced meeting.

Note.—This meeting will be recorded for the benefit of those unable to attend. Cassettes will be available for listening in the Board's Freedom of Information Office, and copies may be ordered for $5 per cassette by calling (202) 452-3684 or by writing to: Freedom of Information Office, Board of Governors of the Federal Reserve System, Washington, DC 20551.

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452-3204.

Date: October 19, 1988.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 88-24466 Filed 10-19-88; 3:48 pm]

BILLING CODE 6210-01-M

FEDERAL RESERVE SYSTEM BOARD OF GOVERNORS

TIME AND DATE: Approximately 10:30 a.m., Wednesday October 26, 1988, following a recess at the conclusion of the open meeting.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets NW., Washington, DC 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.
2. Any items carried forward from a previously announced meeting.

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452-3204. You may call (202) 452-3207, beginning at approximately 5 p.m. two business days before this meeting, for a recorded announcement of bank and bank holding company applications scheduled for the meeting.

Date: October 19, 1988.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 88-24467 Filed 10-20-88; 3:48 pm]

BILLING CODE 6210-01-M

Corrections

Federal Register
Vol. 53, No. 204
Friday, October 21, 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.

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Nixon Presidential Historical Materials; Opening of Materials

Correction

In notice document 88–24175 beginning on page 40976 in the issue of Wednesday, October 19, 1988, make the following correction:

On page 40976, in the third column, the heading should read as set forth above.

BILLING CODE 1505–01–M

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Arts; Meeting; National Council on the Arts

Correction

In notice document 88–24197 beginning on page 40977 in the issue of Wednesday, October 19, 1988, make the following correction:

On page 40977, in the third column, the heading should read as set forth above.

BILLING CODE 1505–01–M

federal register

Friday
October 21, 1988

Part II

State Justice Institute

Grant Guideline; Proposed Grant Guideline

STATE JUSTICE INSTITUTE

Grant Guideline

AGENCY: State Justice Institute.

ACTION: Proposed grant guideline.

SUMMARY: This guideline sets forth the proposed administrative, programmatic, and financial requirements attendant to Fiscal Year 1989 State Justice Institute grants, cooperative agreements, and contracts.

DATE: The Institute invites public comment on the guideline until November 21, 1988.

ADDRESS: Comments should be sent to: State Justice Institute, 120 S. Fairfax St., Alexandria, VA 22314.

FOR FURTHER INFORMATION CONTACT: David I. Tevelin, Executive Director, or Richard Van Duizend, Deputy Director, at the above address, or at (703) 684–6100.

SUPPLEMENTARY INFORMATION: Pursuant to the State Justice Institute Act of 1984, Pub. L. 98–620, 42 U.S.C. 10701 *et seq.*, as amended, the Institute is authorized to award grants, cooperative agreements, and contracts to State and local courts, nonprofit organizations, and others for the purpose of improving the administration of justice in the State courts of the United States. Approximately $10 million will be available for award in FY 1989.

The guideline published for comment below establishes the Institute's funding schedule, procedures, and priorities for FY 1989. As in previous years, the guideline sets forth "special interest" categories of Institute funding. A number of administrative changes are also proposed and summarized below.

FY 1989 Funding Schedule

The FY 1989 concept paper deadline is February 2, 1989. In a departure from previous practice, papers must be postmarked, rather than received by SJI, by that date. The Board of Directors will meet in late March to invite formal applications based on the most promising concept papers. Applications will be due in late May, and awards approved by the Board in July. This will be the only round of funding in FY 1989; the FY 1990 funding cycle is expected to begin with the submission of concept papers in November, 1989.

Special Interest Categories

A number of the FY 1988 special interest categories have been retained without change for FY 1989. Several others have been amended, and six new categories have been added. See section II.B for the complete list of special interest categories.

The amended special interest categories are: Judicial career enhancement; judicial education; alternative dispute resolution; the future and the courts; litigation expense and delay; enforcement of fines and orders to pay; victim/witness procedures; courthouse security; State/Federal relations; and the special needs of the largest urban courts. (A description of the proposed changes in the judicial education category is set forth below.)

The six new special interest categories are: The impact of user fees; improved enforcement and management of probation; review and enforcement of continuing court orders; substance abuse; the court-related needs of elderly and disabled persons; and public education about the courts.

In addition, the general description of "special interest" projects has been modified to clarify the meaning of the terms "replicability" and "transferability."

Judicial education. The proposed changes in the "judicial education" special interest category are specifically noted for public comment.

In May, 1988, the Board of Directors selected a panel of six individuals to examine judicial education from different perspectives in order to give the Board a clearer direction about how the Institute should use its funds in the area. The panelists were: Thomas Hodson, an attorney in private practice and former judge who facilitated the panel's work; Justice Christine Durham of the Utah Supreme Court; Dennis Catlin, Executive Director of the Michigan Judicial Institute; David Schultz, Associate Dean and Professor of Law at the University of Wisconsin Law School; Professor Charles Claxton of the Memphis State University College of Education; and Professor Frederick Lawrence of the Boston College Department of Theology and School of Law.

The panelists have prepared independent, preliminary draft papers that were circulated to State and national judicial education providers for comment. In early October, 1988, representatives of those organizations were invited to comment on the papers at a public forum before the Board. Based on the panel's observations, the educators' response to their papers, and the discussions of the Board, the Institute invites comment on a number of issues.

First, comment is specifically invited on the following types of possible SJI funding in the judicial education area in FY 1989:

(1) *Technical assistance.* The Board will consider awarding a contract for the provision of technical assistance to State judicial educators and national judicial education organizations for the purpose of State-to-State, State-to-national, and national-to-State transfer of educational curricula, delivery techniques, services and resource materials. The project could also assist State judicial educators and other State court officials in the preparation of grant applications.

(2) *Money for States lacking well developed judicial education programs.* Due to the disparity which exists in State judicial education programs, the Board is considering whether the Institute should provide seed money to assist interested States in developing minimum standards for judicial education and training; creating an on-going entity responsible for planning and implementing judicial education programs; and developing basic in-State judicial education programs for judges and other court personnel.

(3) *Formula grants to each State for judicial education.* The Institute requests comment on whether it should award formula grants to States for certain educational purposes, e.g., developing and improving in-State judicial education programs, or supporting "scholarships" for judges and other court personnel to attend out-of-State training? Commenters should identify the bases on which such funds might be distributed among the States, e.g., population, number of judges, size of the States' judicial education budgets, as well as the criteria States might be required to meet to receive such funding, e.g., the demonstration of the State's commitment to providing judicial education.

The second broad issue on which SJI seeks comment is the specific criteria on which education and training proposals should be evaluated. The Institute is considering evaluating the following elements in order to determine whether a project is likely to result in effective training for judges and other court personnel: The description of how the need for the program has been determined; the methods by which faculty will be recruited, selected, and trained; the objectives of the training; the adult education practices and teaching methods to be employed; and the methods by which the program will be evaluated to determine the impact of the training as well as the reaction of the participants.

Third, SJI asks for comment on whether it should give priority to certain types of judicial education projects.

Which, if any, of the following types of education and training should be given priority by SJI: Training programs developed for an individual when he or she first becomes a judge; continuing judicial education projects which inform judges of new developments in the law or enhance judicial skills; or personal development projects which focus on human enrichment?

Finally, the Board is interested in continuing to develop a long-range strategic plan for SJI support of judicial education programs at the State and national level. Specific comment on issues and ideas that the plan should address is also invited.

Administrative Changes

The proposed FY 1989 SJI grant procedures will be substantially similar to the FY 1988 program. The Board considered changing the two-tiered (concept paper/application) funding process in order to reduce the burdens the process may impose on applicants, particularly those applicants who are invited to apply formal applications that are disapproved by the Board. However, after reviewing the Institute's FY 1988 experience, when approximately 85% of the formal applications were approved (in contrast to FY 1987, when only about half of the applications were approved), the Board concluded that the present procedures were not unduly burdensome. Comment is specifically invited, however, on possible changes in the application process, including ways to relieve organizations submitting multiple concept papers or applications from the burden of submitting repetitive information in each paper or application.

Some changes in the funding process have been made on the basis of the experience of the Institute, applicants, and grantees, and several technical amendments to the SJI enabling legislation that were recently passed by Congress. The most significant of these changes are:

Renewal funding. The guideline establishes two types of renewal funding: Continuation grants and on-going support grants. A "continuation" grant is one that extends an existing project for an additional period of time in order to enhance its benefits; an "on-going support" grant would support a program or service for which there is a continuing, important national need.

With respect to continuation grants, the guideline seeks to clarify and reduce the information that applicants for continuation funding must provide about their projects and organizations. In addition, applicants for continuation grants would be permitted to apply for funding outside of the normal funding cycle for FY 1989 awards. See section IX. A.

"On-going support" grants would be reserved for SJI-supported projects that the Board determines are especially unique and valuable to the State courts. Funding for the second and third years of such projects would be contingent on satisfactory performance and the availability of appropriations. An evaluation report regarding the effectiveness and operation of the project will be required during the final year of an "on-going support" project. See section IX.B.

Match. Pursuant to a statutory amendment, all units of State or local government (not just courts) must provide a match equal to 50% of the amount of funding requested from SJI. See section X.B.

Interim funding. The previous statutory requirement that funding to an applicant seeking continuation funding be continued until such time as a formal hearing has been held terminating its funds has been eliminated by an amendment to the SJI statute.

Confidentiality of information/human subjects protection. The confidentiality provision in the FY 1988 guideline has been incorporated into the Institute's enabling legislation, and a new clause protecting human research subjects has been added to the guideline. See section VII.C.

Budget information. Applicants will be asked to provide more information in support of some budget items. See section VII.D.

The Institute also invites comment on the following specific issue: Should "maintenance" funding be provided to certain *organizations* that provide important services to the State courts, without requiring those organizations to submit proposals seeking funds for specific projects? Commenters should also indicate which organizations they believe should receive such funding, and the criteria on which such funds should be awarded.

Recommendations to Grantwriters

Over the past two years, Institute staff have reviewed approximately 550 concept papers and 200 applications. On the basis of those reviews, inquiries from applicants, and the views of the Board, the Institute offers the following recommendations to help potential applicants present workable, understandable proposals that can meet the funding criteria set forth in this guideline. The Institute suggests that applicants make certain that they answer the following questions when preparing a concept paper or application:

1. *What is the subject or problem you wish to address?*

Describe the subject or problem and how it affects the courts and the public. Discuss how your approach will improve the situation or advance the state of the art or knowledge, and explain why it is the most appropriate approach to take. When statistics or research findings are cited to support a statement or position, the source of the citation should be referenced in a footnote.

2. *What do you want to do?*

Explain the goal(s) of the project in simple, straightforward terms. To the greatest extent possible, an applicant should avoid a specialized vocabulary that is not readily understood by the general public. Technical jargon does not enhance a paper.

3. *How will you do it?*

All proposed tasks should be set forth so that a reviewer can see a logical progression of tasks and relate those tasks directly to the accomplishment of the project's goal(s). When in doubt about whether to provide a more detailed explanation or to assume a particular level of knowledge or expertise on the part of the reviewers, err on the side of caution and provide the additional information. A description of project tasks will also help identify necessary budget items. All staff positions and project costs should relate directly to the tasks described. The Institute encourages concept paper applicants to attach letters of cooperation and support from the courts and related agencies that will be involved in or directly affected by the proposed project.

4. *How will you know it works?*

Every project design must include an evaluation component to determine whether the proposed training, procedure, service, or technology accomplished the objectives it was designed to meet. Concept papers and applications should describe the criteria that will be used to evaluate the project's effectiveness and identify program elements which will require further modification. The description in the application should include how the evaluation will be conducted, when it will occur during the project period, who will conduct it, and what specific measures will be used. In most instances, the evaluation should be conducted by persons not connected with the implementation of the procedure, training, service, or technique, or the administration of the project.

5. *How will others find out about it?*

Every project design must include a plan to disseminate the results of the training, research, or demonstration beyond the jurisdictions and individuals directly affected by the project. The plan should identify the specific methods which will be used to inform the field about the project, such as the publication of law review or journal articles, presentations at appropriate conferences, or the distribution of key materials. A statement that a report or research findings "will be made available to" the field is not sufficient. The specific means of distribution or dissemination should be identified. Reproduction and dissemination costs are allowable budget items.

6. What are the specific costs involved?

The budget in both concept papers and applications should be clearly presented. Major budget categories such as personnel, benefits, travel, supplies, equipment, and indirect costs should be clearly identified. In applications, the budgeted figures should relate directly to the specific project tasks included in the workplan. If match is offered, the nature of the match (cash or in-kind) should be explained and, at the application stage, the tasks and line items for which the costs will be covered wholly or in part by the match should be specified.

7. *What, if any, match is being offered?*

All units of State and local government, including courts, are required by the State Justice Institute Act, as amended, to contribute a match (cash, non-cash, or both) of not less than 50 percent of the grant funds requested from the Institute; all other applicants are also encouraged to provide a matching contribution to assist in meeting the costs of a project. The match requirement works as follows in practice: If the total cost of a project is anticipated to be $150,000, a State court or executive branch agency may request up to $100,000 from the Institute to implement the project. The remaining $50,000 (50% of the $100,000 requested from SJI) must be provided as match.

Cash match includes funds directly contributed to the project by the applicant, or by other public or private sources. Non-cash match refers to in-kind contributions by the applicant, or other public private sources. When match is offered, the nature of the match (cash or in-kind) should be explained and, at the application stage, the tasks and line items for which costs will be covered wholly or in part by match should be specified.

Contact Persons for State Agencies Administering Institute Grants to State and Local Courts

The Institute would appreciate receiving updated information regarding the name, title, address, and telephone number of the person designated by the State Supreme Court to be responsible for overseeing the administration of Institute grants awarded to the courts of the State. A list of the persons currently so designated is appended to the guideline.

Proposed State Justice Institute Grant Guideline

The following FY 1989 Grant Guideline is proposed for public comment:

State Justice Institute Grant Guideline Table of Contents

Summary
I. Background
II. Scope of the Program
III. Definitions
IV. Eligibility for Award
V. Types of Projects and Amounts of Awards
VI. Concept Paper Submission Requirements for New Projects
VII. Application Requirements for New Projects
VIII. Application Review Procedures
IX. Renewal Funding Procedures and Requirements
X. Compliance Requirements
XI. Financial Requirements
XII. Grant Adjustments
Appendix—Contact Persons for State Agencies Administering Institute Grants to State and Local Courts

Summary

This guideline sets forth the programmatic, financial, and administrative requirements of grants, cooperative agreements, and contracts awarded by the State Justice Institute. The Institute, a private nonprofit corporation established by an Act of Congress, is authorized to award grants, cooperative agreements and contracts to State and local courts and their agencies; national nonprofit organizations controlled by, operating in conjunction with, and serving the judicial branch of State governments; and national nonprofit organizations for the education and training of judges and support personnel of the judicial branch of State governments.

The Institute may also award funds to other nonprofit organizations with expertise in judicial administration; institutions of higher education; individuals, partnerships, firms, or corporations; and private agencies with expertise in judicial administration if the objectives of the funded program can be better served by such an entity. Funds may also be awarded to Federal, State or local agencies and institutions other than courts for services that cannot be provided for adequately through nongovernmental arrangements.

Approximately $10 million is available for grants, contracts, and cooperative agreements from FY 1989, appropriations. The Institute may also provide financial assistance in the form of interagency agreements with other grantors. The Institute will consider applications for funding support that address any of the areas specified in its enabling legislation; however, the Board of Directors of the Institute has designated certain program categories as being of special interest.

The Institute has established one round of competition for FY 1989 funds, with a concept paper submission deadline of February 2, 1989. This guideline applies to concept papers and formal applications submitted for FY 1989 funding.

The awards made by the State Justice Institute are governed by the requirements of this guideline and the authority conferred by Pub. L. 98–620, Title II, 42 U.S.C. 10701, *et seq.*

I. Background

The State Justice Institute ("Institute") was established by Pub. L. 98–620 to improve the administration of justice in the State courts in the United States. Incorporated in the State of Virginia as a private, nonprofit corporation, the Institute is charged, by statute, with the responsibility to:

A. Direct a national program of financial assistance designed to assure that each citizen of the United States is provided ready access to a fair and effective system of justice;

B. Foster coordination and cooperation with the Federal judiciary;

C. Promote recognition of the importance of the separation of powers doctrine to an independent judiciary; and

D. Encourage education for judges and support personnel of State court systems through national and State organizations, including universities.

To accomplish these broad objectives, the Institute is authorized to provide funds to State courts, national organizations which support and are supported by State courts, national judicial education organizations, and other organizations that can assist in improving the quality of justice in the State courts.

The Institute is supervised by an eleven-member Board of Directors appointed by the President, by and with

the consent of the Senate. The Board is statutorily composed of six judges, a state court administrator and four members of the public, no more than two of whom can be of the same political party.

The Institute's program budget for Fiscal Year 1989 is approximately $10 million. Through the award of grants, contracts and cooperative agreements, the Institute is authorized to perform the following activities:

1. Support research, demonstrations, special projects, technical assistance, and training to improve the administration of justice in the State courts;

2. Provide for the preparation, publication, and dissemination of information regarding State judicial systems;

3. Participate in joint projects with Federal agencies and other private grantors;

4. Evaluate or provide for the evaluation of programs and projects funded by the Institute to determine their impact upon the quality of criminal, civil, and juvenile justice and the extent to which they have contributed to improving the quality of justice in the State courts;

5. Encourage and assist in furthering judicial education;

6. Encourage, assist, and serve in a consulting capacity to State and local justice system agencies in the development, maintenance, and coordination of criminal, civil, and juvenile justice programs and services; and

7. Be responsible for the certification of national programs that are intended to aid and improve State judicial systems.

II. Scope of the Program

During FY 1989, the Institute will consider applications for funding support that address any of the areas specified in its enabling legislation. The Board, however, has designated certain program categories as being of "special interest." See section II.B.

A. Authorized Program Areas

The State Justice Institute Act authorizes the Institute to fund projects addressing one or more of the following program areas:

1. Assistance to State and local court systems in establishing appropriate procedures for the selection and removal of judges and other court personnel and in determining appropriate levels of compensation;

2. Education and training programs for judges and other court personnel for the performance of their general duties and for specialized functions, and national and regional conferences and seminars for the dissemination of information on new developments and innovative techniques;

3. Research on alternative means for using judicial and nonjudicial personnel in court decisionmaking activities, implementation of demonstration programs to test such innovative approaches, and evaluations of their effectiveness;

4. Studies of the appropriateness and efficacy of court organizations and financing structures in particular States, and support to States to implement plans for improved court organization and financing;

5. Support for State court planning and budgeting staffs and the provision of technical assistance in resource allocation and service forecasting techniques;

6. Studies of the adequacy of court management systems in State and local courts, and implementation and evaluation of innovative responses to records management, data processing, court personnel management, reporting and transcription of court proceedings, and juror utilization and management;

7. Collection and compilation of statistical data and other information on the work of the courts and on the work of other agencies which relate to and affect the work of courts;

8. Studies of the causes of trial and appellate court delay in resolving cases, and establishing and evaluating experimental programs for reducing case processing time;

9. Development and testing of methods for measuring the performance of judges and courts and experiments in the use of such measures to improve the functioning of judges and the courts;

10. Studies of court rules and procedures, discovery devices, and evidentiary standards to identify problems with the operation of such rules, procedures, devices, and standards; and the development of alternative approaches to better reconcile the requirements of due process with the need for swift and certain justice, and testing of the utility of those alternative approaches;

11. Studies of the outcomes of cases in selected areas to identify instances in which the substance of justice meted out by the courts diverges from public expectations of fairness, consistency, or equity; and the development, testing and evaluation of alternative approaches to resolving cases in such problem areas;

12. Support for programs to increase court responsiveness to the needs of citizens through citizen education, improvement of court treatment of witnesses, victims, and jurors, and development of procedures for obtaining and using measures of public satisfaction with court processes to improve court performance;

13. Testing and evaluating experimental approaches to provide increased citizen access to justice, including processes which reduce the cost of litigating common grievances and alternative techniques and mechanisms for resolving disputes between citizens; and

14. Other programs, consistent with the purposes of the Act, as may be deemed appropriate by the Institute, including projects dealing with the relationship between Federal and State court systems in areas where there is concurrent State-Federal jurisdiction and where Federal courts, directly or indirectly, review State court proceedings.

Funds will not be made available for the ordinary, routine operation of court systems in any of these areas.

B. Special Interest Program Categories

1. General Description

The Institute is interested in funding both innovative programs and programs of proven merit that can be replicated in other jurisdictions. Although applications in any of the statutory program areas are eligible for funding in FY 1989, the Institute is especially interested in funding those projects that:

a. Formulate new procedures and techniques, or creatively enhance existing arrangements to improve the courts;

b. Address aspects of the State judicial systems that are in special need of serious attention;

c. Have national significance in terms of their impact or replicability in that they develop products, services and techniques that may be used in other States;

d. Create and disseminate products that effectively transfer the information and ideas developed to relevant audiences in State and local judicial systems or provide technical assistance to facilitate the adaptation of effective programs and procedures in other State and local jurisdictions.

A project will be identified as a "Special Interest" project if it meets the four criteria set forth above and (1) it falls within the scope of the "special interest" program areas designated below or (2) information coming to the attention of the Institute from the State courts, their affiliated organizations, the research literature, or other sources demonstrates that the project responds

to another special need or interest of the State courts.

Concept papers and applications which address a "Special Interest" category will be accorded a preference in the rating process. (See the selection criteria listed in sections VI. B, "Concept Paper Submission Requirements for New Projects" and VIII. B, "Application Review Procedures.")

2. Specific Categories

The Board has designated the areas set forth below as "Special Interest" program categories. The order of listing does not imply any ordering of priorities among the categories.

a. *Judicial and court personnel career enhancement.* This category includes the development and testing of innovative measures to encourage and enhance judicial and court personnel careers, other than direct increases in salary. These methods could include approaches that emphasize the intrinsic rewards of the profession such as job enrichment and participative management strategies, use of "quality circles", judicial and nonjudicial personnel exchange programs, innovative programs or techniques for reducing judicial stress or "burnout", judicial sabbatical programs, or mentoring programs. This category also includes efforts to prepare lawyers for judicial careers and to encourage qualified persons to seek and accept positions as judges and court professionals.

b. *Education and training for judges and other key court personnel.* This category includes:

i. The development of minimum standards for judicial education at the State level;

ii. The preparation of State plans to ensure a comprehensive training program and the effective allocation of limited court education resources;

iii. For those States with a limited court education capacity, the development of an organization to plan and implement education programs for judges and court personnel;

iv. The establishment of in-State pre-bench orientation programs and new judge training programs; and

v. The development of innovative continuing education and career development programs for all court personnel, including but not limited to programs that emphasize "team" training.

Court education programs should assure that faculty understand and apply adult education techniques and teaching methods; provide opportunities for structured interaction among participants; develop tangible products and materials for use by the faculty and participants; employ a process for the recruitment of qualified and effective faculty; and develop sound methods for evaluating the impact of the training.

Court education programs also should develop new or revised curricula on key topics of concern to the judiciary, such as those identified in the SJI Special Interest categories and other topics that judges and court personnel have identified as important.

The Board also is interested in awarding a contract for the provision of technical assistance to State judicial educators and national judicial education organizations for the purpose of State-to-State, State-to-national, and national-to-State transfer of educational curricula, delivery techniques, services and resources. This project could also assist State judicial educators and other State court officials in preparation of grant applications.

c. *Alternative Dispute Resolution (ADR).* This category includes the evaluation of new and existing dispute resolution procedures and programs that have a substantial likelihood of resolving civil, criminal, domestic relations, juvenile and other types of disputes more fairly, more expeditiously and less expensively than the traditional court process, with particular emphasis on the impact of those procedures and programs on the quality of justice provided, litigant and court costs, and court workload. Among the possible issues that may be addressed are the effects that ADR programs that focus on domestic relations cases have on case processing; the effectiveness of ADR techniques in complex civil litigation; and the judicial role in settling cases, including the effectiveness of various settlement techniques, the most appropriate point(s) in the litigation process to convene a settlement conference, and the ethical questions that may confront a judge seeking to settle a case.

d. *The future and the courts.* This category includes research on the changing demands and circumstances that will face the courts in the 21st century, and the planning and implementation of modifications that may be needed in court organization, financing, procedures, services, personnel, and facilities to respond to those demands and circumstances. A proposed project could focus on such issues as:

—The impact that demographic changes in the American population over the next generation will have on the State courts;

—How developments in chemistry, disease and disease control, engineering, computer design, and other sciences are likely to affect the courts; or

—The possible changes in court structure, court administration, or legal authority that might help the State courts more effectively administer justice.

e. *The impact of user fees on court revenues and the access to justice.* This category includes research examining the various forms of user fees that are imposed on parties in civil, criminal, domestic relations, juvenile and other types of cases in order to assess their impact on court use, policies, services, revenues, and costs.

f. *Application of technology.* This category includes the testing of innovative applications of technology to improve the operation of court management systems and judicial practices at both the trial and appellate court levels, including, e.g., the publication of a court technology bulletin to assist judges and court managers in selecting technology appropriate to a court's needs; assessment of the usefulness of on-bench computer terminals; and local experiments with promising but untested applications of technology in the courts. (See paragraph XI.H.2.b. regarding the limits on the use of grant funds to purchase equipment and software.)

g. *Jury system management.* This category includes the development, implementation and evaluation of legal and administrative procedures relating to jurors to ensure the representativeness of the juror pool, clarify jury instructions, expedite the jury selection and empanelment process without affecting fairness, and otherwise reduce the cost and enhance the fairness of the jury process.

h. *Reduction of litigation expense and delay.* This category includes the implementation and evaluation of innovative programs and procedures designed to reduce substantially the expense and delay in civil, criminal, domestic relations, juvenile, or other types of litigation at the trial or appellate level (or both), and the examination of effective methods of limiting the expense and delay arising from the use of discovery procedures.

i. *Enforcement of fines and orders to pay.* This category includes the implementation and evaluation of procedures for effectively imposing, collecting, and enforcing orders to pay fines, restitution, and other obligations.

j. *Improved enforcement and management of probation.* This category includes the implementation and evaluation of innovative procedures for enforcing compliance with conditions of probation, and methods through which courts responsible for managing the probation function can carry out this responsibility more effectively and efficiently.

k. *Review and enforcement of continuing court orders.* This category includes the development, implementation and evaluation of effective and efficient procedures for monitoring and enforcing on-going court orders such as those issued in civil commitment, guardianship, neglect and abuse, child support, and institutional reform cases. Examples of these procedures include but are not limited to periodic review hearings; the required submission and review of periodic reports and financial accountings; the use of citizen review panels; and the appointment of special masters. Proposed projects should seek to provide fair, current, and thorough review of continuing court orders within realistic financial constraints and without overburdening the agencies, organizations, or individuals responsible for implementing the continuing order.

l. *Substance abuse.* The Board is interested in sponsoring (or co-sponsoring) conferences, seminars, or other forums for judges, probation officers, caseworkers and other court personnel to examine court-related issues concerning drug and alcohol abuse and to discuss the appropriate role of the courts in addressing the problem of substance abuse.

m. *Implications of AIDS for the courts.* This category includes research regarding the implications of Acquired Immune Deficiency Syndrome for court decisions, procedures, and policies, including but not limited to such matters as pretrial release, sentencing, child custody, termination of parental rights, and the right to and termination of medical treatment.

n. *Programs and procedures for victims and witnesses.* This category includes the implementation and evaluation of innovative court-based programs and procedures for providing fair treatment for victims of crimes and witnesses. "Court-based" programs include those programs that are administered directly by the courts or through contracts negotiated between service providers and the courts. Programs and services operating in prosecutors' offices are ordinarily outside the scope of Institute funding.

Eligible projects may involve civil, criminal, domestic relations, juvenile and other types of cases, including but not limited to demonstrations and evaluations of innovative court-ordered treatment programs for victims or offenders; court procedures for notifying victims of key events pertaining to their cases; the use of child victim impact statements; procedures for the fair, effective and efficient handling of domestic violence and child sexual abuse cases; the issuance and enforcement of protective orders; and the obtaining of testimony from children.

o. *Responding to the court-related needs of elderly and disabled persons.* This category includes research and demonstration projects on issues related to access to the courts by elderly persons and physically or mentally disabled persons, and the fair and effective handling of cases affecting those persons; and the presentation of a national conference for judges, court personnel and others on the court-related needs of elderly or disabled persons. The issues that may be addressed include, but are not limited to:

—The fair and effective disposition of cases concerning the provision of medical, mental health, social and support services to elderly or disabled persons;
—The fair and effective disposition of cases concerning the imposition of plenary or limited surrogate decision-makers;
—The impact on court caseloads of the increasing proportion of elderly persons in the population; and
—The improvement of access to courthouses and court proceedings for litigants, jurors, witnesses, and victims of crime who have mobility or communication impairments.

p. *Public education about the courts.* This category includes projects designed to improve the public's understanding of the courts, such as the development of video tapes and other informational materials to be shown to citizens' groups or in schools; the development of survey instruments by which the courts could determine areas of public dissatisfaction or misunderstanding; and other innovative approaches to enhancing the public's understanding of the purpose of the courts, the operations of the judicial system, and the system's responsiveness to its citizens.

q. *Courthouse security and operation.* This category includes the implementation and evaluation of innovative techniques for improving courthouse security, and the development of policies, practices and procedures which emphasize the prevention of incidents that endanger the lives of judges, court personnel, and others in the courtroom. Funds will not be made available solely to hire additional security personnel or to purchase alarm or other security systems.

r. *The relationship between State and Federal courts.* This category includes research to develop creative ideas and procedures that could improve the administration of justice in the State courts and at the same time reduce the work burdens of the Federal courts. Such research projects might address innovative State court procedures for:

—Reducing the burdens attendant to Federal habeas corpus cases involving State convictions;
—Handling civil, criminal, domestic relations or other types of cases in which a party also is subject to a Federal bankruptcy proceeding;
—Processing complex multistate litigation in the State courts;
—Facilitating the adjudication of Federal law questions by State courts with appropriate opportunities for review; and
—Otherwise allocating judicial burdens between and among Federal and State courts.

Other possible areas of research include studies examining the impact of the enforcement of selected Federal statutes on the State courts, the likely effect of the elimination or restriction of Federal diversity jurisdiction on the State courts, and the factors that motivate litigants to select the Federal or State courts in cases in which there is concurrent jurisdiction.

s. *Special needs of the largest urban courts.* This category is limited to projects submitted by State or local court systems regarding the implementation and evaluation of innovative programs and procedures to address the critical needs of a trial court serving a city or county with a population of at least 1,000,000 persons. Such projects might include the development and testing of improved methods to assist those courts in selecting, retaining and removing judges, or projects to relieve acute problems in the court's ability to handle civil, criminal, domestic relations, juvenile and other types of cases in a fair and timely manner. The Board will consider awarding grants of up to $500,000 each to support projects in this category. Up to $1,000,000 of available grant funds have been set aside to support such projects.

C. Programs Addressing a Critical Need of a Single State or Local Jurisdiction

1. The Board will consider supporting a limited number of projects submitted by State or local courts that relate only to that State or local jurisdiction. Up to $500,000 of available grant funds has been set aside for such projects.

2. Concept papers and applications requesting funds for projects under this section must meet the requirements of sections VI ("Concept Paper Submission Requirements for New Projects") and VII ("Application Requirements") respectively, and must demonstrate that:

a. The proposed project is essential to meeting a critical need of the jurisdiction; and

b. The need cannot be met solely with State and local resources within the foreseeable future.

3. All awards under this category are subject to the matching requirements set forth in section X.B.

III. Definitions

The following definitions apply for the purposes of this guideline:

A. Institute

The State Justice Institute.

B. State Supreme Court

The highest appellate court in a State, unless, for the purposes of the Institute program, a constitutionally or legislatively established judicial council acts in place of that court. In States having more than one court with final appellate authority, *State Supreme Court* shall mean that court which also has administrative responsibility for the State's judicial system. *State Supreme Court* also includes the office of the court or council, if any, it designates to perform the functions described in this guideline.

C. Designated Agency or Council

The office or judicial body which is authorized under State law or by delegation from the State Supreme Court to approve applications for funds and to receive, administer, and be accountable for those funds.

D. Grantor Agency

The State Justice Institute.

E. Grantee

The organization, entity, or individual to which an award of Institute funds is made. For a grant based on an application from a State or local court, *grantee* refers to the State Supreme Court.

F. Subgrantee

A State or local court which receives Institute funds through the State Supreme Court.

G. Match

The portion of project costs not borne by the Institute. *Match* includes both cash and in-kind contributions.

H. Renewal Funding

A grant to support an existing project for an additional period of time. Renewal funding may take the form of a continuation grant or an on-going support grant.

I. Continuation Grant

A grant of no more than 24 months to permit completion of activities initiated under an existing Institute grant or enhancement of the knowledge, programs or services produced or established during the prior grant period.

J. On-going Support Grant

A grant of up to 36 months to support a project that is national in scope and that provides the State courts with services, programs or products for which there is a continuing important need.

K. Human Subjects

Individuals who are participants in an experimental procedure or who are asked to provide information about themselves, their attitudes, feelings, opinions and/or experiences through an interview, questionnaire, or other data collection technique(s).

IV. Eligibility for Award

In awarding funds to accomplish these objectives and purposes, the Institute has been directed by Congress to give priority to State and local courts and their agencies (42 U.S.C. 10705(b)(1)(A)); national nonprofit organizations controlled by, operating in conjunction with, and serving the judicial branches of State governments (42 U.S.C. 10705(b)(1)(B)); and national nonprofit organizations for the education and training of judges and support personnel of the judicial branch of State governments (42 U.S.C. 10705(b)(1)(C)).

An applicant will be considered a "priority" education and training applicant under section 10705(b)(1)(C) if: (1) The principal purpose or activity of the applicant is to provide education and training to State and local judges and court personnel; and (2) the applicant demonstrates a record of substantial experience in the field of judicial education and training.

The Institute also is authorized to make awards to other nonprofit organizations with expertise in judicial administration, institutions of higher education, individuals, partnerships, firms, corporations, and private agencies with expertise in judicial administration, provided that the objectives of the relevant program area(s) can be served better. In making this judgment, the Institute will consider the likely replicability of the projects' methodology and results in other jurisdictions. For-profit organizations are also eligible for grants and cooperative agreements; however, they must waive their fees.

Finally, the Institute is authorized to make awards to Federal, State or local agencies and institutions other than courts for services that cannot be adequately provided through nongovernmental arrangements.

Each application for funding from a State or local court must be approved, consistent with State law, by the State's Supreme Court or its designated agency or council. The latter shall receive all Institute funds awarded to such courts and be responsible for assuring proper administration of Institute funds, in accordance with section XI.B.2 of this guideline. A list of persons to contact in each State regarding approval of applications from State and local courts and administration of Institute grants to those courts is contained in the Appendix.

V. Types of Projects and Amounts of Awards

A. Types of Projects

Except as expressly provided in sections II.B.2.s. and II.C.1. above, the Institute has placed no limitation on the overall number of awards or the number of awards in each special interest category. The general types of projects are:

1. Education and training;
2. Research and evaluation;
3. Demonstration; and
4. Technical Assistance.

B. Size of Awards

1. Concept papers and applications for new projects and applications for continuation grants may request funding in amounts up to $300,000; a project addressing the needs of the largest urban courts under Special Interest category s. may, however, receive support of up to $500,000. For other new and continuation projects, awards in excess of $200,000 are likely to be rare and to be made, if at all, only for highly promising proposals that will have a significant impact nationally.

2. Applications for on-going support grants may request funding in amounts up to $600,000. The funds to support the first year of the project will be drawn from the Institute's appropriations for the Fiscal Year of the award. Funds to support each subsequent year will be made available subject to the availability of appropriations for that Fiscal Year, the satisfactory performance of the project as reflected in the quarterly Progress Reports required to be filed and routine grant monitoring, and the submission for Institute approval of a detailed annual task schedule within 30 days of the end of each project year.

C. Length of Grant Periods

1. Grant periods for all new and continuation projects ordinarily will not exceed 24 months.

2. Grant periods for on-going support grants ordinarily will not exceed 36 months.

VI. Concept Paper Submission Requirements for New Projects

Concept papers are an extremely important part of the application process because they enable the Institute to learn the program areas of primary interest to the courts and to explore innovative ideas, without imposing heavy burdens on prospective applicants. The use of concept papers also permits the Institute to better project the nature and amount of grant awards. Because of their importance, the Institute requires all parties requesting financial assistance from the Institute (except those seeking renewal funding pursuant to section IX.) to submit concept papers prior to submitting a formal grant application. This requirement may be waived by the Board only if it determines that extraordinary circumstances exist to justify the waiver.

A. Format and Content

Concept papers must include a cover sheet and a narrative.

1. The cover sheet must contain:

a. A title describing the proposed project;

b. The name and address of the court, organization or individual submitting the paper; and

c. The name, title, address (if different from that in b.), and telephone number of a contact person who can provide further information about the paper.

2. The narrative must be no more than 10 doublespaced pages on 8½ by 11 inch paper. Margins should not be less than 1 inch. The narrative should contain:

a. A statement listing the statutory program area(s), and "special interest" category(ies), if any, addressed by the paper;

b. An explanation of the need for the project;

c. A summary description of the approach to be taken;

d. A summary description of how the project will be evaluated, including the evaluation criteria;

e. A description of the products that will result, the degree to which they will be applicable to courts across the nation, and the manner in which the products and results of the project will be disseminated;

f. An explanation of the expected benefits to be derived from the project;

g. The identity of the key staff (if known) and a summary description of their qualifications;

h. A preliminary budget estimate including the anticipated costs for personnel, fringe benefits, travel, equipment, supplies, contracts, indirect costs, and other anticipated major expenditure categories;

i. The amount, nature (cash or non-cash), and source of match to be provided (see section X.B.); and

j. A statement of whether financial assistance for the project has been or will be sought from other sources.

The Institute encourages concept paper applicants to attach letters of cooperation and support from the courts and related agencies that will be involved in or directly affected by the proposed project.

The Institute will not accept concept papers exceeding 10 pages. The page limit does not include letters of cooperation or endorsements. Additional material should not be attached unless it is essential to impart a clear understanding of the project.

B. Selection Criteria

1. All concept papers will be evaluated by the staff on the basis of the following criteria:

a. The demonstration of need for the project;

b. The soundness and innovativeness of the approach described;

c. The benefits to be derived from the project; and

d. The reasonableness of the proposed budget.

2. "Special Interest" category concept papers submitted pursuant to section II.B will also be rated on the proposed project's relationship to one of the "Special Interest" categories set forth in that section, and the degree to which the findings, procedures, training, technology, or other results of the project can be transferred to other jurisdictions.

3. "Single jurisdiction" concept papers submitted pursuant to section II.C will be rated on the proposed project's relation to one of the "Special Interest" categories set forth in section II.B, and on the special requirements listed in section II.C.2.

4. In determining which concept papers will be selected for development into full applications, the Institute will also consider the availability of financial assistance from other sources for the project; the amount and nature (cash or in-kind) of the submitter's anticipated match; whether the submitter is a "priority applicant" under the Institute's enabling legislation (see 42 U.S.C. 10705(b)(1) and section IV above); and the extent to which the proposed project would also benefit the Federal courts or help the State courts enforce Federal constitutional and legislative requirements.

C. Review Process

Concept papers will be reviewed competitively by the Board of Directors. Institute staff will prepare a narrative summary of each paper, and a rating sheet assigning points for each relevant selection criterion. Committees of the Board will review concept papers within assigned program areas and prepare recommendations for the full Board. The full Board of Directors will then decide which concept paper applicants should be invited to submit formal applications for funding. The decision to invite an application is solely that of the Board of Directors.

D. Submission Requirements

An original and three copies of all concept papers submitted for consideration in Fiscal Year 1989 must be sent by first class or overnight mail, or by courier no later than February 2, 1989. A postmark or courier receipt will constitute evidence that the concept paper was sent on or before the deadline date. All envelopes containing concept papers should be marked CONCEPT PAPER and should be sent to State Justice Institute, 120 S. Fairfax Street, Alexandria, Virginia 22314.

Receipt of each concept paper will be acknowledged in writing. Extensions of the deadline for receipt of concept papers will not be granted.

The Board expects to meet in late March 1989 to review the concept papers and invite applications. The Institute will send written notice to all persons submitting concept papers of the Board's decisions regarding their papers and of the key issues and questions that arose during the review process. A decision by the Board not to

invite an application may not be appealed, but does not prohibit resubmission of the concept paper or a revision thereof in a subsequent round of funding. The State Chief Justice and State Court Administrator will be notified when the Board invites applications that are based on concept papers submitted by courts within their State or which include a participating site within their State.

VII. Application Requirements for New Projects

Except as specified in section VI, a formal application for a new project is to be submitted only upon invitation of the Board following review of a concept paper. An application for Institute funding support must include an application form, budget forms (with appropriate documentation), a project abstract and program narrative, and certain certifications and assurances. These documents are described below.

A. Forms

1. Application Form (FORM A)

The application form requests basic information regarding the proposed project, the applicant, and the amount of funding support requested. It also requires the signature of an individual authorized to certify on behalf of the applicant that the information contained in the application is true and complete, that submission of the application has been authorized by the applicant, and that if funding for the proposed project is approved, the applicant will comply with the requirements and conditions of the award, including the assurances set forth in Form D.

2. Certificate of State Approval (FORM B)

An application from a State or local court must include a copy of FORM B signed by the State's Chief Judge or Chief Justice, the director of the designated agency, or the head of the designated council. The signature denotes that the proposed project has been approved by the State's highest court or the agency or council it has designated. It denotes further that if funding for the project is approved by the Institute, the court or designated agency or council will receive, administer, and be accountable for the awarded funds.

3. Budget Forms (FORM C or C1)

Applicants may submit the proposed project budget either in the tabular format of FORM C or in the spreadsheet format of FORM C1. Applicants requesting more than $100,000 are encouraged to use the spreadsheet format. If the proposed project period is for more than 12 months, a separate form should be submitted for the portion of the project extending beyond month 12.

In addition to FORM C or C1, applicants must provide a detailed budget narrative providing an explanation of the basis for the estimates in each budget category.

If funds from other sources are required to conduct the project, either as match or to support other aspects of the project, the source, current status of the request, and anticipated decision date must be provided.

4. Assurances (FORM D)

This form lists the statutory, regulatory, and policy requirements and conditions with which recipients of Institute funds must comply.

B. Project Abstract

The abstract should highlight the purposes, goals, methods and anticipated benefits of the proposed project. It should not exceed one single-spaced page on 8½ by 11 inch paper.

C. Program Narrative

The program narrative should not exceed 25 double-spaced pages on 8½ by 11 inch paper. Margins should not be less than 1 inch. The page limit does not include appendices containing resumes and letters of cooperation or endorsement. Additional background material may be attached only if it is essential to obtaining a clear understanding of the proposed project. Numerous and lengthy appendices are strongly discouraged.

The program narrative should address the following topics:

1. Project Objectives

A clear, concise statement of what the proposed project is intended to accomplish.

2. Program Areas To Be Covered

A statement which lists the program areas set forth in the State Justice Institute Act, and, if appropriate, the Institute's Special Interest program categories that are addressed by the proposed projects. A discussion should be included only if the relationship between the proposed project and the program areas and special interest categories is not obvious.

3. Need for the Project

If the project is to be conducted in a specific location(s), a discussion of the particular needs of the project site(s) to be addressed by the project and why those needs are not being met through the use of existing materials, programs, procedures, services or other resources.

If the project is not site specific, a discussion of the problems that the proposed project will address, and why existing materials, programs, procedures, services or other resources do not adequately resolve those problems. The discussion should include specific references to the relevant literature and to the experience in the field.

4. Tasks and Methods

A delineation of the tasks to be performed and the methods to be used for accomplishing each task. For example:

For research and evaluation projects, the data sources, data collection strategies, variables to be examined, and analytic procedures to be used for conducting the research or evaluation and ensuring the validity and general applicability of the results. For projects involving human subjects, the discussion of methods should address the procedures for obtaining respondents' informed consent, ensuring the respondents' privacy and freedom from risk or harm, and the protection of others who are not the subjects of research but would be affected by the research. If the potential exists for risk or harm to the human subjects, a discussion should be included of the value of the proposed research and the methods to be used to minimize or eliminate such risk.

For education and training projects, the adult education techniques to be used in designing and presenting the training, including the teaching methods to be used and the opportunities for structured interaction among the participants; how faculty will be recruited, selected, and trained; the proposed number and length of the conferences, courses, seminars or workshops to be conducted; the materials to be provided and how they will be developed; the cost to participants; and the methods to be used for evaluating the reaction of the participants and the impact and effectiveness of the training.

For demonstration projects, how the sites will be identified and their cooperation obtained; how the program or procedures will be implemented and monitored; and how the results of the demonstration will be determined and assessed.

For technical assistance projects, the types of assistance that will be provided; the particular program area(s) for which assistance will be provided;

how requests will be obtained and the type of assistance determined; how suitable providers will be selected and briefed; how reports will be reviewed; the cost to recipients; and how the usefulness and impact of the technical assistance will be determined and assessed.

Every project design must include an evaluation plan to determine whether the project met its objectives. The plan should present the evaluator's qualifications; describe the criteria that will be used to evaluate the project's effectiveness; explain how the evaluation will be conducted, including the specific data collection and analysis techniques to be used; discuss why this approach is appropriate; and present a schedule for completion of the evaluation.

5. Project Management

A detailed management plan including the starting and completion date for each task; the time commitments to the project of key staff and their responsibilities regarding each project task; and the procedures that will be used to ensure that all tasks are performed on time, within budget, and at the highest level of quality. The management plan must also provide for the submission of Quarterly Progress and Financial Reports within 30 days of the close of each calendar quarter (i.e., no later than January 30, April 30, July 30, and October 30).

6. Products

A description of the products to be developed by the project (e.g., monographs, training curricula and materials, videotapes, articles, or handbooks), including when they will be submitted to the Institute. The application must explain how and to whom the products will be disseminated; identify development, production, and dissemination costs covered by the project budget; and present the basis on which products and services developed or provided under the grant will be offered to the courts community and the public at large. Ordinarily, the products of a research, evaluation, or demonstration project should include an article summarizing the project findings that is publishable in a journal serving the courts community nationally, an executive summary that will be disseminated to the project's primary audience, or both. The products developed by education and training projects should be designed for use outside the classroom so that they may be used again by original participants and others in the course of their duties. Fourteen copies of all project products must be submitted to the Institute.

7. Applicant Status

A statement demonstrating whether the applicant (if the applicant is not a State or local court) qualifies as either a national non-profit organization controlled by, operating in conjunction with, and serving the judicial branches of State governments; or a national non-profit organization for the education and training of State court judges and support personnel. See section IV. An applicant other than a State or local court that may qualify as a priority recipient pursuant to 42 U.S.C. 10705 (b)(1)(B) or (1)(C) must set forth the basis for designation as a priority recipient in its application. If the applicant is neither such an organization nor a State court, this section must demonstrate how it will serve the objectives of the relevant program area(s) in terms of replicability and other appropriate factors. Non-judicial units of Federal, State, or local government must demonstrate that the proposed services are not available from non-governmental sources.

8. Staff Capability

A summary of the training and experience of the key staff members that qualify them for conducting and managing the proposed project. Resumes of identified staff should be attached to the application. If one or more key staff members are not known at the time of the application, a description of the criteria that will be used to select persons for these positions should be included.

9. Organizational Capacity

Applicants that have not received a grant from the Institute within the past two years should submit a statement describing the capacity of the applicant to administer grant funds including the financial systems used to monitor project expenditures (and income, if any), and a summary of the applicant's past experience in administering grants, as well as any resources or capabilities that the applicant has that will particularly assist in the successful completion of the project.

If the applicant is a non-profit organization (other than a university), it must also provide documentation of its section 501(c) tax exempt status as determined by the Internal Revenue Service and a copy of a current certified audit report. For purposes of this requirement, "current" means no earlier than two years prior to the current calendar year. If a current audit report is not available, the Institute will require the organization to complete a financial capability questionnaire which must be certified by a Certified Public Accountant. Other applicants may be required to provide a current audit report, a financial capability questionnaire, or both, if specifically requested to do so by the Institute.

Unless requested otherwise, an applicant that has received a grant from the Institute within the past two years should describe only the changes in its organizational capacity, tax status, or financial capability that may affect its capacity to administer a grant.

10. Letters of Support for the Project

If the cooperation of courts, organizations, agencies, or individuals other than the applicant is required to conduct the project, written assurances of cooperation and availability should be attached as an appendix to the application.

D. Budget Narrative

The budget narrative should provide the basis for the computation of all project-related costs. Additional background or schedules may be attached only if they are essential to obtaining a clear understanding of the proposed budget. Numerous and lengthy appendices are strongly discouraged. The budget narrative should address the following items:

1. Justification of Personnel Compensation

The applicant should set forth the percentages of time to be devoted by, and salaries to be paid to, individuals directly involved with the project. The applicant should address the basis for personnel compensation and explain any deviations from current rates or established written organization policies.

2. Fringe Benefit Computation

The applicant should provide a description of the fringe benefits provided to employees. If percentages are used, the authority for such use should be presented as well as a description of the elements included in the determination of the percentage rate.

3. Consultant/Contractual Services

The applicant should describe each type of service to be provided. The basis for compensation rates and the method for selection should also be included. Rates for consultant services must be set in accordance with Section XI.H.2.c.

4. Travel

Transportation costs and per diem rates must comply with the policies of

the applicant organization. If the applicant does not have an established travel policy, then travel rates shall be consistent with those established by the Institute or the Federal Government. (A copy of the Institute's travel policy is available upon request.) The budget narrative should include a description of the rate method used and address the per diem rates separate from transportation expenses. The purpose for travel should also be included in the narrative.

5. Equipment

Grant funds may be used to purchase or lease only that equipment which is essential to accomplishing the objectives of the project. The applicant should describe the equipment to be purchased or leased and explain why the acquisition of that equipment is essential to accomplish the project's goals and objectives. The narrative should clearly identify which equipment is to be leased and which is to be purchased. The method of procurement should also be described. Purchases for automatic data processing equipment must comply with section XI.H.2.b.

6. Supplies

The applicant should provide a general description of the supplies necessary to accomplish the goals and objectives of the grant. In addition, the applicant should provide the details supporting the total requested for this expenditure category.

7. Construction

Construction expenses are prohibited except for the limited purposes set forth in section XI.G.2. Any allowable construction or renovation expense should be described in detail in the budget narrative.

8. Telephone

Applicants should include anticipated telephone charges, distinguishing between monthly charges and long distance charges in the budget narrative. Also, applicants should provide the basis used in developing the monthly and long distance estimates.

9. Postage

Anticipated postage costs for project related mailings should be described in the budget narrative. The cost of special mailings such as for a survey or for announcing a workshop should be distinguished from routine operational mailing costs. The bases for all postage estimates should be included in the justification material.

10. Printing/Photocopying

Anticipated costs for printing or photocopying should be included in the budget narrative. Applicants should provide the details underlying these estimates in support of the request.

11. Indirect Costs

Applicants should describe the indirect cost rates applicable to the grant in detail. These rates must be established in accordance with section XI.H.3.

12. Match

The applicant should describe the source of any matching contribution and the nature of the match provided. Any additional contributions to the project should be described in this section of the budget narrative as well.

E. Submission Requirements

An application package containing the application, an original signature on FORM A (and on FORM B, if the application is from a State or local court), and four photocopies of the application package must be sent by first class or overnight mail, or by courier no later than May 23, 1989. A postmark or courier receipt will constitute evidence that the application was sent on or before the deadline date. Please mark APPLICATION on all application package envelopes and send to: State Justice Institute, 120 S. Fairfax Street, Alexandria, Virginia 22314.

Receipt of each proposal will be acknowledged in writing. Extensions of the deadline for receipt of applications will not be granted.

VIII. Application Review Procedures

A. Preliminary Inquiries

The Institute staff will answer inquiries concerning application procedures. The staff contact will be named in the Institute's letter inviting submission of a formal application.

B. Selection Criteria

1. All applications will be rated on the basis of the criteria set forth below. The Institute will accord the greatest weight to the following criteria:

a. The soundness of the methodology, including the evaluation design;

b. The qualifications of the project's staff;

c. The applicant's management plan and organizational capabilities;

d. The reasonableness of the proposed budget;

e. The demonstration of need for the project;

f. The products and benefits resulting from the project; and

g. The demonstration of cooperation and support of other agencies that may be affected by the project.

2. "Special Interest" applications submitted pursuant to section II.B. will also be rated on the proposed project's relationship to one of the "Special Interest" categories set forth in that section, and the degree to which the findings, procedures, training, technology, or other results of the project can be transferred to other jurisdictions.

3. "Single jurisdiction" applications submitted pursuant to section II.C. will also be rated on the proposed project's relation to one of the "Special Interest" categories set forth in section II.B. and on the special requirements listed in section II.C.2.

4. In determining which applicants to fund, the Institute will also consider the applicant's standing in relation to the statutory priorities discussed in section IV; the availability of financial assistance from other sources for the project; the amount and nature (cash or in-kind) of the applicant's match; and the extent to which the proposed project would also benefit the Federal courts or help the State courts enforce Federal constitutional and legislative requirements.

C. Review and Approval Process

Applications will be reviewed competitively by the Board of Directors. The Institute staff will prepare a narrative summary of each application, and a rating sheet assigning points for each relevant selection criterion. When necessary, applications may also be reviewed by outside experts. Committees of the Board will review applications within assigned program categories and prepare recommendations to the full Board. The full Board of Directors will then decide which applications to approve for a grant. The decision to award a grant is solely that of the Board of Directors.

Awards approved by the Board will be signed by the Chairman of the Board on behalf of the Institute.

D. Return Policy

Unless a specific request is made, unsuccessful applications will not be returned. Applicants are advised that Institute records are subject to the provisions of the Federal Freedom of Information Act, 5 U.S.C. 552.

E. Notification of Board Decision

The Institute will send written notice to applicants concerning all Board decisions to approve or deny their respective applications and the key

issues and questions that arose during the review process. A decision by the Board to deny an application may not be appealed, but does not prohibit resubmission of a concept paper based on that application in a subsequent round of funding. The State Chief Justice and State Court Administrator will be notified when grants are approved by the Board to support projects that will be conducted by or involve courts in their State.

IX. Renewal Funding Procedures and Requirements

The Institute recognizes two types of renewal funding. The first, a "continuation grant," is to permit completion of activities initiated under an existing Institute grant or to enhance the knowledge, programs or services produced or established during the prior grant period. Continuation grants are intended to support projects with a limited duration. They may be used, for example, when a project is divided into two or more sequential phases, for secondary analysis of data obtained in an Institute-supported research project, or for more extensive testing of an innovative technology, procedure, or program developed with SJI grant support. Continuation grants are subject to the limits on size and duration set forth in sections V.B.1 and V.C.1.

The second, an on-going support grant, is to support a project that is national in scope and that provides the State courts with services, programs or products for which there is a continuing important need. On-going support grants are subject to the limits on size and duration set forth in sections V.B.2. and V.C.2.

A. Continuation Grants

1. In lieu of a concept paper, a grantee seeking a continuation grant must inform the Institute, by letter, of its intent to submit an application for such funding as soon as the need for renewal funding becomes apparent but no less than 120 days before the end of the current grant period.

a. A letter of intent must be no more than 3 single-spaced pages on 8½ by 11 inch paper and must contain an estimate of the funds to be requested and a brief description of anticipated changes in scope, focus or audience of the project.

b. Letters of intent will not be reviewed competitively. Within 30 days of receiving a letter of intent, the Institute will inform the grantee filing of the date by which an application for a continuation grant must be submitted.

2. An application for a continuation grant must include an application form, budget forms (with appropriate documentation), a project abstract conforming to the format set forth in section VII.B., a program narrative, a budget narrative, and certain certifications and assurances.

The program narrative should conform to the length and format requirements set forth in section VII.C. However, rather than the topics listed in section VII.C., the program narrative of an application for a continuation grant should:

a. Explain why continuation of the project is necessary to achieve the goals of the project, and how the continuation will benefit the participating courts or the courts community generally. That is, to what extent will the goals and objectives of the project be unfulfilled if the project is not continued, and conversely, how will the findings or results of the project be enhanced by continuing the project?

b. Discuss the status of all activities conducted during the previous project period, identify any activities that were not completed, and explain why;

c. Present a detailed task schedule for the next project period;

d. Specify the key findings or recommendations resulting from the evaluation of the project, if they are available, and explain how they will be addressed during the proposed continuation;

e. Describe fully any other changes to the tasks to be performed, the methods to be used, the products of the project, the assigned staff, or the grantee's organizational capacity;

f. Indicate why other sources of support are inadequate, inappropriate or unavailable; and

g. Provide a complete budget and budget narrative conforming to the requirements set forth in paragraph VII.D. Changes in the funding level requested should be discussed in terms of corresponding increases or decreases in the scope of activities or services to be rendered.

3. An application for a continuation grant should not repeat information contained in a previously approved application.

4. The submission requirements set forth in section VII.E., other than the deadline for mailing, apply to applications for a continuation grant. Such applications will be rated on the selection criteria set forth in section VIII.B. The key findings and recommendations resulting from an evaluation of the project and the proposed response to those findings and recommendations will also be considered. The review and approval process, return policy, and notification procedures are the same as those for new projects set forth in sections VIII.C.–VIII.E.

B. On-going Support Grants

1. A project is eligible for consideration for an on-going support grant if:

a. The project is supported by and has been evaluated under a grant from the Institute;

b. The project is national in scope and provides a significant benefit to the State courts;

c. There is a continuing important need for the services, programs or products provided by the project as indicated by the level of use and support by members of the court community;

d. The project is accomplishing its objectives in an effective and efficient manner; and

e. It is likely that the service or program provided by the project would be curtailed or significantly reduced without Institute support.

2. The Board will consider awarding an on-going support grant for a period of up to 36 months. The total amount of the grant will be fixed at the time of the initial award. Funds will be made available in annual increments as specified in section V.B.2.

Each project supported by an on-going support grant must include an evaluation component assessing its effectiveness and operation throughout the grant period. A comprehensive evaluation report must be completed not less than 90 days before the end of the grant period.

3. In lieu of a concept paper, a grantee seeking an on-going support grant must inform the Institute by letter of its intent to submit an application for such funding no less than 120 days before the end of the current grant period. The letter of intent should be in the same format as that prescribed for continuation grants in section IX. A.1.a.

4. An application for an on-going support grant must include an application form, budget forms (with appropriate documentation), a project abstract conforming to the format set forth in section VII.B, a program narrative, a budget narrative, and certain certifications and assurances.

The program narrative should conform to the length and format requirements set forth in section VII.C. However, rather than the topics listed in section VII.C, the program narrative of applications for an on-going support grant should:

a. Provide a detailed discussion of the benefits provided by the project to the State courts around the country, including the degree to which State

courts, State court judges, or State court managers and personnel are using the services or programs provided by the project;

b. Demonstrate support for the continuation of the project from the courts community;

c. Discuss the extent to which the project has met its goals and objectives, identify any activities that have not been completed, and explain why;

d. Present a general schedule for the full proposed project period and a detailed task schedule for the first year of the proposed new project period;

e. Attach a copy of the final evaluation report regarding the effectiveness and operation of the project, specify the key findings or recommendations resulting from the evaluation, and explain how they will be addressed during the proposed renewal period;

f. Describe fully any other changes to the tasks to be performed, the methods to be used, the products of the project, the assigned staff, or the grantee's organizational capacity;

g. Indicate why other sources of support are inadequate, inappropriate or unavailable; and

h. Provide a complete budget and budget narrative conforming to the requirements set forth in paragraph VII.D. Changes in the funding level requested should be discussed in terms of corresponding increases or decreases in the scope of activities or services to be rendered.

5. An application for an on-going support grant should not repeat information contained in a previously approved application.

6. The submission requirements set forth in section VII.E other than the deadline for mailing apply to applications for an on-going support grant. Such applications will be rated on the selection criteria set forth in section VIII.B. The extent to which the project has met its goals and objectives, the key findings and recommendations resulting from an evaluation of the project, and the proposed response to those findings and recommendations will also be considered. The review and approval process, return policy, and notification procedures are the same as those for new applications set forth in sections VII.C–VII.E.

X. Compliance Requirements

The State Justice Institute Act (Pub. L. 98–620) contains limitations and conditions on grants, contracts and cooperative agreements of which applicants and recipients should be aware. In addition to eligibility requirements which must be met to be considered for an award from the Institute, all applicants should be aware of and all recipients will be responsible for ensuring compliance with the following:

A. State and Local Court Systems

Each application for funding from a State or local court must be approved, consistent with State law, by the State's Supreme Court, or its designated agency or council. The latter shall receive, administer, and be accountable for all funds awarded to such courts. 42 U.S.C. 10705(b)(4). The Appendix to this guideline lists the agencies, councils and contact persons designated to administer Institute awards to the State and local courts.

B. Matching Requirements

1. All awards to courts or other units of State or local government require a match from private or public sources of not less than 50 percent of the total amount of the Institute's award. A cash match, non-cash match, or both may be provided, but the Institute will give preference to those applicants who provide a cash match to the Institute's award. The requirement to provide match may be waived in exceptionally rare circumstances upon approval of the Chief Justice of the highest court in the State and a majority of the Board of Directors. 42 U.S.C. 10705(d) (as amended).

2. Other eligible recipients of Institute funds are not required to provide a match, but are encouraged to contribute to meeting the costs of the project (see section VIII.B above).

C. Conflict of Interest

Personnel and other officials connected with Institute-funded programs shall adhere to the following requirements:

1. No official or employee of a recipient court or organization shall participate personally through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise in any proceeding, application, request for a ruling or other determination, contract, grant, cooperative agreement, claim, controversy, or other particular matter in which Institute funds are used, where to his/her knowledge he/she or his/her immediate family, partners, organization other than a public agency in which he/she is serving as officer, director, trustee, partner, or employee or any person or organization with whom he/she is negotiating or has any arrangement concerning prospective employment, has a financial interest.

2. In the use of Institute project funds, an official or employee of a recipient court or organization shall avoid any action which might result in or create the appearance of:

a. Using an official position for private gain; or

b. Affecting adversely the confidence of the public in the integrity of the Institute program.

3. Requests for proposals or invitations for bids issued by a recipient of Institute funds or a subgrantee or subcontractor will provide notice to prospective bidders that the contractors who develop or draft specifications, requirements, statements of work and/or requests for proposals for a proposed procurement will be excluded from bidding on or submitting a proposal to compete for the award of such procurement.

D. Lobbying

Funds awarded to recipients by the Institute shall not be used, indirectly or directly, to influence Executive orders or similar promulgations by Federal, State or local agencies, or to influence the passage or defeat of any legislation by Federal, State or local legislative bodies. 42 U.S.C. 10706(a).

E. Political Activities

No recipient shall contribute or make available Institute funds, program personnel or equipment to any political party or association, or the campaign of any candidate for public or party office. Recipients are also prohibited from using funds in advocating or opposing any ballot measure, initiative, or referendum. Finally, officers and employees of recipients shall not intentionally identify the Institute or recipients with any partisan or nonpartisan political activity associated with a political party or association, or the campaign of any candidate for public or party office. 42 U.S.C. 10706(a).

F. Advocacy

No funds made available by the Institute may be used to support or conduct training programs for the purpose of advocating particular nonjudicial public policies or encouraging nonjudicial political activities. 42 U.S.C. 10706(b).

G. Supplantation and Construction

To ensure that funds are used to supplement and improve the operation of State courts, rather than to support basic court services, funds shall not be used for the following purposes:

1. To supplant State or local funds supporting a program or activity;

2. To construct court facilities or structures, except to remodel existing facilities or to demonstrate new architectural or technological techniques, or to provide temporary facilities for new personnel or for personnel involved in a demonstration or experimental program; or

3. To solely purchase equipment for a court system.

H. Confidentiality of Information

Except as provided by Federal law other than the State Justice Institute Act, no recipient of financial assistance from SJI may use or reveal any research or statistical information furnished under the Act by any person and identifiable to any specific private person for any purpose other than the purpose for which the information was obtained. Such information and copies thereof shall be immune from legal process, and shall not, without the consent of the person furnishing such information, be admitted as evidence or used for any purpose in any action, suit, or other judicial, legislative, or administrative proceedings.

I. Reporting Requirements

Recipients of Institute funds shall submit Quarterly Progress and Financial Reports within 30 days of the close of each calendar quarter (that is, no later than *January 30, April 30, July 30, and October 30*). These reports shall include a narrative description of project activities during the calendar quarter, the relationship between those activities and the task schedule and objectives set forth in the approved application or an approved adjustment thereto, any significant problem areas that have developed and how they will be resolved, and the activities scheduled during the next reporting period.

The quarterly financial status report shall be submitted in accordance with section XI.G.2 of this guideline.

J. Audit

Each recipient must provide for an annual fiscal audit. (See section XI.J of this guideline for the requirements of such audits.)

Accounting principles employed in recording transactions and preparing financial statements must be based upon generally accepted accounting principles (GAAP).

K. Suspension of Funding

After providing a recipient reasonable notice and opportunity to submit written documentation demonstrating why fund termination or suspension should not occur, the Institute may terminate or suspend funding of a project that fails to comply substantially with the Act, Institute guidelines, or that terms and conditions of the award. 42 U.S.C. 10708(1).

L. Title to Property

At the conclusion of the project, title to all expendable and nonexpendable personal property purchased with Institute funds shall vest in the recipient court, organization, or individual that purchased the property if certification is made to the Institute that the property will continue to be used for the authorized purposes of the Institute-funded project or other purposes consistent with the State Justice Institute Act, as approved by the Institute. If such certification is not made or the Institute disapproves such certification, title to all such property with an aggregate or individual value of $1,000 or more shall vest in the Institute, which will direct the disposition of the property.

M. Disclaimer

Recipients of Institute funds shall prominently display the following disclaimer on all project-related products developed with Institute funds:

"This [document, film, videotape, etc.] was developed under a [grant, cooperative agreement, contract] from the State Justice Institute. Points of view expressed herein are those of the [author(s), filmmaker(s), etc.] and do not necessarily represent the official position or policies of the State Justice Institute."

N. Copyrights

Except as otherwise provided in the terms and conditions of an Institute award, a recipient is free to copyright any books, publications, or other copyrightable materials developed in the course of an Institute-supported project, but the Institute shall reserve a royalty-free, nonexclusive and irrevocable right to reproduce, publish, or otherwise use, and to authorize others to use, the materials for purposes consistent with the State Justice Institute Act.

O. Inventions and Patents

If any patentable items, patent rights, processes, or inventions are produced in the course of Institute-sponsored work, such fact shall be promptly and fully reported to the Institute. Unless there is a prior agreement between the grantee and the Institute on disposition of such items, the Institute shall determine whether protection of the invention or discovery shall be sought. The Institute will also determine how the rights in the invention or discovery, including rights under any patent issued thereon, shall be allocated and administered in order to protect the public interest consistent with "Government Patent Policy" (President's Memorandum for Heads of Executive Departments and Agencies, August 23, 1971, and statement of Government Patent Policy as printed in 36 FR 16889).

P. Charges for Grant-Related Products

When Institute funds fully cover the cost of developing, producing, and disseminating a product, e.g., a document or software, the product should be distributed to the field without charge. When Institute funds only partially cover the development, production, and dissemination costs, the grantee may recover its costs for reproducing and disseminating the material to those requesting it.

Q. Approval of Key Staff

If the qualifications of a person assigned to a key project staff position are not described in the application or if there is a change of a person assigned to such a position, a recipient shall submit a description of the qualifications of the newly assigned person to the Institute. Prior written approval of the qualifications of the new person assigned to a key staff position must be received from the Institute before the salary of that person and associated costs may be paid or reimbursed from grant funds.

XI. Financial Requirements

A. Accounting Systems and Financial Records

All grantees, subgrantees, contractors and other organizations directly or indirectly receiving Institute funds are required to establish and maintain accounting systems and financial records to accurately account for funds they receive. These records shall include total program costs, including Institute funds, State and local matching shares, and any other fund sources included in the approved project budget.

1. Purpose

The purpose to this section is to establish accounting system requirements and to offer guidance on procedures which will assist all grantees/subgrantees in:

a. Complying with the statutory requirements for the awarding, disbursement, and accounting of funds;

b. Complying with regulatory requirements of the Institute for the financial management and disposition of funds;

c. Generating financial data which can be used in the planning,

management and control of programs; and

d. Facilitating an effective audit of funded programs and projects.

2. References

Except where inconsistent with specific provisions of this guideline, the following regulations, directives and reports are applicable to Institute grants and cooperative agreements. These materials supplement the requirements of this section for accounting systems and financial recordkeeping and provide additional guidance on how these requirements may be satisfied.

a. *Office of Management and Budget (OMB) Circular A–21,* Cost Principles for Educational Institutions.

b. *Office of Management and Budget (OMB) Circular A–87,* Cost Principles for State and Local Governments.

c. *Office of Management and Budget (OMB) Circular A–88 (revised),* Indirect Cost Rates, Audit and Audit Followup at Educational Institutions.

d. *Office of Management and Budget (OMB) Circular A–102,* Uniform Administrative Requirements for Grants-in-Aid to State and Local Governments.

e. *Office of Management and Budget (OMB) Circular A–110,* Grants and Agreements with Institutions of Higher Education, Hospitals and other Non-Profit Organizations.

f. *Office of Management and Budget (OMB) Circular A–128,* Audits of State and Local Governments.

g. *Office of Management and Budget (OMB) Circular A–122,* Cost Principles for Non-profit Organizations.

B. Supervision and Monitoring Responsibilities

1. Grantee Responsibilities

All grantees receiving direct awards from the Institute are responsible for the management and fiscal control of all funds. Responsibilities include the accounting of receipts and expenditures, the maintaining of adequate financial records and the refunding of expenditures disallowed by audits.

2. Responsibilities of State Supreme Court

Each application for funding from a State or local court must be approved, consistent with State law, by the State's Supreme Court, or its designated agency or council.

The State Supreme Court shall receive all Institute funds awarded to such courts and shall be responsible for assuring proper administration of Institute funds. The State Supreme Court is responsible for all aspects of the project including proper accounting and financial recordkeeping by the subgrantee. The responsibilities include:

a. *Reviewing financial operations.* The State Supreme Court should be familiar with, and periodically monitor, its subgrantees' financial operations, records system and procedures. Particular attention should be directed to the maintenance of current financial data.

b. *Recording financial activities.* The subgrantee's grant award or contract obligation, as well as cash advances and other financial activities, should be recorded in the financial records of the State Supreme Court in summary form. Subgrantee expenditures should be recorded on the books of the State Supreme Court *OR* evidenced by report forms duly filed by the subgrantee. Non-Institute contributions applied to projects by subgrantees should likewise be recorded, as should any project income resulting from program operations.

c. *Budgeting and budget review.* The State Supreme Court should ensure that each subgrantee prepares an adequate budget on which its award commitment will be based. The detail of each project budget should be maintained on file by the State Supreme Court.

d. *Accounting for non-institute contributions.* The State Supreme Court will ensure, in those instances where subgrantees are required to furnish non-Institute matching funds, that the requirements and limitations of this guideline are applied to such funds.

e. *Audit requirement.* The State Supreme Court is required to ensure that subgrantees have met the necessary audit requirements as set forth by the Institute (see section X.J and XI.J).

f. *Reporting irregularities.* The State Supreme Court and its subgrantees are responsible for promptly reporting to the Institute the nature and circumstances surrounding any financial irregularities discovered.

C. Accounting System

The grantee is responsible for establishing and maintaining an adequate system of accounting and internal controls for itself and for ensuring that an adequate system exists for each of its subgrantees and contractors. An acceptable and adequate accounting system is considered to be one which:

1. Properly accounts for receipt of funds under each grant awarded and the expenditure of funds for each grant by category of expenditure (including matching contributions and project income);

2. Assures that expended funds are applied to the appropriate budget category included within the approved grant;

3. Presents and classifies historical costs of the grant as required for budgetary and evaluation purposes;

4. Provides cost and property controls to assure optimal use of grant funds;

5. Is integrated with a system of internal controls adequate to safeguard the funds and assets covered, check the accuracy and reliability of the accounting data, promote operational efficiency, and assure conformance with any general or special conditions of the grant;

6. Meets the prescribed requirements for periodic financial reporting of operations; and

7. Provides financial data for planning, control, measurement, and evaluation of direct and indirect costs.

D. Total Cost Budgeting and Accounting

Accounting for all funds awarded by the Institute shall be structured and executed on a "total project cost" basis. That is, total project costs, including Institute funds, State and local matching shares, and any other fund sources included in the approved project budget shall be the foundation for fiscal administration and accounting. Grant applications and financial reports require budget and cost estimates on the basis of total costs.

1. Timing of Matching Contributions

Matching contributions need not be applied at the exact time of the obligation of Institute funds. However, the full matching share must be obligated by the end of the period for which the Institute funds have been made available for obligation under an approved project.

2. Records for Match

All grantees must maintain records which clearly show the source, amount, and timing of all matching contributions. In addition, if a project has included, within its approved budget, contributions which exceed the required matching portion, the grantee must maintain records of those contributions in the same manner as it does the Institute funds and required matching shares. For all grants made to State and local courts, the State Supreme Court has primary responsibility for grantee/subgrantee compliance with the requirements of this section. (See XI.B.2.)

E. Maintenance and Retention of Records

All financial records, supporting documents, statistical records and all other records pertinent to grants, subgrants, cooperative agreements or contracts under grants shall be retained by each organization participating in a project for at least three years for purposes of examination and audit. State Supreme Courts may impose record retention and maintenance requirements in addition to those prescribed in this chapter.

1. Coverage

The retention requirement extends to books of original entry, source documents supporting accounting transactions, the general ledger, subsidiary ledgers, personnel and payroll records, cancelled checks, and related documents and records. Source documents include copies of all grant and subgrant awards, applications, and required grantee/subgrantee financial and narrative reports. Personnel and payroll records shall include the time and attendance reports for all individuals reimbursed under a grant, subgrant or contract, whether they are employed full-time or part-time. Time and effort reports will be required for consultants.

2. Retention Period

The three-year retention period starts from the date of the submission of the final expenditure report or, for grants which are renewed annually, from the date of submission of the annual expenditure report.

3. Maintenance

Grantees and subgrantees are expected to see that records of different fiscal years are separately identified and maintained so that requested information can be readily located. Grantees and subgrantees are also obligated to protect records adequately against fire or other damage. When records are stored away from the grantee's/subgrantee's principal office, a written index of the location of stored records should be on hand, and ready access should be assured.

F. Project-Related Income

Records of the receipt and disposition of project-related income must be maintained by the grantee in the same manner as required for the project funds that gave rise to the income. The policies governing the disposition of the various types of project-related income are listed below.

1. Interest

A State and any agency or instrumentality of a State including State institutions of higher education and State hospitals, shall not be held accountable for interest earned on advances of project funds. When funds are awarded to subgrantees through a State, the subgrantees are not held accountable for interest earned on advances of project funds. Local units of government that are direct grantees and nonprofit organizations must refund any interest earned. Grantees shall so order their affairs to ensure minimum balances in their respective grant cash accounts.

2. Other Project Income

a. *Royalties.* The grantee/subgrantee may retain all royalties received from copyrights or other works developed under projects or from patents and inventions, unless the terms and conditions of the project provide otherwise.

b. *Registration/tuition fees and other.* These types of project income shall be treated in accordance with disposition instructions set forth in the project's terms and conditions.

G. Payments and Financial Reporting Requirements

1. Payment of Grant Funds

The procedures and regulations set forth below are applicable to all Institute grant funds and grantees.

a. *Request for advance or reimbursement of funds.* Grantees will receive funds on a "Check-Issued" basis. Upon receipt, review, and approval of a Request for Advance or Reimbursement by the Institute, a check will be issued directly to the grantee or its designated fiscal agent. A request must be limited to the grantee's immediate cash needs. The Request for Advance or Reimbursement, along with the instructions for its preparation, will be included in the official Institute award package.

b. *Termination of advance funding.* When a grantee organization receiving cash advances from the Institute—

i. Demonstrates an unwillingness or inability to attain program or project goals, or to establish procedures that will minimize the time elapsing between cash advances and disbursements, or cannot adhere to guideline requirements or special conditions;

ii. Engages in the improper award and administration of subgrants or contracts; or

iii. Is unable to submit reliable and/or timely reports,

The Institute may terminate advance financing and require the grantee organization to finance its operations with its own working capital. Payments to the grantee shall then be made by the use of the Institute check method to reimburse the grantee for actual cash disbursements. In the event the grantee continues to be deficient, the Institute reserves the right to suspend payments until the deficiencies are corrected.

c. *Principle of minimum cash on hand.* Recipient organizations should request funds based upon immediate disbursement requirements. Grantees should time their requests to ensure that cash on hand is the minimum needed for disbursements to be made immediately or within a few days. Idle funds in the hands of subgrantees will impair the goals of good cash management.

2. Financial Reporting

In order to obtain financial information concerning the use of funds, the Institute requires that grantees/subgrantees of these funds submit timely reports for review.

The Financial Status Report is required from all grantees for each active quarter on a calendar-quarter basis. This report is due within 30 days after the close of the calendar quarter. It is designed to provide financial information relating to Institute funds, State and local matching shares, and any other fund sources included in the approved project budget. The report contains information on obligations as well as outlays. A copy of the Financial Status Report, along with instructions for its preparation, will be included in the official Institute Award package. In circumstances where an organization requests substantial payments for a project prior to the completion of a given quarter, the Institute may request a brief summary of the amount requested, by object class, in support of the Request for Advance or Reimbursement.

3. Consequences of Non-Compliance with Submission Requirements

Failure of the grantee organization to submit required financial and program reports may result in a suspension of grant payments.

H. Allowability of Costs

1. General

Except as may be otherwise provided in the conditions of a particular grant, cost allowability shall be determined in accordance with the principles set forth in *OMB Circulars A–87,* Cost Principles for State and Local Governments; *A–21,* Cost Principles Applicable to Grants and Contracts with Educational

Institutions; and *A–122,* Cost Principles for Non-Profit Organizations.

2. Costs Requiring Prior Approval

a. *Preagreement costs.* The written prior approval of the Institute is required for costs which are considered necessary to the project but occur prior to the starting date of the grant period.

b. *Equipment.* Grant funds may be used to purchase or lease only that equipment which is essential to accomplishing the goals and objectives of the project. The written prior approval of the Institute is required when the amount of automated data processing (ADP) equipment to be purchased or leased exceeds $10,000 or the software to be purchased exceeds $3,000.

c. *Consultants.* The written prior approval of the Institute is required when the rate of compensation to be paid a consultant exceeds $200 a day.

3. Indirect Costs

These are costs of an organization that are not readily assignable to a particular project, but are necessary to the operation of the organization and the performance of the project. The cost of operating and maintaining facilities, depreciation, and administrative salaries are examples of the types of costs that are usually treated as indirect costs. It is the policy of the Institute that all costs should be budgeted directly; however, if a recipient has an indirect cost rate approved by a Federal agency as set forth below, the Institute will accept that rate.

a. *Approved Plan Available.* (1) The Institute will accept an indirect cost rate or allocation plan approved for a grantee during the preceding two years by any Federal granting agency on the basis of allocation methods substantially in accord with those set forth in the applicable cost circulars. A copy of the approved rate agreement must be submitted to the Institute.

(2) Where flat rates are accepted in lieu of actual indirect costs, grantees may not also charge expenses normally included in overhead pools, e.g., accounting services, legal services, building occupancy and maintenance, etc., as direct costs.

(3) Organizations with an approved indirect cost rate, utilizing total direct costs as the base, usually exclude contracts under grants from any overhead recovery. The negotiation agreement will stipulate that contracts are excluded from the base for overhead recovery.

b. *Establishment of indirect cost rates.* In order to be reimbursed for indirect costs, a grantee or organization must first establish an appropriate indirect cost rate. To do this, the grantee must prepare an indirect cost rate proposal and submit it to the Institute. The proposal must be submitted in a timely manner (within three months after the start of the grant period) to assure recovery of the full amount of allowable indirect costs, and it must be developed in accordance with principles and procedures appropriate to the type of grantee institution involved.

c. *No approved plan.* If an indirect cost proposal for recovery of actual indirect costs is not submitted to the Institute within three months after the start of the grant period, indirect costs will be irrevocably disallowed for all months prior to the month that the indirect cost proposal is received. This policy is effective for all grant awards.

I. Procurement and Property Management Standards

1. Procurement Standards

For State and local governments, the Institute is adopting the standards set forth in Attachment O of *OMB Circular A–102.* Institutions of higher education, hospitals, and other non-profit organizations will be governed by the standards set forth in Attachment O of *OMB Circular A–110.*

2. Property Management Standards

The property management standards as prescribed in Attachment N of OMB Circulars A–102 and A–110 shall be applicable to all grantees and subgrantees of Institute funds except as provided in subsection b. below.

a. *Acquisition.* All grantees/subgrantees are required to be prudent in the acquisition and management of property with grant funds. If suitable property required for the successful execution of projects is already available within the grantee or subgrantee organization, expenditures of grant funds for the acquisition of new property will be considered unnecessary.

b. *Title to property.* At the conclusion of the project, title to all expendable and nonexpendable personal property purchased with Institute funds shall vest in the court, organization, or individual that purchased the property if certification is made to the Institute that the property will continue to be used for the authorized purposes of the Institute-funded project or other purposes consistent with the State Justice Institute Act, as approved by the Institute. If such certification is not received, or the Institute disapproves such certification, title to all such property with an aggregate or individual value of $1,000 or more shall vest in the Institute, which will direct the disposition of the property.

J. Audit Requirements

1. Audit Objectives

Grants and other agreements are awarded subject to conditions of fiscal, program and general administration to which the recipient expressly agrees. Accordingly, the audit objective is to review the grantee's or subgrantee's administration of grant funds and required non-Institute contributions for the purpose of determining whether the recipient has:

a. Established an accounting system integrated with adequate internal fiscal and management controls to provide full accountability for revenues, expenditures, assets, and liabilities;

b. Prepared financial statements which are presented fairly, in accordance with generally accepted accounting principles;

c. Prepared Institute financial reports (including Financial Status Reports, Cash Reports, and Requests for Advances and Reimbursements) which contain accurate and reliable financial data, and are presented in accordance with prescribed procedures; and

d. Expended Institute funds in accordance with the terms of applicable agreements and those provisions of Federal law or Institute regulations that could have a material effect on the financial statements or on the awards tested.

2. Implementation

Each grantee (including a State or local court receiving a subgrant from the State Supreme Court) shall provide for an annual fiscal audit. The audit may be of the entire grantee organization (e.g., a university) or of the specific project funded by the Institute. The audit shall be conducted by an independent Certified Public Accountant, or a State or local agency authorized to audit government agencies. The audit shall be conducted in compliance with generally accepted auditing standards established by the American Institute of Certified Public Accountants. A written report shall be prepared upon completion of the audit. Grantees are responsible for submitting copies of the reports to the Institute within thirty days after the acceptance of the report by the grantee, for each year that there is financial activity involving Institute funds.

3. Resolution and Clearance of Audit Reports

Timely action on recommendations by responsible management officials is an

integral part of the effectiveness of an audit. Each grant recipient shall have policies and procedures for acting on audit recommendations by designating officials responsible for: Follow-up, maintaining a record of the actions taken on recommendations and time schedules, responding to and acting on audit recommendations, and submitting periodic reports to the Institute on recommendations and actions taken.

4. Consequences of Non-Resolution of Audit Issues

It is the general policy of the State Justice Institute not to make new grant awards to an applicant having an unresolved audit report involving Institute awards. Failure of the grantee organization to resolve audit questions may also result in the suspension of payments for active Institute grants to that organization.

K. Close-Out of Grants

1. Definition

Close-out is a process by which the Institute determines that all applicable administrative and financial actions and all required work of the grant have been completed by both the grantee and the Institute.

2. Grantee Close-Out Requirements

Within 90 days after the end date of the grant or any approved extension thereof (revised end date), the following documents must be submitted by the grantee to the Institute.

a. *Financial status report.* The FINAL report of expenditures must have no unliquidated obligations and must indicate the exact balance of unobligated funds. Any unobligated/unexpended funds will be deobligated from the award amount by the Institute. Grantees on a check-issued basis, who have drawn down funds in excess of their obligations/expenditures, must return any unused funds to the Institute at the same time they submit a final report.

b. *Final progress report.* This report should be prepared in accordance with instructions provided by the Institute.

XII. Grant Adjustments

All requests for program or budget adjustments requiring Institute approval must be submitted in a timely manner by the project director. All requests for changes from the approved application will be carefully reviewed for both consistency with this guideline and the enhancement of grant goals and objectives.

A. Grant Adjustments Requiring Prior Written Approval

There are several types of grant adjustments which require the prior written approval of the Institute. Examples of these adjustments include:

1. Budget revisions among direct cost categories which exceed or are expected to exceed 5 percent of the approved budget.

2. A change in the scope of work to be performed or the objectives of the project (see section XII.D).

3. A change in the project site.

4. A change in the project period, such as an extension of the grant period and/or extension of the expenditure deadline (see section XII.E).

5. Satisfaction of special conditions, if required.

6. A change in or temporary absence of the project director (see sections XII.F and G).

7. The assignment of a person to a key staff position whose qualifications were not described in the application, or a change of a person assigned to a key project staff position (see section X.Q).

8. A successor in interest or name change agreements.

9. A transfer or contracting out of grant-supported activities (see section XII.H).

10. Preagreement costs, the purchase of automated data processing equipment and software, and consultant rates, as specified in section XI.H.2.

B. Request for Grant Adjustments

All grantees and subgrantees must promptly notify the SJI program managers, in writing, of events or proposed changes which may require an adjustment from the approved application. In requesting an adjustment, the grantee must set forth the reasons and basis for the proposed adjustment and any other information the SJI program managers determine would help the Institute's review.

C. Notification of Approval / Disapproval

If the request is approved, the grantee will be sent a Grant Adjustment Notice signed by the Executive Director or his/her designee. If the request is denied, the grantee will be sent a written explanation of the reasons for the denial.

D. Changes in the Scope of the Grant

A grantee/subgrantee may make minor changes in methodology, approach, or other aspects of the grant to expedite achievement of the grant's objectives with subsequent notification of the SJI program manager. Major changes in scope, duration, training methodology, or other significant areas must be approved in advance by the Institute.

E. Date Changes

Requests for changes or extensions of the grant period are to be made 90 days in advance of the end date of the grant whenever possible. In no instance may the request be made less than 30 days before the end date of the grant.

F. Temporary Absence of the Project Director

Whenever absence of the project director is expected to exceed a continuous period of one month, the plans for the conduct of the project director's duties during such absence must be approved in advance by the Institute. This information must be provided in a letter signed by an authorized representative of the grantee/subgrantee at least 30 days before the departure of the project director, or as soon as it is known that the project director will be absent. The grant may be terminated if arrangements are not approved in advance by the Institute.

G. Withdrawal of / Change in Project Director

If the project director relinquishes or expects to relinquish active direction of the project, the Institute must be notified immediately. In such cases, if the grantee/subgrantee wishes to terminate the project, the Institute will forward procedural instructions upon notification of such intent. If the grantee wishes to continue the project under the direction of another individual, a statement of the candidate's qualifications should be sent to the Institute for review and approval. The grant may be terminated if the qualifications of the proposed individual are not approved in advance by the Institute.

H. Transferring or Contracting Out of Grant-Supported Activities

A principal activity of the grant-supported project shall not be transferred or contracted out to another organization without specific prior approval by the Institute. All such arrangements should be formalized in a contract or other written agreement between the parties involved. Copies of the proposed contract or agreement must be submitted for prior approval at the earliest possible time. The contract or agreement must state, at a minimum, the activities to be performed, the time schedule, the policies and procedures to

be followed, the dollar limitation of the agreement, and the cost principles to be followed in determining what costs, both direct and indirect, are to be allowed. The contract or other written agreement must not affect the grantee's overall responsibility for the direction of the project and accountability to the Institute.

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David I. Tevelin,

Executive Director.

Appendix—List of State Contacts Regarding Administration of Institute Grants to State and Local Courts

Mr. Allen L. Tapley, Administrative Director of the Courts, Administrative Office of the Courts, 817 South Court Street, Montgomery, Alabama 36130, (205) 834–7990
Mr. Arthur H. Snowden II, Administrative Director the Court, Supreme Court, State of Alaska, 303 K Street, Anchorage, Alaska 99501, (907) 264–0547
Mr. William L. McDonald, Administrative Director, Supreme Court of Arizona, 209 West Wing, State Capitol, Phoenix, Arizona 85007, (602) 255–4359
Mr. Christopher Thomas, Executive Secretary, Arkansas Judicial Department, Supreme Court of Arkansas, Justice Building, Little Rock, Arkansas 72201, (501) 371–2295
Mr. William E. Davis, Director, Administrative Office of the Courts, State Building, 350 McAllister Street, Room 3154, San Francisco, California 94102, (415) 557–1581
Mr. James D. Thomas, State Court Administrator, Colorado Judicial Department, State Judicial Building, 2 East 14th Avenue Room 215, Denver, Colorado 80203, (303) 861–1111, ext. 125
Mr. Bruce Borre, Director, Research and Planning, Office of the Chief Court Administrator, Drawer N, Station A, Hartford, Connecticut 06106, (203) 722–5836
Mr. Ted Philyaw, Director, Administrative Office of the Courts, Carvel State Office Building, 820 N. French Street, Wilmington, Delaware 19801, (302) 571–2480
Mr. James Lynch, Deputy Executive Officer, Courts of the District of Columbia, 500 Indiana Avenue, NW., Washington, DC 20001, (202) 879–1700
Mr. Kenneth Palmer, State Court Administrator, Office of the State Courts Administrator, Supreme Court Building, Tallahassee, Florida 32399–1900, (904) 488–8621
Mr. Robert L. Doss, Jr., Director, Administrative Office of the Courts, The Judicial Council of Georgia, 244 Washington Street SW., Suite 500, Atlanta, Georgia 30334, (404) 656–5171
Mr. Robert E. Leon Guerrero, Administrative Director, Superior Court of Guam, Judiciary Building, 110 West O'Brien Drive, Agana, Guam 96910, 011 (671) 472–8961 through 8968
Ms. Janice Wolfe, Administrative Director of Courts, The Judiciary, Post Office Box 2560, Honolulu, Hawaii 96804, (808) 548–4605
Mr. Carl F. Bianchi, Administrative Director of the Courts, Supreme Court Building, 451 West State Street, Boise, Idaho 83720, (208) 334–2246
Mr. William J. O'Brien, State Court Administrator, Supreme Court of Iowa, State House, Des Moines, Iowa 50319, (515) 281–5241
Dr. Howard P. SChwartz, Judicial Administrator, Kansas Judicial Center, 301 West 10th Street, Topeka, Kansas 66612, (913) 296–4873
Ms. Laura Stammel, Comptroller, Administrative Office of the Courts, 403 Wapping Street, Frankfort, Kentucky 40601, (502) 564–2350
Dr. Hugh M. Collins, Chief Deputy Judicial Administrator, Supreme Court of Louisiana, 301 Loyola Avenue, Room 109, New Orleans, Louisiana 70112–1887, (504) 568–5747
Mr. Dana R. Baggett, State Court Administrator, Administrative Office of the Courts, P.O. Box 4820, Downtown Station, Portland, Maine 04112, (207) 879–4792
Mr. Peter J. Lally, Assistant State Court Administrator, Courts of Appeal Building, 361 Rowe Boulevard, Annapolis, Maryland 21401, (301) 974–2141
Honorable Arthur M. Mason, Chief Administrative Justice of the Trial Court, 317 New Courthouse, Boston, Massachusetts 02108, (617) 725–8787
Honorable Dorothy Comstock Riley, Chief Justice, Supreme Court of Michigan, Law Building, Post Office Box 30052, Lansing, Michigan 48909, (517) 373–0128
Ms. Sue K. Dosal, State Court Administrator, Supreme Court of Minnesota, 230 State Capitol, St. Paul, Minnesota 55155, (617) 296–2474
Mr. Charles Clark, Director, Center for Court Education and Continuing Studies, Box 879, Oxford, Mississippi 38677, (601) 232–5955
Mr. Jim Oppedahl, Court Administrator, Montana Supreme Court, Justice Building, 215 North Sanders, Helena, Montana 59620–3001, (406) 444–2621
Mr. Joseph C. Steele, State Court Administrator, 1220 State Capitol Building, Lincoln, Nebraska 68509, (404) 471–2643
Mr. Donald J. Mello, Director, Administrative Office of the Courts, Capitol Complex, Carson City, Nevada 89710, (702) 885–5076
Mr. Jeffrey Leidinger, Director, Administrative Office of the Courts, Supreme Court of New Hampshire, Noble Drive, Concord, New Hampshire 03301, (603) 271–2521
Mr. Robert Lipscher, Administrative Director, Administrative Office of the Courts, CN–037, RJH Justice Complex, Trenton, New Jersey 08625, (609) 984–0275
Honorable Albert M. Rosenblatt, Chief Administrative Judge, New York State Office of Court Administrator, Empire State Plaza, Agency Building 4, 20th Floor, Albany, New York 12207, (913) 431–1930
Mr. Franklin E. Freeman, Jr., Administrative Director, Administrative Office of the Courts, Post Office Box 2448, Raleigh, North Carolina 27602, (919) 733–7106/7107
Mr. William G. Bohn, State Court Administrator, Supreme Court of North Dakota, State Capitol Building, Bismarck, North Dakota 58505, (701) 224–4216
Mr. Stephan W. Stover, Administrative Director of the Courts, Supreme Court of Ohio, State Office Tower, 30 East Broad Street, Columbus, Ohio 43266–0419, (614) 466–2653
Mr. Charles E. Ferrell, Jr., Administrative Director, Administrative Office of the Courts, 1915 N. Stiles, Suite 305, Oklahoma City, Oklahoma 73105, (405) 521–2450
Mr. R. William Linden, Jr., State Court Administrator, Supreme Court of Oregon, Supreme Court Building, Salem, Oregon 97310, (503) 378–6046
Mr. Ralph Hunsicker, Administrative Office of Pennsylvania Courts, 407 City Towers, 301 Chestnut Street, Harrisburg, Pennsylvania 17101, (717) 783–7322
Mr. Walter Kane, State Court Administrator, Supreme Court of Rhode Island, 250 Benefit Street, Providence, Rhode Island 02903, (401) 277–3263 or 277–3272
Mr. Louis L. Rosen, Director, South Carolina Court Administration, Post Office Box 50447, Columbia, South Carolina 29250, (803) 758–2961
Honorable George W. Wuest, Chief Justice, Supreme Court of South Dakota, 500 East Capitol Avenue, Pierre, South Dakota 57501, (605) 773–4885
Mr. Cletus W. McWilliams, Executive Secretary, Supreme Court of Tennessee, Supreme Court Building, Room 422, Nashville, Tennessee 37219, (615) 741–2687
Mr. C. Raymond Judice, Executive Director, Texas Judicial Council, Post Office Box 12066, Austin, Texas 78711, (512) 463–1625
Honorable Gordon R. Hall, Chief Justice, Supreme Court of Utah, State Capitol Building, Room 332, Salt Lake City, Utah 84114, (801) 533–5285
Mr. Thomas J. Lehner, Court Administrator, Supreme Court of Vermont, 111 State Street, Montpelier, Vermont 05602, (802) 828–3281
Ms. Viola E. Smith, Clerk of the Court/Administrator, Territorial Court of the Virgin Islands, Post Office Box 70, Charlotte Amalie, St. Thomas, Virgin Islands 00801, (809) 774–6680, ext. 248

Mr. Robert N. Baldwin, Executive Secretary, Supreme Court of Virginia, Administrative Offices, 100 North Ninth Street, 3rd Floor, Richmond, Virginia 23219, (804) 786–6455

Ms. Mary McQueen, Administrator for the Courts, Supreme Court of Washington, Temple of Justice, Olympia, Washington 98504, (206) 753–5780

Mr. Paul Crabtree, Administrative Director of the Courts, Administrative Office, 402–E State Capitol, Charleston, West Virginia 25305, (304) 348–0145

Mr. J. Denis Moran, Director of State Courts, P.O. Box 1688, Madison, Wisconsin 53701–1688, (608) 266–6828

Justice Walter Urbigkit, Supreme Court of Wyoming, Supreme Court Building, Cheyenne, Wyoming 82002, (307) 777–7571

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Friday
October 21, 1988

Part III

Department of Education

34 CFR Parts 75, 76, 78, 200, and 204
Chapter 1 Program in Local Educational Agencies; Notice of Proposed Rulemaking

DEPARTMENT OF EDUCATION

34 CFR Parts 75, 76, 78, 200, and 204

Chapter 1 Program in Local Educational Agencies

AGENCY: Department of Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: The U.S. Secretary of Education (Secretary) proposes to issue regulations implementing Part A of Chapter 1 of Title I of the Elementary and Secondary Education Act of 1965, as amended, which provides financial assistance through State educational agencies (SEAs) to local educational agencies (LEAs) to meet the special educational needs of educationally deprived children in school attendance areas with high concentrations of children from low-income families and of children in local institutions for neglected or delinquent children. Part A also provides assistance of the U.S. Secretary of the Interior for Indian children. In implementing Part A of Chapter 1, the Secretary proposes to make applicable appropriate portions of the Education Department General Administrative Regulations (EDGAR). Accordingly, the Secretary proposes conforming changes to 34 CFR Part 76 (State-Administered Programs) and Part 78 (Education Appeal Board). The Secretary also proposes several other amendments to Part 76 and 34 CFR Part 75 (Direct Grant Programs). Finally, the Secretary proposes to remove 34 CFR Part 204 because it is no longer needed.

DATE: Comments must be received on or before December 20, 1988.

ADDRESSES: All comments concerning these proposed regulations should be addressed to Mrs. Mary Jean LeTendre, Director, Compensatory Education Programs, Office of Elementary and Secondary Education, U.S. Department of Education, 400 Maryland Avenue, SW. (Room 2043), Washington, DC 20202–6132.

A copy of any comments that concern information collection requirements should also be sent to the Office of Management and Budget at the address listed in the Paperwork Reduction Act section of this preamble.

FOR FURTHER INFORMATION CONTACT: Mr. James R. Ogura, Chief, Program Policy Branch, U.S. Department of Education, 400 Maryland Avenue, SW. (Room 2043), Washington, DC 20202–6132. Telephone: (202) 732–4701.

SUPPLEMENTARY INFORMATION:

Overview of the Reauthorization

On April 28, 1988, the President signed into law the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. 100–297. Principal themes of this new legislation are to promote access to quality education for educationally deprived students and excellence in education for the Nation as a whole. In framing the legislation, Congress noted that Americans are becoming increasingly aware that enhancing educational opportunities is an investment in the future of the Nation. A less than quality education for elementary and secondary students would have severe and far-reaching economic consequences, such as much expensive programs for remediating older students' deficiencies, retraining unskilled workers, foregone tax revenues, and lost productivity.

In keeping with these themes, Title I of the Hawkins-Stafford Act amends the Elementary and Secondary Education Act of 1965 (ESEA) (the Act) to include a number of new and reauthorized Federal education programs. One of these programs is Chapter 1 of Title I of the ESEA, which reauthorizes programs previously contained in Chapter 1 of the Education Consolidation and Improvement Act of 1981 (ECIA). Part A of Chapter 1, which would be implemented by these proposed regulations, provides financial assistance through SEAs to LEAs to meet the special educational needs of educationally deprived children in school attendance areas with high concentrations of children from low-income families and of children in local institutions for neglected or delinquent children. This assistance is to improve the educational opportunities of educationally deprived children by helping these children succeed in the regular program, attain grade-level proficiency, and improve achievement in basic and more advanced skills. Part A of Chapter 1 also provides financial assistance to the U.S. Secretary of the Interior for Indian children.

In reauthorizing the Chapter 1 LEA Program, Congress retained the basic goals and structure of the program. Within the basic framework, however, Congress sought to strengthen and improve the program in a number of important respects. First, the reauthorization attempts to ensure that funds under the Chapter 1 LEA Program are targeted in areas and on children whose needs are the greatest. For example, section 1006 of the Act authorizes concentration grants for areas with particularly high concentrations of children from low-income families. Likewise, section 1013 refines the selection of eligible areas and schools by, for example, explicitly requiring ranking in order of poverty and restricting the "grandfathering" of ineligible areas to one year. Section 1014 also improves targeting by directing funds to those children determined, through an annual assessment of need, to be in greatest need of special assistance.

Second, the reauthorization emphasizes accountability and program effectiveness. Sections 1020 and 1021 are the centerpiece of efforts to improve the quality of Chapter 1 LEA projects. These sections require an LEA to identify unsuccessful projects and modify those projects, with the assistance of the SEA if necessary, to effect needed improvements. Section 1021(f) requires a similar identification and assessment of the program for participating children whose academic performance is not improving as it should. In addition, section 1435 requires the Secretary, in consultation with State and local agencies, to develop national standards for local evaluation of programs.

Third, the reauthorization encourages program improvement in other ways. For example, section 1011(b) authorizes an LEA to reserve up to and including five percent of its allocation under Part A of Chapter 1 for innovation projects. The Act also emphasizes in several places the requirement for an LEA to consider achievement not only in basic skills but also in more advanced skills to create an expectation that all students can master those necessary skills. In addition, an LEA must assure in its application that it will allocate time and resources for frequent and regular coordination of the curriculum of projects under Part A of Chapter 1 with the LEA's regular instructional program.

Fourth, the reauthorization contains a number of provisions to provide greater flexibility in the use of funds received under Part A of Chapter 1. The primary new provision that affords greater flexibility is section 1015 concerning schoolwide projects, which permits an LEA to use those funds in schools with high concentrations of children from low-income families to upgrade the entire educational program in the school. Section 1015 elminates the provision requiring a matching contribution of State and local funds for every child in the schoolwide project who is not eligible for Chapter 1.

Fifth, the reauthorization includes strong new parental involvement requirements in section 1016. Like the Department's existing regulations on

parental involvement under Chapter 1 of the ECIA, section 1016 does not mandate the particular forms that parental involvement should take. However, it incorporates a number of specific requirements that an LEA must implement to ensure significant parent involvement. Significantly, section 1016 adopts many of the parent involvement provisions set forth in the existing Chapter 1 LEA regulations, including strong emphasis on training parents to work with their children at home.

Finally, the reauthorization contains several new provisions concerning services for private school children under Part A of Chapter 1. For example, section 1017(d) authorizes payments to cover capital expenses incurred by an LEA in providing equitable services to private school children since the Supreme Court's decision in *Aguilar v. Felton*. Section 1017(b)(3)(A) also requires the Secretary to investigate and resolve a complaint that equitable services are not being provided to eligible private school children within 120 days after receiving the complaint.

Negotiated Rulemaking Demonstration

Section 1431(b) of the Act contains procedural requirements that the Department is to follow in developing and issuing regulations to govern the Chapter 1 LEA Program. Section 1431(b)(1) requires the Secretary to convene regional meetings to gain input on the content of proposed regulations. Participants at these meetings are to include representatives of Federal, State, and local administrators, parents, teachers, and local school board members. Subsequent to these meetings, section 1431(b)(2) requires the Secretary to draft and submit regulations on a minimum of four key issues to a modified negotiated rulemaking process as a demonstration of the process. Participants in the demonstration are to be selected from among those attending the regional meetings.

In accordance with these requirements, the Department convened five regional meetings to discuss primarily six issues: Targeting of school attendance areas and students, schoolwide projects, parental involvement, program improvement, State administration, and national evaluation standards. Meetings were held in Atlanta, Georgia, May 23–24; Philadelphia (Langhorne), Pennsylvania, May 26–27; Indianapolis, Indiana, June 1–2; Denver, Colorado, June 6–7; and San Francisco, California, June 9–10. Organizations representing the interest groups named in the Act were invited to nominate persons to be invited to the meetings. The Department announced these meetings in the **Federal Register** (53 FR 16292–93, May 6, 1988). Upon conclusion of the meetings the Department invited eighteen representatives to participate in a modified negotiation rulemaking process on July 19–20, 1988. The Department announced this meeting in the **Federal Register** (53 FR 26214–15, July 11, 1988). Taking into account views expressed at the regional meetings, the Department prepared draft regulations on the six main issues discussed, which served as the basis for the negotiated rulemaking process.

Following is a brief synopsis by topic area for the major issues and outcomes of the two-day negotiations. For each topic, the Department's draft proposed regulation is described, followed by the result of the negotiated rulemaking.

Targeting

The draft proposed regulations included four provisions not contained in the Act and therefore strictly regulatory:

1. Section 200.6(c) defined "educationally deprived child" as a child whose educational attainment is below what is expected for the child's age.

While the group supported retention of the defintion of "educationally deprived child," consensus on the language was not obtained. The definition in the proposed regulations contains the Department's proposed language, which is the same as that contained in the regulations for Chapter 1 of the ECIA and prior regulations under Title I of the ESEA.

2. Section 200.30(a)(1)(ii) set rules for determining attendance areas having high concentrations of low-income children, which the Department proposed to be areas in which the precentage or number of low-income children was at least as high as the percentage or average number per school of low-income children in the district as a whole.

The Department's proposal concerning attendance areas with high concentrations of low-income children has been modified to clarify that the identification may be made on a districtwide or grade span basis. While no specific language was proposed to the negotiation group, the group agreed that the change should be made.

3. Section 200.30(b)(3)(ii) made applicable other attendance area provisions to schools selected to participate in the Chapter 1 LEA Program. The group agreed to the Department's language.

4. Section 200.31(c)(5)(ii) clarified the selection of limited English proficient children to particiate in the Chapter 1 LEA Program. The group agreed to the Department's proposal.

The group also requested that the Department provide guidance on several items in the Policy Manual required by section 1436 of the Act. The items include the following:

1. Section 1013(b)(1) of the Act, allowing LEAs to serve all attendance areas when the percentage of low-income children in each attendance area is within five percentage points of the districtwide average of low-income children. The Department interprets this provision to mean five percentage points above the five percentage points below the average.

2. The effect on the selection of private school children if, in accordance with section 1013(b)(4) of the Act, an LEA selects a school rather than an attendance area to participate in the program.

3. Provisions in sections 1013(b)(5) and 1014(c)(3) related to continuation of services to schools and children no longer eligible to receive services under standard selection procedures.

4. Section 1013(b)(6) related to skipping schools that are receiving comparable services supported with non-Federal funds.

5. Under section 1014(d)(1), what constitutes valid assessment of limited English proficient children for selection to participate in the Chapter 1 LEA Program.

Parental Involvement

The draft proposed regulations contained three provisions not in the Act and therefore strictly regulatory:

1. Section 200.6(c) defined "in loco parentis" as a person with whom a child lives who acts in place of a parent, such as a grandparent, stepparent, aunt, uncle, or older sibling.

While the group agrees that the terms "in loco parentis" should be defined, it did not reach consensus on specific language. The proposed regulations modify the Department's original proposal to make clear that persons other than relatives may also act in place of a parent. In addition, the proposed regulations permit a parent or legal guardian to designate a person with whom a child does not live to act in place of the parent or guardian.

2. Section 200.34(a)(2)(ii) specified that consultation with parents be organized, systematic, ongoing, informed, and timely.

The group agreed to the Department's proposal, with a modification to make the provision apply to all consultation, not just the consultation required under

§ 200.34. The proposed regulations reflect this modification.

3. Section 200.34(e) clarified that allowable parental involvement activities may be paid for with funds received under this part.

The group agreed to the provisions in § 200.34(e), adding language to make clear that only Chapter 1 parental activities may be supported with funds under this part.

Several additional items were raised by group members. Consensus was reached to include language in § 200.34(c)(1)(i) that written policies must provide for timely responses to recommendations by parents. The group also agreed to clarify in § 200.34(a) that parental involvement must occur in the planning, design, and implementation of Chapter 1 LEA programs. No agreement was reached on a proposal that the regulations specify that consultation take place on both a districtwide and on a school-by-school basis, and the proposed regulations do not contain that provision. The Department thinks that this decision is best made at State or local levels.

Schoolwide Projects

Draft regulations proposed by the Department included four regulatory provisions for schoolwide projects not specified in section 1015 of the Act:

1. Section 200.36(c)(1) described how an LEA shall determine the number of educationally deprived children in a schoolwide project and clarified an LEA's responsibility to provide additional funds if the amount allocated to a project is not sufficient to meet the size, scope, and quality requirement.

The negotiated rulemaking group agreed with the two methods outlined in the draft proposed regulations for determining the number of educationally deprived children in a schoolwide project. This provision is contained in § 200.36(c)(1)(i) of the proposed regulations. The group also agreed to retain the regulatory requirement that LEA's provide sufficient funds for a schoolwide project to ensure that the project is of sufficient size, scope, and quality to give reasonable promise of success. This is included in § 200.36(c)(1)(ii) of the proposed regulations. However, as agreed by the group, the language was modified to shorten the provision and make clear the LEA's responsibility to ensure that sufficient funds are allocated for a schoolwide project while removing the specific requirement that an LEA allocate funds received under this part in excess of the per pupil average in other Chapter 1 schools.

2. Section 200.36(d)(2)(iii) clarified that an LEA is not required to demonstrate that particular services paid for with funds under this part supplement the services regularly provided in a school operating a schoolwide project. Group members accepted this regulatory provision without discussion.

3. Section 200.36(f)(1) clarified that, in meeting accountability requirements, comparisons of achievement levels must be made between children of comparable standing.

Group members agreed to this clarification as contained in § 200.36(f)(1) of the proposed regulations. Furthermore, the group requested the Department to add language clarifying that the accountability requirements pertain specifically to the continuation of a schoolwide project and would not result in an audit exception for past use of funds. This change also is reflected in § 200.36(f)(1) of the proposed regulations.

4. Section 200.36(g) clarified that eligible private school children residing in a schoolwide project attendance area must be determined on the same basis as the number of educationally deprived children in a schoolwide project is determined under § 200.36(c)(1)(i).

The group accepted this provision as drafted, and the proposed regulations reflect this consensus.

In addition to areas the Department proposed to regulate, participants raised a concern about the absence of a transition provisions in the three-year timeframe established for a schoolwide project during which an informed decision could be made whether to extend the project for an additional three years. Because the statute does not provide for a transition period, the group decided that this issue could not be addressed appropriately through regulations. In addition, group members questioned whether the program improvement provisions in sections 1020 and 1021 of the Act should apply, given the specific accountability requirements for schoolwide projects. The proposed regulations address this issue in § 200.36(f)(5), making clear that program improvement requirements apply to schoolwide projects. A final issue involved representation and participation of private school children. A proposal to include private school officials in the list of individuals to be involved in planning a schoolwide project under § 200.36(b)(6) did not receive consensus and is not included in the proposed regulations. Because it would be incompatible with attending a private school for private school children to participate fully in a public schoolwide project, the Department believes that inclusion of private school officials in planning a schoolwide project would be inappropriate. The group agreed that schoolwide projects cannot be conducted in private schools.

Program Improvement

The Department's draft proposed regulations included ten items not specified in the Act and therefore strictly regulatory:

1. Section 200.37(a)(2)(i) made clear that program improvement plans for SEAs must include standards for both aggregate performance and substantial progress toward meeting desired outcomes. Similar changes were made throughout §§ 200.37 and 200.38 to clarify that both methods of determining the success of Chapter 1 LEA projects apply.

The group did not reach consensus on the inclusion of both aggregate performance and desired outcomes throughout §§ 200.37 and 200.38. The Department believes, however, that this is the most consistent and meaningful reading of the Act, and the proposed regulations reflect this interpretation.

2. Section 200.37(a)(2)(i) provided that SEAs may establish minimum standards for program improvement.

No consensus was obtained on whether the SEA should be explicitly authorized to set minimum standards for program improvement. However, the Department believes this authority is implicit in both section 1020(a)(1) concerning program improvement and section 1451 concerning State rulemaking authority. In addition, in response to concerns raised by some group members, the proposed regulations clarify that any minimum standards should address the proposes of the Chapter 1 LEA Program stated in section 1001(b) of the Act.

3. Section 200.37(b)(1)(ii)(A) required SEAs to follow the progress of schools under local school improvement plans.

At the request of some group members, the Department's proposal has been modified to reflect the concern that the requirement to follow the progress of any school identified under § 200.38(b)(1) be done with the least possible paperwork and burden. While no consensus was reached on inclusion of this provision, the Department wishes to emphasize that the provision is not meant to require excessive reporting by LEAs.

4, 5, and 6. Section 200.38(b)(5)(i) required LEAs to develop a timeline for school improvement. Section 200.38(b)(5)(ii) set an outside time limit for implementation of local school

improvement plans. Section 200.38(b)(6)(i) set the time for implementation of joint LEA and SEA plans. Consensus was reached on the draft timelines.

7. Section 200.38(c)(2) clarified that local conditions may be considered during all program improvement activities. Some group members expressed concern that the provision, as drafted, could lead to setting low expected outcomes for certain students or be used to justify poor school or student performance. The proposed regulations clarify when LEAs may consider local conditions.

8. Section 200.38(d)(4) stated that student needs assessment data should be used to modify the program. Consensus was reached to add "if appropriate" to this provision.

9. Section 200.38(e) made clear that private school children are included in program improvement. The group agreed to this provision.

10. Section 200.38(f) set the effective date for initial data gathering as the 1988–89 school year. The group agreed to this provision.

In addition to these departmental proposals, the group agreed that a school that shows improvement in aggregate performance and substantial progress toward meeting desired outcomes during the time it is planning modification of its program need not implement that modification. This provision is included in § 200.38(b)(4)(ii).

Some group members suggested inclusion of information contained in the Conference Report accompanying the Hawkins-Stafford Act clarifying the meaning of "improvement." Although other members did not agree, the information has been included in § 200.38(b)(1)(ii). The Department believes the inclusion of this language clarifies the provision.

Several other issues were raised by group members, most particularly the role of parents and teachers in program improvement. No consensus was reached on this issue, and the proposed regulations do not address it. The Department believes that the general parental involvement provisions contained in § 200.34 apply to all phases to the Chapter 1 LEA Program, including program improvement, and considers § 200.34, together with § 200.38(a)(1)(ii), which reiterates a portion of section 1021(a)(1) of the Act, to be sufficient. Further, the Department believes that teacher involvement is implicit in the requirements to identify schools and students in need of improvement, and in designing plans to bring about the improvement.

State Administration

The Department's draft proposed regulations governing State administration of the Chapter 1 LEA Program contained regulatory provisions not included in the Act to clarify two aspects of the reauthorization:

1. Regarding the assignment of personnel to supervisory duties under section 1453(a) of the Act:

a. Section § 200.39(a)(2)(iii) set sixty minutes per day as the maximum time permitted for supervisory duties;

b. Section 200.39(b) allowed the amount of time spent on supervisory duties to be calculated on a daily, weekly, monthly, or annual basis; and

c. Section 200.39(c) highlighted allowable supervisory duties to include activities such as supervision of halls, playgrounds, lunchrooms, study halls, bus loading and unloading, and homerooms; participation as a member of a school or district curriculum committee; and participation in the selection of regular curriculum materials and supplies.

The negotiation group agreed to these provisions without modification. The proposed regulations reflect this consensus.

2. Regarding State regulations under section 1451 of the Act:

a. Section 200.70(c)(2) clarified an SEA's authority to review and approve LEA applications and to ensure that LEAs use funds received under this part in accordance with all applicable requirements.

b. Section 200.70(e) made clear that States are to convene a committee of practitioners before publication of a proposed or final rule or regulation, not just obtain views of each committee member on an individual basis.

Members of the negotiation group accepted the provision under § 200.70(c)(2) as proposed, but the group requested changes to § 200.70(e). Specifically, praticipants agreed to add representatives of private school children as a category of individuals to be included on the committee as required in section 1451(b) of the Act. The group also agreed to add language from the statute providing that a majority of the committee members be LEA representatives. A proposal to include a regulatory requirement that States select members of the committee of practitioners from nominations submitted by appropriate organizations and groups was not resolved. Section 200.70(e)(2) of the proposed regulations includes the two changes agreed to by the group and encourages States to seek recommendations from organizations and groups.

Section 200.70(e) of the draft proposed regulations required that the State convene a committee of practitioners before publication of a major proposed or final rule or regulation. Although the statute only appears to require that the committee actually convene to review emergency regulations prior to issuance in final form, the Department believed that it would facilitate development of State rules and regulations if the committee were also convened before publication of *major* rules and regulations. Although the Department only recommended convening the committee of practitioners before publishing major rules or regulations, the negotiation group agreed that the committee should be convened before publication of any proposed or final rule or regulation. Upon further reflection concerning the possible burden on States to convene the committee for any proposed or final State rules or regulations, the Secretary has decided to return to the statutory language that requires that the committee of practitioners convene only to review emergency regulations prior to issuance in final form. However, as indicated in § 200.70(e)(1)(ii), States are encouraged to convene the committee to review other State rules and regulations. The Secretary specifically invites comments on the appropriateness of convening the committee to review only emergency rules or regulations.

National Evaluation Standards

The draft proposed regulations contained a detailed description of the methods to be used by LEAs and SEAs to provide information to the Department in a form that would allow aggregation of the data to national totals. These proposed regulations meet the requirements in section 1435 that the Department establish national standards for local evaluations to be used in this aggregation, and that the Secretary provide SEAs and LEAs with advance notification of the standards.

The draft proposed regulations included some explanations of the technical standards that are applicable to LEA and SEA evaluations. During the negotiation group's discussion of the length of the evaluation section of the draft proposed regulations, members discussed the need for additional explanatory material and whether the information could be included in the Policy Manual rather than in the regulations. In reponse to concerns with the length of the evaluation section, the group agreed to remove all the explanatory information on the technical standards from the regulations

and recommended that both the removed information as well as additional explanations be included in the Policy Manual.

While full consensus on the provisions in these sections was not obtained, the majority of the members did agree to the draft proposed regulations with some revisions. Basically, the proposed regulations would:

1. Require the use of norm-referenced tests to provide aggregate data on the achievement of children participating in the Chapter 1 LEA Program or, if other tests are used, would require SEAs or LEAs to conduct equating studies so that the results of the other tests can be converted to the aggregatable measure. Norm-referenced tests are those for which measures of attainment have been established through a process that determines the distribution of scores to be expected among the population to be tested.

2. Allow funds received under this part to be used to pay for the equating of other than norm-referenced tests to the aggregatable measure.

3. Require the evaluation results be reported for aggregation on a fall-fall or spring-spring cycle. This would not preclude LEAs from testing on a fall-spring cycle as long as the data are reported on a fall-fall or spring-spring basis.

4. Use the Title I Evaluation and Reporting System (TIERS) as the basic method to gather aggregatable data, but would allow other methods, with approval of the SEA and the Secretary, to be used.

5. Require collection of achievement data in reading, mathematics, and language arts in grades 2–12.

6. Allow SEAs and LEAs to use sampling in gathering data.

7. Require SEAs to submit the following information for all LEAs, or a sample of LEAs if a sampling plan is approved by the Secretary, as part of the evaluation requirement contained in section 1019(b)(1) of the Act: (1) A statewide average of achievement gains resulting from participation in the Chapter 1 LEA Program for grades 2 through 12 in reading, mathematics, and language arts; (2) a statewide average of progress students are making in more advanced skills in reading and in mathematics; and (3) the number of students LEA projects excluded from the report because of missing or erroneous data and reasons for the exclusion.

8. State allowable and unallowable costs related to the evaluation of programs under this part.

The Secretary invites comments on these proposed national evaluation standards. Section 200.82 of the proposed regulations requires that an LEA evaluate student performance by testing achievement in the basic skill areas, including language arts. The Secretary specifically seeks comments on whether language arts testing should be required and, if so, at what grade level language arts becomes a basic skill area to be tested, and the appropriateness of such testing at the secondary level.

In addition, the Department's draft proposal also listed items to be included in the annual collection of information by SEAs required by section 1019(b)(3) of the Act, along with additional items the Secretary believed are necessary and helpful in constructing a picture of the impact of the Chapter 1 LEA Program. The Department has since decided not to include this list in the regulations, but includes it here to inform SEAs and LEAs of the information the Department intends to collect in an annual performance report under § 200.35(c). The items are: (1) The number of children participating in the program, by grade, who attend public schools; (2) the number of children participating in the program, by grade, who attend private schools; (3) the number of children in local institutions for neglected or delinquent children; (4) characteristics of participants, including age, gender, and ethnicity; (5) the number of participants—in public schools, in private schools, and in local institutions for neglected or delinquent children—each by type of instructional and supporting service provided; (6) the number of participants with handicapping conditions; (7) the number of schoolwide projects; (8) the number of LEAs with schools undergoing program improvement under § 200.38 and the total number of LEAs with Chapter 1 programs under this part; (9) the number of schools undergoing program improvement under § 200.38 and the total number of schools operating Chapter 1 programs under this part in the State; (10) achievement data collected from LEAs; and (11) the number of children receiving Chapter 1 services under this part and the number of children declared eligible to receive Chapter 1 services under this part in public and in private schools. This last data item was added by agreement of most members of the negotiated rulemaking group. The other items received strong support, although not full consensus.

The group requested that the Department include in the Policy Manual, required by section 1436 of the Act, the following:

(1) A discussion of the use of appropriate norming periods for testing to ensure accurate evaluation.

(2) An explanation of the need for schools to have spring test results on first grade children to use as a base for evaluating second grade projects, and that these results would not be used for evaluating first grade projects.

(3) Details on the technical standards referenced in §§ 200.81 and 200.85.

The use of national evaluation standards does not satisfy the full evaluation requirements for an LEA or SEA. Rather, as § 200.35(a)(1)(ii) indicates, an LEA must use the national evaluation standards to assess student achievement. The LEA is also required in § 200.35(a)(1)(i), however, to evaluate the effectiveness of its projects under this part, in terms of basic and more advanced skills, on the basis of the desired outcomes described in the LEA's application. Evaluation of desired outcomes, for example, may include the use of criterion-referenced tests or may measure reduction in dropout rates, improved attendance, or other indicators of program effectiveness. These requirements reflect the fact that use of national evaluation standards alone may not provide a complete picture of the results of the Chapter 1 LEA Program, particularly in the assessment of advanced skills. Further, SEAs may provide for evaluations that go beyond the minimum requirements that would be set by the proposed regulations in § 200.80(a). Section 200.35(b)(4) explicitly recognizes the SEA's authority to require LEAs to evaluate the effect of Chapter 1 projects under this part on achievement of Chapter 1 students in the regular program.

Other Significant Changes Resulting From Reauthorization

Innovation projects. Section 200.4(d) of these proposed regulations implements the new authority under section 1011(b) of the Act for an LEA to use up to and including five percent of its allocation for seven types of innovation projects. The provision is intended to provide more flexibility for LEAs in operating projects under this part and to promote program improvement. As indicated in § 200.4(d)(3), with two exceptions, the requirements of this part apply to innovation projects.

LEA applications. Section 200.20(a) of the proposed regulations lists the information that an LEA must include in its application for assistance. In addition to the assurances that were previously required, the application must include,

for example, a description of the procedures used to conduct an annual assessment of educational needs and a description of desired outcomes for project participants. These additions, required by section 1012(b) by the Act, are necessary to implement the program improvement requirements under sections 1020 and 1021 of the Act.

Concentration grants. Sections 200.3(c) and 200.25(a) of the proposed regulations implement new criteria for counties and LEAs to be eligible for concentration grants. In addition, § 200.25 of the proposed regulations provides procedures to allocate concentration grants to eligible LEAs in eligible counties, to LEAs in eligible counties with no eligible LEAs, and to LEAs in a State that receives a minimum concentration grant. That section also authorizes an SEA to reserve not more than two percent of the concentration grant funds it receives to make direct payments to eligible LEAs located in ineligible counties.

Reallocation. Section 200.26 of the proposed regulations provides revised procedures for determining whether an LEA is eligible to receive reallocated funds and for determining among all eligible LEAs those with the greatest need for additional funds.

Comparability. Section 1018(c) of the Act requires that an LEA develop procedures to comply with the comparability requirements and maintain records documenting its compliance. Section 200.43(c) of the proposed regulations implements the new statutory requirements. In addition, § 200.43(d) of the proposed regulations requires that either the SEA or LEA establish standards to determine that the LEA's policies result in the provision of equivalent staffing, materials, and supplies among Chapter 1 and non-Chapter 1 schools in the LEA.

Exclusions from the supplement-not-supplant and comparability requirements. Section 200.45 of the proposed regulations continues the current provision that allows an LEA to exclude (1) State and local funds spent for compensatory education from determinations of compliance with the supplement-not-supplant and comparability requirements; and (2) State and local funds spent for bilingual education, special education, and State "phase-in" programs from determinations of compliance with the comparability requirement. Section 1018(d) of the Act requires that the Secretary determine in advance that State programs meet certain requirements to be excluded and that the SEA make similar determinations for local programs. Section 200.45 (b) and (c) of the proposed regulations implements these new statutory requirements.

Participation of children in private schools. The proposed regulations implement three changes made in section 1017 of the Act concerning the participation of children in private schools. In enacting these changes, Congress sought to ameliorate the adverse effects of the Supreme Court's decision in *Aguilar* v. *Felton* on the quality and level of educational services provided to private school children. First, § 200.50(b) implements the provision in section 1017(b)(3)(A) that authorizes parents, teachers, and other concerned individuals or organizations to file complaints with the Secretary alleging that an LEA has failed to meet its obligation to provide equitable services to children enrolled in private schools. As § 200.50(b)(3) indicates, the Secretary investigates a complaint and issues a letter of finding within 120 days. Second, § 200.51 implements the requirement—made explicit in section 1017(a) of the Act—that an LEA must engage in "timely and meaningful consultation" with appropriate private school officials. Third, §§ 200.56–200.58 implement section 1017(d) regarding capital expenses. Congress specifically authorized payments for capital expenses to reduce the financial strain on LEAs that must pay for alternative delivery systems for private school children as a result of the *Felton* decision. As § 200.56 indicates, from funds appropriated for capital expenses, the Secretary pays each State an amount based on the number of private school children in the State served under Chapter 1 of the ECIA during the period July 1, 1984 through June 30, 1985. An LEA may apply to the SEA for these payments to cover capital expenses the LEA has paid from funds under this part and Chapter 1 of the ECIA funds since July 1, 1985, is currently paying, or would incur in order to provide services to additional private school children. Capital expenses are defined in § 200.57(a)(2) as only expenditures for noninstructional goods and services incurred as a result of the *Felton* decision. They do not include the purchase of instructional equipment such as computers. The SEA must distribute funds it receives for capital expenses on the basis of need, using criteria such as those in § 200.57(c).

In addition to these changes, the proposed regulations also include two provisions to clarify certain requirements following the *Felton* decision. First, in § 200.52 concerning equal expenditures, paragraph (a)(2) makes clear that an LEA must pay for reasonable and necessary administrative costs of providing services to public and private school children from the LEA's whole allocation received under this part. Second, § 200.52(b)(2) describes factors to be used to determine whether the services being provided to private school children are equitable. Finally, also in response to *Felton*, the proposed regulations delete the provision currently in § 200.73 concerning use of public school personnel in other than public facilities.

State complaint procedures. Section 200.72 of the proposed regulations has been added to require States to develop and implement procedures for resolving complaints at the State and local levels. The Secretary has added this section in response to language in the conference report accompanying the Hawkins-Stafford Act recommending that the Secretary "issue amended regulations making 34 CFR 76.780–783 applicable to Chapter 1." H.R. Rept. 567, 100th Cong., 2d Sess. 341 (1988). The Secretary has proposed, in a previously published notice of proposed rulemaking, to remove the complaint procedures from Part 76 and to retain those procedures only in regulations for the specific programs to which they apply. Rather than repeating the complaint provisions currently in Part 76, however, the Secretary has attempted in § 200.72 to implement the conferees' intent that States develop and implement procedures to resolve complaints while affording States maximum flexibility in tailoring those procedures to fit State and local needs.

Applicability of EDGAR

As indicated in § 200.5(a), the Secretary proposes to make the relevant parts of EDGAR applicable to programs under this part. In making this proposal, the Secretary is responding to a need for additional guidance. During the six years that EDGAR has not been applicable under Chapter 1 of the ECIA, SEAs and LEAs have asked the Department numerous questions that are answered by the provisions in EDGAR. Moreover, without the benefit of the guidance in EDGAR, a number of States have incurred audit exceptions concerning fiscal control and fund accountability. The Secretary believes that making the relevant parts of EDGAR applicable to programs under this part will address the need for better guidance and accountability. Moreover, the Secretary does not believe this action will create additional burden for SEAs and LEAs because EDGAR is applicable to other State-administered

Federal education programs and has recently been reviewed with respect to federalism issues and burden reduction, and unduly burdensome requirements have been revised or removed.

Specifically, the Secretary proposes to apply Part 76 (State-Administered Programs), with certain exceptions; Part 77 (Definitions that Apply to Department Regulations); and Part 78 (Education Appeal Board). In addition, regulations implementing the new enforcement provisions in Part E of the General Education Provisions Act would apply when those regulations are promulgated. Further, the Secretary proposes in § 200.5(a)(4) to apply Part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments), unless a State formally adopts its own written fiscal and administrative requirements for expending and accounting for funds received by the SEA and its LEAs under this part. If a State does not have its own written requirements implemented by July 1, 1989, but wishes to develop them, the requirements in Part 80 would apply until such time as written requirements are formally adopted. If a State chooses to apply its own written requirements, those requirements must be available for Federal inspection. In a case where departmental officials determine that a State's requirements are not sufficient, the enforcement provisions in Part E of GEPA would apply, including the due process provisions in that part. During the transition period provided for in section 1491(c) of the Act (July 1, 1988–June 30, 1989), a State may continue to comply with the requirements under Chapter 1 of the ECIA. The Secretary specifically invites comments on § 200.5(a)(4).

Enforcement Procedures

Section 3501 of the Hawkins-Stafford Act amended Part E of GEPA to provide for new enforcement procedures. The amended Part E requires the Secretary to establish an Office of Administrative Law Judges (OALJ) to replace the existing Education Appeal Board and sets out new hearing procedures. 20 U.S.C. 1234–1234i. With the exception of provisions regarding withholding actions and judicial review of those actions, which are superseded by sections 1433 and 1434 of the Act, Part E applies to the Chapter 1 LEA Program. As a result, appeals from cost disallowance decisions, received by an SEA on or after October 25, 1988, as well as most other enforcement proceedings under the Chapter 1 LEA Program, will be heard by the OALJ. Proposed regulations implementing Part E will address whether withholding actions under the Chapter 1 LEA Program will also be heard by the OALJ. The Education Appeal Board will continue to hear appeals from determinations under the Chapter 1 LEA Program received by an SEA before October 25.

Procedures for Bypass

Under a number of elementary and secondary education programs reauthorized by the Hawkins-Stafford Act—namely, Chapters 1 and 2 of Title I of the Elementary and Secondary Education Act of 1965, as amended, the Dwight D. Eisenhower Mathematics and Science Education Act, and Part B of the Drug-Free Schools and Communities Act of 1986—the Secretary is authorized to waive the requirements for providing services to private school children and to implement a bypass. The procedures that the Secretary would use in implementing a bypass under these programs are virtually identical. Rather than repeating the same procedures in a number of sets of regulations, therefore, the Secretary proposes to add procedures for bypass in §§ 76.671–76.677 of EDGAR that would apply to each program listed in § 76.670.

Cooperation with Audits

The proposed regulations include two new sections concerning cooperation with audits that would be added to Parts 75 and 76 of EDGAR, respectively. These sections make clear that grantees and subgrantees must cooperate with the Secretary and the Comptroller General of the United States or their authorized representatives in the conduct of audits. This cooperation includes access to records and personnel of the grantee and subgrantee for the purpose of obtaining relevant information, a requirement formerly contained in 34 CFR 204.11(a) (Chapter 1 of the ECIA) and 34 CFR 298.16(a) (Chapter 2 of the ECIA). Because access to records and personnel is essential in all Department programs, the Secretary proposes to clarify that the access to records and personnel must be without unreasonable restrictions. Examples that may constitute unreasonable restrictions that would not result in access include limiting written or oral information to be supplied, requiring the presence of a third person at an audit interview, or requiring that an audit interview be tape recorded.

The Secretary proposes these provisions because of concern about attempts by some grantees to impose unreasonble restrictions on auditors' access to the grantee's records or personnel. For example, some grantees have maintained that restrictions on access to personnel are necessary to ensure an accurate record of communications between their personnel and the auditors. The Secretary considers these restrictions to be incompatible with sound audit practice because they could discourage the complete and accurate disclosure of relevant information by a grantee's personnel. The Department's established audit procedures are designed to promote accuracy. Safeguards for grantees include ongoing access to the auditors in the course of the audit, an exit conference at the end of the field work, inviting the auditee to comment on and correct a draft audit report, and including the auditee's comments on the draft audit report in the final audit report. All interviews with personnel are summarized in the audit workpapers and the summaries can be made available to the auditee and to the interviewed person reasonably soon after the interview. Whistle-blowing disclosures by the interviewed person are not included in written summaries in order to protect the person from employer reprisal. It is important to note, however, that unattributed statements by personnel are not used as the basis for audit findings, but only as a source enabling the auditors to obtain objective information that would be available to the auditee. The proposed language in Parts 75 and 76 makes it clear that the grantee's or subgrantee's obligation to cooperate with audits means not imposing unreasonable restrictions on access to records and personnel. Comments concerning these provisions will be referred to the Office of Inspector General for consideration.

Removal of Part 204

The Secretary proposes in these regulations to remove Part 204, which contains general definitions and administrative, project, fiscal, and due process requirements for all Chapter 1 programs. Part 204 was originally promulgated to consolidate provisions that applied to all of the Chapter 1 programs to avoid repeating identical requirements in each set of regulations. Under the reauthorization, however, there are far fewer requirements that apply in the same way to each Chapter 1 program. Moreover, because the Secretary is proposing to make relevant provisions of EDGAR applicable, a number of common provisions currently contained in Part 204 would be governed by EDGAR. The Secretary believes, therefore, that a separate Part 204 is no longer necessary. Instead, all common requirements not contained in EDGAR will be included in the regulations implementing each specific Chaper 1

program, thereby reducing the number of documents with which the SEA or LEA must deal.

Executive Order 12291

These proposed regulations have been reviewed in accordance with Executive Order 12291. They are not classified as major because they do not meet the criteria for major regulations established in the order.

Executive Order 12606

The Secretary certifies that these proposed regulations have been reviewed in accordance with Executive Order 12606 and that they do not have a significant negative impact on family formation, maintenance, and general well-being. To the contrary, the Chapter 1 LEA program supports and strengthens the family by containing strong parental involvement requirements. Specifically, an LEA develop, in coordination with parents of participating children, programs, activities, and procedures to: inform parents about the Chapter 1 LEA program; support the efforts of parents, including training parents to work with their children at home; train teachers and other staff to work effectively with parents; consult with parents on an ongoing basis; and provide opportunities for the full participation of parents who lack literacy skills or whose native language is not English. Funds received under this part may be used to support these activities.

Regulatory Flexibility Act Certification

The Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities. The small entities that would be affected by these proposed regulations are small LEAs receiving Federal funds under this part. However, the regulations would not have a significant economic impact on the small LEAs affected because the regulations would not impose excessive regulatory burdens or require unnecessary Federal supervision. The regulations would impose minimal requirements to ensure the proper expenditure of program funds.

Paperwork Reduction Act of 1980

Sections 200.10, 200.20, 200.35, 200.36, 200.37, 200.38, 200.43, 200.57, 200.80, 200.84, and 200.87 contain information collection requirements. As required by the Paperwork Reduction Act of 1980, the Department of Education will submit a copy of these sections to the Office of Management and Budget for its review. (44 U.S.C. 3504(h))

Organizations and individuals desiring to submit comments on the information collection requirements should direct them to the Office of Information and Regulatory Affairs, Room 3002, New Executive Office Building, Washington, DC 20503, Attention: James D. Houser.

Invitation to comment

Interested persons are invited to submit comments and recommendations regarding these proposed regulations.

All comments submitted in response to these proposed regulations will be available for public inspection, during and after the comment period, in Room 2043, 400 Maryland Avenue, SW., Washington, DC, between the hours of 8:30 a.m. and 4:00 p.m., Monday through Friday of each week except Federal holidays.

To assist the Department in complying with the specific requirements of Executive Order 12291 and the Paperwork Reduction Act of 1980 and their overall requirement of reducing regulatory burden, the Secretary invites comment on whether there may be further opportunities to reduce any regulatory burdens found in these proposed regulations.

List of Subjects in 34 CFR Part 200

Administrative practice and procedure, Education of disadvantaged, Elementary and secondary education, Grant programs—education, Juvenile delinquency, Neglected, Private schools, Reporting and recordkeeping requirements, State-administered programs.

Dated: October 17, 1988.

Lauro F. Cavazos,

Secretary of Education.

(Catalog of Federal Domestic Assistance Numbers: 84.010, Chapter 1 Program in Local Educational Agencies; 84.012, Chaper 1 Program—State Administration)

The Secretary proposes to amend Parts 75, 76, 78 and 204 and revise Part 200 of Title 34 of the Code of Federal Regulations as follows:

1. Part 200 is revised to read as follows:

PART 200—CHAPTER 1 PROGRAM IN LOCAL EDUCATIONAL AGENCIES

Subpart A—General

Sec.

200.1 What is the Chapter 1 Program in Local Educational Agencies?
200.2 Who is eligible for a grant?
200.3 Who is eligible for a subgrant?
200.4 What kind of activities may an LEA conduct?
200.5 What regulations apply to the Chapter 1 LEA Program?
200.6 What definitions apply to the Chapter 1 LEA Program?
200.7 through 200.9 [Reserved]

Subpart B—How Does a State Apply for and Receive a Grant?

200.10 What assurances must a State submit to receive a grant?
200.11 through 200.19 [Reserved]

Subpart C—How Does an LEA Apply for and Receive a Subgrant?

200.20 How does an LEA apply for a subgrant?
200.21 Under what conditions does an SEA approve an LEA's application?

Allocation of Basic Grants

200.22 How does an SEA allocate funds for basic grants to an LEA?
200.23 How does an SEA allocate county aggregate amounts?
200.24 Are there exceptions to how an SEA allocates county aggregate amounts?

Allocation of Concentration Grants

200.25 How does an SEA allocate concentration grants to an LEA?

Reallocation

200.26 How does an SEA reallocate funds?
200.27 through 200.29 [Reserved]

Subpart D—What Project Requirements Apply to the Chapter 1 LEA Program?

200.30 How does an LEA select school attendance areas to be project areas?
200.31 How does an LEA identify and select children to participate?
200.32 What are the size, scope, and quality requirements of a project?
200.33 How does an LEA allocate resources to project areas and schools?
200.34 How does an LEA involve parents?
200.35 What are the requirements for evaluating and reporting project results?
200.36 What are the requirements for schoolwide projects?
200.37 What are an SEA's responsibilities for program improvement?
200.38 What are an LEA's responsibilities for program improvement?
200.39 How may personnel be assigned supervisory duties?

Subpart E—What Fiscal Requirements Apply to the Chapter 1 LEA Program?

200.40 What is the prohibition against using funds under this part to provide general aid?
200.41 What maintenance of effort requirements apply to this program?
200.42 Under what circumstances may an SEA waive the maintenance of effort requirement?
200.43 What comparability of services requirements apply to this program?
200.44 What supplement-not-supplant requirement applies to this program?
200.45 How may an LEA exclude special State and local funds from comparability and supplement-not-supplant determinations?
200.46 What is the maximum amount of funds an LEA may carry over?
200.47 What is the prohibition against considering payments under this part in determining State aid?

Sec.
200.48 through 200.49 [Reserved]

Subpart F—What Requirements Govern Participation in the Chapter 1 LEA Program of Educationally Deprived Children in Private Schools?

General

200.50 What are an LEA's responsibilities for providing Chapter 1 services to children in private schools?
200.51 What are the requirements for consultation with private school officials?
200.52 What factors does an LEA use in determining equitable participation?
200.53 What are the requirements to ensure that funds do not benefit a private school?
200.54 What are the requirements concerning equipment and supplies for the benefit of private school children?
200.55 May funds be used for construction of private school facilities?

Capital Expenses

200.56 How does a State receive a payment for capital expenses?
200.57 How does an LEA receive a payment for capital expenses?
200.58 How does an LEA use payments for capital expenses?
200.59 [Reserved]

Bypass

200.60 What general requirements govern the implementation of a bypass?
200.61 through 200.69 [Reserved]

Subpart G—What Are Other State Responsibilities for the Chapter 1 LEA Program?

200.70 Does a State have authority to issue State regulations for the Chapter 1 LEA Program?
200.71 How may State personnel paid with funds available under this part be assigned to State programs?
200.72 What complaint procedures must an SEA adopt?
200.73 What funds are available for an SEA to carry out its responsibilities?
200.74 through 200.79 [Reserved]

Subpart H—What Are the National Evaluation Standards?

Evaluation by an LEA

200.80 How does an LEA evaluate student achievement?
200.81 What technical standards does an LEA apply in evaluating student achievement?
200.82 What procedures does an LEA use in evaluating student achievement?
200.83 What alternative procedures may an LEA use?
200.84 How does an LEA report the results of student achievement to the SEA?

Evaluation by an SEA

200.85 What technical standards does an SEA use in conducting its evaluation?
200.86 What requirements govern an SEA sampling plan?
200.87 How does an SEA aggregate LEA student achievement data for inclusion in its evaluation?

Allowable and Nonallowable Costs

200.88 For what evaluation activities may an LEA or SEA use funds available under this part?
200.89 For what evaluation activities may an LEA or SEA not use funds available under this part?

Authority: 20 U.S.C. 2701–2731, 2821–2838, 2851–2854, 2891–2901, unless otherwise noted.

Subpart A—General

§ 200.1 What is the Chapter 1 Program in Local Educational Agencies?

(a) Under the Chapter 1 Program in Local Educational Agencies (LEAs)—referred to in this part as the Chapter 1 LEA Program—the Secretary provides Federal financial assistance for projects designed to meet the special educational needs of—

(1) Educationally deprived children in LEAs;

(2) Children in local institutions for neglected or delinquent children; and

(3) Indian children under section 1005(d) of the Act.

(b) The purpose of assistance under this part is to improve the educational opportunities of educationally deprived children by helping these children—

(1) Succeed in the regular program of the LEA;

(2) Attain grade level proficiency; and

(3) Improve achievement in basic and more advanced skills.

(Authority: 20 U.S.C. 2701)

§ 200.2 Who is eligible for a grant?

The Secretary provides funds under the Chapter 1 LEA Program to—

(a) States, through their respective State educational agencies (SEAs); and

(b) The Secretary of the Interior for Indian children referred to in § 200.1(a)(3).

(Authority: 20 U.S.C. 2711–2712)

§ 200.3 Who is eligible for a subgrant?

(a) *General rule.* (1) Except as provided in paragraph (d) of this section, an LEA that qualifies under paragraph (b) or (c) of this section is eligible for a subgrant under the Chapter 1 LEA Program.

(2) An SEA provides two types of subgrants—basic grants and concentration grants—to qualifying LEAs.

(b) *Basic grants.* An LEA is eligible for a basic grant if—

(1) There are at least 10 children counted under section 1005(c) of the Act in the school district of the LEA; or

(2) Satisfactory data on a school district basis are not available but the school district served by the LEA is located, in whole or in part, in a county in which there are at least 10 children counted under section 1005(c) of the Act.

(c) *Concentration grants.* (1) From funds available under section 1006(c) of the Act, an LEA is eligible for a concentration grant if—

(i) The LEA is eligible for a basic grant under paragraph (b) of this section;

(ii) The school district of the LEA is located, in whole or in part, in a county in which the number of children counted under section 1005(c) of the Act in the school districts of LEAs in the county in the preceding fiscal year exceeds—

(A) 6,500; or

(B) 15 percent of the total number of children aged 5 to 17, inclusive, in the school districts of LEAs in the county in the preceding fiscal year; and

(iii) The number of children counted under section 1005(c) of the Act in the preceding fiscal year in the school district of the LEA exceeds—

(A) 6,500; or

(B) 15 percent of the total number of children aged 5 to 17, inclusive, in the school district of the LEA in the preceding fiscal year.

(2) An LEA that does not qualify for a concentration grant under paragraph (c)(1) of this section may receive a concentration grant under § 200.25(b).

(d) *Exception.* This section does not apply to Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, Palau, the Federated States of Micronesia, and the Republic of the Marshall Islands.

(Authority: 20 U.S.C. 2711–2712)

§ 200.4 What kind of activities may an LEA conduct?

(a) Under the Chapter 1 LEA Program, an LEA may only conduct projects that are designed to provide supplemental services to meet the special educational needs of educationally deprived children at the preschool, elementary, and secondary school levels.

(b) An LEA is encouraged to—

(1) Develop programs to assist participating children to improve achievement in basic and more advanced skills; and

(2) Consider year-round services and activities, including intensive summer school programs.

(c) Authorized activities include—

(1) Acquisition of equipment and instructional materials;

(2) Acquisition of books and school library resources;

(3) Employment of special instructional personnel, school counselors, and other pupil services personnel;

(4) Employment and training of education aides;

(5) Payments to teachers of amounts in excess of regular salary schedules as a bonus for service in schools serving project areas;

(6) Training of teachers, librarians, other instructional and pupil services personnel, and, as appropriate, early childhood education professionals;

(7) Construction, if necessary, of school facilities;

(8) Parental involvement activities;

(9) Planning for and evaluation of Chapter 1 projects; and

(10) Other allowable activities.

(d)(1) With the approval of the SEA, an LEA may use up to and including 5 percent of the funds the LEA receives under §§ 200.22–200.26 for innovation projects to promote quality in the Chapter 1 LEA Program.

(2) Innovation projects may include only the following:

(i) Notwithstanding § 200.31(a), the continuation of services to children who received Chapter 1 services in any preceding year for a period sufficient to maintain progress made during the period of their participation in the program.

(ii) Notwithstanding § 200.31(c)(1), the provision of continued services, for a period not to exceed two years, to children participating in a Chapter 1 program who are transferred to ineligible areas or schools as part of a desegregation plan.

(iii) Incentive payments to schools that have demonstrated significant progress and success in attaining the goals of this part.

(iv) Training of teachers paid with funds under this part and teachers and librarians paid with other funds with respect to the special educational needs of eligible children and integration of activities under this part into regular classroom programs.

(v) Programs to encourage innovative approaches to parental involvement or rewards to or expansion of exemplary parental involvement programs.

(vi) Encouraging the involvement of community and private sector resources (including fiscal resources) in meeting the needs of eligible children.

(vii) Assistance by LEAs of schools identified under § 200.38(b).

(3) Except as provided in paragraph (d)(2) (i) through (ii) of this section, the requirements of this part apply to innovation projects conducted under this section.

(Authority: 20 U.S.C. 2721)

§ 200.5 What regulations apply to the Chapter 1 LEA Program?

The following regulations apply to the Chapter 1 LEA Program:

(a) The Education Department General Administrative Regulations (EDGAR) as follows:

(1) 34 CFR Part 76 (State-Administered Programs) as follows:

(i) Subpart A (General).

(ii) Sections 76.125 through 76.137 (Consolidated Grant Applications for Insular Areas).

(iii) Section 76.401 (Disapproval of an application—opportunity for a hearing).

(iv) Subpart F (What Conditions Must Be Met by the State and Its Subgrantees?), except for §§ 76.650 through 76.662 (Participation of Students Enrolled in Private Schools).

(v) Subpart G (What are the Administrative Responsibilities of the State and Its Subgrantees?), except for § 76.772 (Other responsibilities of the State).

(vi) Subpart H (What Procedures Does the Secretary Use to Get Compliance?).

(2) 34 CFR Part 77 (Definitions that Apply to Department Regulations).

(3) 34 CFR Part 78 (Education Appeal Board).

(4) 34 CFR Part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments), unless a State formally adopts its own written fiscal and administrative requirements for expending and accounting for all funds received by SEAs and LEAs under this part. These requirements must be available for Federal inspection and must—

(i) Be sufficiently specific to ensure that funds received under this part are used in compliance with all applicable statutory and regulatory provisions;

(ii) Result in the efficient and effective administration or programs under this part;

(iii) Ensure that funds received under this part are only spent for reasonable and necessary costs of operating programs under this part; and

(iv) Ensure that funds received under this part are not used for general expenses required to carry out other responsibilities of State or local governments.

(b) The regulations in this Part 200.

(Authority: 20 U.S.C. 2831(a))

§ 200.6 What definitions apply to the Chapter 1 LEA Program?

(a) *Definitions in the Elementary and Secondary Education Act.* The following terms used in this part are defined in section 1471 of the Act:

Average daily attendance
Construction
County
Effective schools programs
Elementary school
Equipment
Free public education
Local educational agency (LEA)
More advanced skills
Parent advisory council
Project area
Pupil services
Pupil services personnel
School facilities
Secondary school
Secretary
State
State educational agency (SEA)

(b) *Definitions in EDGAR.* The following terms used in this part are defined in 34 CFR 77.1:

Acquisition
Application
Department
EDGAR
GEPA
Grant
Minor remodeling
Personal property
Private
Project
Public
Real property
Subgrant
Supplies

(c) *Other definitions.* The following definitions also apply to this part:

"Act" means the Elementary and Secondary Education Act of 1965, as amended (ESEA).

"Chapter 1" means Chapter 1 of Title I of the Act.

"Children" means persons—

(1) Up to age 21 who are entitled to a free public education through grade 12; or

(2) Who are of preschool age.

"ECIA" means the Education Consolidation and Improvement Act of 1981.

"Educationally deprived children" means children whose educational attainment is below the level that is appropriate for children of their age.

"Fiscal year" means the Federal fiscal year—a period beginning on October 1 and ending on the following September 30—or another twelve-month period normally used by the SEA for recordkeeping.

"Institution for delinquent children" means, as determined by the SEA, a public or private residential facility that is operated primarily for the care of children who have been determined to be delinquent or in need of supervision.

"Institution for neglected children" means, as determined by the SEA, a

public or private residential facility—other than a foster home—that is operated primarily for the care of children who have been committed to the institution—or voluntarily placed in the institution under applicable State law—because of the abandonment by, neglect by, or death of parents.

"Parent." (1) The term includes a legal guardian or other person standing in loco parentis.

(2) "In loco parentis" means a person acting in place of a parent or legal guardian, and may include a person such as a grandparent, stepparent, aunt, uncle, older sibling, or other person—

(i) With whom a child lives; or

(ii) Who has been designated by a parent or legal guardian to act in place of the parent or legal guardian.

"Preschool children" means children who are—

(1) Below the age or grade level at which the LEA provides a free public education; and

(2) Of the age or grade level at which they can benefit from an organized instructional program provided in a school or other educational setting.

"School attendance area." (1) This term means, in relation to a particular public school, the geographic area in which the children who are normally served by that school reside.

(2) If a child's school attendance area cannot be determined on a geographic basis, the child is considered to be in the school attendance area of the school to which the child is assigned or would be assigned if the child were not attending a private school or another public school on a voluntary basis.

(Authority: 20 U.S.C. 2831(a), 2891)

§§ 200.7 through 200.9 [Reserved]

Subpart B—How Does a State Apply for and Receive a Grant?

§ 200.10 What assurances must a State submit to receive a grant?

(a) A State that wishes to receive funds under this part for projects designed to meet the special educational needs of educationally deprived children shall submit to the Secretary, through its SEA, assurances that the SEA—

(1) Will meet the requirements in section 435(b)(2) and (5) of the General Education Provisions Act (GEPA) relating to fiscal control and fund accounting procedures;

(2) Will carry out the activities in §§ 200.35 (evaluation) and 200.37 through 200.38 (school program improvement);

(3) Has on file a program improvement plan that meets the requirements of § 200.37(a); and

(4) Will ensure that its LEAs comply with all applicable statutory and regulatory requirements.

(b) The assurances submitted under paragraphs (a) of this section remain in effect for the duration of the SEA's participation in the Chapter 1 LEA Program.

(Authority: 20 U.S.C. 2722(a))

§§ 200.11 through 200.19 [Reserved]

Subpart C—How Does an LEA Apply for and Receive a Subgrant?

§ 200.20 How does an LEA apply for a subgrant?

(a) *Contents of an application.* An LEA may receive a subgrant under this part for any fiscal year if the LEA has on file with the SEA an application that contains the following information:

(1) A description of the procedures to be used to conduct an annual assessment of educational needs that meets the requirements of § 200.31(b).

(2) A rank ordering of eligible school attendance areas, including the identification of project areas and the basis for the selection of each project area.

(3) A description of the Chapter 1 project to be conducted, including a budget for the initial project year.

(4) A description of—

(i) The desired outcomes for children participating in the Chapter 1 project, in terms of basic and more advanced skills that all children are expected to master, that will be a basis for evaluating the project under § 200.35; and

(ii) How the LEA will measure substantial progress toward meeting the outcomes.

(5) A description of the services to be provided to eligible children enrolled in private elementary and secondary schools and children in local institutions for neglected or delinquent children.

(6) A description of any innovation projects the LEA proposes to conduct.

(7) Data showing that the LEA has maintained fiscal effort in accordance with § 200.41.

(8) For an LEA that is required to meet the comparability requirements in § 200.43—

(i) An assurance that the LEA is in compliance with the requirements in § 200.43(c)(1)(i); and

(ii) A copy of the LEA's salary schedule and policies required by § 200.43(c)(1)(i).

(9) The assurances required under section 436(b) (2) and (3) of GEPA relating to fiscal control and fund accounting procedures.

(10) Assurances that the LEA's Chapter 1 projects—

(i) Are of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting the special educational needs of the children being served;

(ii) Are designed and implemented in consultation with teachers (including early childhood professionals and librarians, if appropriate);

(iii) Provide for parental involvement in accordance with § 200.34;

(iv) Provide for the allocation of time and resources for frequent and regular coordination of the Chapter 1 curriculum with the regular instructional program; and

(v) Provide maximum coordination between Chapter 1 services and services provided to address children's handicapping conditions or limited English proficiency.

(11) Additional information an SEA finds necessary to ensure compliance with the assurances under paragraph (a)(10) of this section.

(b) *Development and approval of application.* An application must be—

(1) Developed in consultation with parents and teachers; and

(2) Approved by the SEA under § 200.21.

(c) *Frequency of submission.* (1) An LEA shall submit to the SEA an application prior to each project period.

(2) A project period may cover a period of not more than three years.

(d) *Annual updating of information in the application.* An LEA shall annually update its application by submitting to the SEA—

(1) Information on eligible school attendance areas and the selection of project areas required in paragraph (a)(2) of this section;

(2) Data showing that the LEA has maintained fiscal effort in accordance with §200.41; and

(3) A budget for the expenditure of funds available under this part during the proposed project year.

(e) *Further updating of information in the application.* If there are substantial changes in the number or needs of the children to be served or the services to be provided, an LEA shall submit a description of the changes to the SEA.

(Authority: 20 U.S.C. 2721(b), 2722 (b)–(c), 2723, 2728 (a), (c), 2838(c))

§ 200.21 Under what conditions does an SEA approve an LEA's application?

(a) *Standards for approval.* An SEA shall approve an LEA's application for a subgrant if—

(1) The application meets the requirements in § 200.20;

(2) The SEA determines that the LEA maintained fiscal effort in accordance with § 200.41; and

(3) The SEA determines that the LEA's salary schedule and policies under § 200.43(c)(1)(i), if implemented, would result in compliance with the comparability requirements in § 200.43(a).

(b) *Effect of SEA approval.* SEA approval of an application under paragraph (a) of this section does not relieve the LEA of its responsibility to comply with all applicable requirements.

(Authority: 20 U.S.C. 2722, 2728 (a), (c))

Allocation of Basic Grants

§ 200.22 How does an SEA allocate funds for basic grants to an LEA?

(a) If the Secretary determines the amount of funds that each LEA in a State is eligible to receive under section 1005(a)(2)(A) of the Act, an SEA shall allocate that amount to each LEA within the State.

(b) If the Secretary determines county aggregate amounts under section 1005(a)(2)(B) of the Act, the SEA shall allocate those county aggregate amounts to LEAs in accordance with §§ 200.23–200.24.

(Authority: 20 U.S.C. 2711(a))

§ 200.23 How does an SEA allocate county aggregate amounts?

Except as provided in § 200.24, an SEA shall allocate county aggregate amounts to LEAs as follows:

(a) *Allocations based on children in local institutions for neglected or delinquent children.* (1)(i) Except as provided in paragraphs (a)(2), (a)(3), and (a)(4) of this section, the SEA shall first allocate to a particular LEA that portion, if any, of the county aggregate amount that is based on the total number of children, aged 5 through 17, in the LEA's school district who resided in a local institution for neglected or delinquent children—and were not counted under subpart 3 of part D of Chapter 1 (programs for neglected or delinquent children operated by State agencies)—for at least 30 consecutive days, at least one day of which was in the month of October of the preceding fiscal year.

(ii) For the purpose of this section, the SEA shall consider children who are in correctional institutions to be residing in institutions for delinquent children.

(2) If the SEA determines that the LEA is unable or unwilling to provide for the special educational needs of the children referred to in paragraph (a)(1) of this section, the SEA shall—

(i) Reduce the LEA's allocation by the amount that is based on those children; and

(ii) Assign that portion of the LEA's allocation to—

(A) The SEA if the SEA assumes educational responsibility for those children; or

(B) Another State agency or LEA that agrees to assume educational responsibility for those children.

(3) If no public agency is willing to assume educational responsibility for the children referred to in paragraph (a)(1) of this section, the SEA may not reallocate to any other LEA that portion of the LEA's allocation that is based on those children.

(4) If a local institution for neglected or delinquent children closes and the children are transferred to an institution in the school district of another LEA, the SEA shall adjust the allocations of the two LEAs to reflect the transfer.

(b) *Allocations based on the distribution of children from low-income families.*—(1) *General rule.* (i) After following the procedures in paragraph (a) of this section, the SEA shall allocate the remaining county aggregate amount to LEAs in the county on the basis of the best available data on the number of children from low-income families in the school districts of those LEAs.

(ii) In accordance with section 1403(a) of the Act, an LEA's allocation under paragraphs (a) and (b)(1)(i) of this section may not be less than 85 percent of the allocation it received for the previous fiscal year.

(2) *Special circumstances.* The SEA shall adjust the allocations it makes under paragraph (b)(1) of this section to reflect the following special circumstances:

(i) *LEAs in more than one county.* If a school district of an LEA overlaps a county boundary, the SEA shall make, on a proportionate basis, a separate allocation to the LEA from the county aggregate amount for each county in which the school district of the LEA is located provided the aggregate number of children from low-income families in the LEA is 10 or more.

(ii) *LEAs serving children from another LEA.* If an LEA serves a substantial number of children within the same geographic area as another LEA, the SEA may adjust the allocations between the LEAs in a manner the SEA determines will best carry out the purposes of Chapter 1.

(iii) *Changes in LEAs.* If an LEA's school district is merged or consolidated, or a portion of the district is transferred to another LEA, the SEA may—

(A) Adjust the allocations of the affected LEAs to reflect the number of children from low-income families for whom each LEA is providing a free public education; or

(B) Permit an LEA that has submitted an approved application to carry out the project, by itself or in cooperation with another LEA, during the remainder of the fiscal year.

(3) *Minimum allocation.* The SEA is not required to allocate to an LEA a basic grant of funds under this part generated by fewer than 10 children.

(Authority: 20 U.S.C. 2711, 2822–2823)

§ 200.24 Are there exceptions to how an SEA allocates county aggregate amounts?

(a) In any State in which a large number of LEAs overlap county boundaries, the SEA may apply to the Secretary for authority to make allocations directly to LEAs without regard to counties.

(b) If an SEA allocates directly to LEAs under paragraph (a) of this section, the SEA shall use the same factors to determine the LEAs' allocations as the Secretary used to compute county aggregate amounts under section 1005(a)(2)(B) of the Act.

(c) An LEA dissatisfied with the determination by the SEA under this section may appeal directly to the Secretary for a final determination.

(Authority: 20 U.S.C. 2711)

Allocation of Concentration Grants

§ 200.25 How does an SEA allocate concentration grants to an LEA?

(a) *General rule.* (1) Except as provided in paragraph (b) of this section, an SEA shall allocate a county's concentration grant funds only to LEAs—

(i) Whose school districts lie, in whole or in part, within the county; and

(ii) That meet the eligibility criteria in § 200.3(c)(1).

(2) In allocating concentration grant funds to an LEA under paragraph (a) of this section, the SEA shall distribute the funds to each eligible LEA in proportion to the number of children from low-income families in the school district of each LEA compared to the number of those children in the school districts of all eligible LEAs in the county.

(b) *Exceptions.* (1)(i) An SEA may reserve not more than two percent of the amount of concentration grant funds it receives to make direct payments to LEAs that meet the criteria in § 200.3(c)(1)(i) and (iii)(B) but are located in counties that are not eligible under § 200.3(c)(1)(ii).

(ii) If an SEA plans to reserve concentration grant funds under paragraph (b)(1)(i) of this section, the SEA, before allocating any

concentration grant funds under paragraph (a) or (b)(2) through (3) of this section, shall—

(A) Determine the number of eligible LEAs located in ineligible counties;

(B) Determine the appropriate amount to be reserved;

(C) Proportionately reduce the amount available for concentration grants for eligible counties or LEAs to provide the reserved amount; and

(D) Distribute the reserved funds among all eligible LEAs located in ineligible counties in proportion to the number of children from low-income families in the school district of each LEA compared to the number of those children in all the school districts of those LEAs.

(2) In a county in which no LEA meets the eligibility criteria in § 200.3(c)(1)(iii), an SEA shall—

(i) Rank order the LEAs in the county according to the number of children from low-income families in each LEA;

(ii) Identify those LEAs in which either the number or percentage of children from low-income families exceeds the average number or percentage of those children in the county; and

(iii) Allocate concentration grant funds for the county among the LEAs identified in paragraph (b)(1)(ii) of this section in proportion to the number of children from low-income families in the school district of each LEA compared to the number of those children in all the school districts of those LEAs.

(3) In a State that receives a minimum concentration grant under section 1006(a)(1)(B) of the Act, the SEA shall—

(i) Allocate concentration grant funds among LEAs in the State in accordance with the provisions in paragraphs (a) and (b)(1) of this section; or

(ii) Without regard to the counties in which the LEAs are located—

(A) Rank order the LEAs in the State according to the number or percentage of children from low-income families in each LEA;

(B) Identify those LEAs in which either the number or percentage of children from low-income families exceeds the average number or percentage of those children in the State; and

(C) Allocate concentration grant funds among the LEAs identified in paragraph (b)(2)(ii)(B) of this section in proportion to the number of children from low-income families in the school district of each LEA compared to the number of those children in all the school districts of all LEAs so identified.

(Authority: 20 U.S.C. 2712)

Reallocation

§ 200.26 How does an SEA reallocate funds?

(a) An SEA shall reallocate, on a timely basis, excess Chapter 1 funds provided under §§ 200.22 through 200.25—

(1) From an LEA that—

(i) Is not participating in the Chapter 1 LEA Program;

(ii) Has failed to meet the maintenance of effort requirements in § 200.41; or

(iii) Has carryover funds that exceed the percentage limitation in § 200.46; or

(2) That the SEA has recovered after determining that an LEA has failed to spend funds received under this part in accordance with applicable law.

(b)(1) An SEA may reallocate excess Chapter 1 funds referred to in paragraph (a) of this section only to LEAs with the greatest need for those funds because of inequities in, or mitigating hardships caused by, application of the allocation formula in section 1005 of the Act.

(2) Factors that may cause inequities in the formula include—

(i) An increase since the most recent decennial census, caused by population shifts or changing economic conditions, in the number of children from low-income families.

(ii) Caseload data used in the allocation that are not representative of the number of neglected or delinquent children in local institutions; and

(iii) Other circumstances in which the statutory formula fails to reflect accurately the number or percentage of low-income children.

(c) The SEA shall develop procedures for reallocating excess Chapter 1 funds provided under §§ 200.22 through 200.25 that include the following three steps:

(1) A determination of which LEAs are eligible to receive additional funds as indicated by the presence of factors such as those in paragraph (b)(2) of this section. An LEA's eligibility must be based on inequity caused by the allocation formula.

(2) From among the eligible LEAs, a determination of which LEAs have the greatest need for funds. The SEA may consider such factors as—

(i) The degree of increase in the number or percentage of children from low-income families; and

(ii) An LEA's need for additional funds to provide Chapter 1 services to address the unmet needs of eligible Chapter 1 children.

(3) An establishment of timelines for reallocation.

(d)(1) An SEA may reallocate excess funds only during the Federal fiscal year for which the funds were appropriated or during the succeeding Federal fiscal year.

(2) Reallocation does not extend the period during which the excess funds are available for obligation.

(Authority: 20 U.S.C. 1225(b), 2823(b), 2832(b))

§§ 200.27 through 200.29 [Reserved]

Subpart D—What Project Requirements Apply to the Chapter 1 LEA Program?

§ 200.30 How does an LEA select school attendance areas to be project areas?

(a) *General rule.* (1)(i) Except as provided in paragraphs (b) and (d) of this section, an LEA that receives Chapter 1 funds under this part shall conduct Chapter 1 projects in school attendance areas that have high concentrations of children from low-income families.

(ii) A school attendance area has a high concentration of children from low-income families if—

(A) The percentage of children from low-income families in that school attendance area is at least as high as the percentage of children from low-income families in the LEA as a whole; or

(B) The number of children from low-income families in that school attendance area is at least equal to the average number of children from low-income families per school attendance area in the LEA as a whole.

(iii) If an LEA ranks its school attendance areas by grade span groupings under paragraph (a)(2)(ii)(A) of this section, the LEA shall determine the percentage or average number of children from low-income families in the LEA as a whole for each grade span grouping.

(2)(i) If funds available under this part are insufficient to provide programs and projects for all educationally deprived children in eligible school attendance areas, an LEA shall annually rank its eligible school attendance areas from highest to lowest according to relative degrees of concentrations of children from low-income families.

(ii) An LEA may rank its school attendance areas—

(A) By grade span groupings; or

(B) For the entire LEA.

(3) An LEA may carry out a Chapter 1 program or project in an eligible school attendance area only if it carries out a Chapter 1 program or project in all other eligible school attendance areas that are ranked higher under paragraph (a)(2) of this section.

(b) *Special rules.* Notwithstanding paragraph (a) of this section, an LEA

may identify and rank eligible school attendance areas as follows:

(1) An LEA may designate as eligible and serve all school attendance areas within a grade span grouping or in the entire LEA if the percentage of children from low-income families in each school attendance area is within five percentage points of the average percentage of children from low-income families within a grade span grouping or within the entire LEA.

(2)(i) If the expenditure requirements in paragraph (b)(2)(ii) of this section are met, an LEA may designate as eligible any school attendance areas in which at least 25 percent of the children are from low-income families.

(ii) An LEA may use the provision in paragraph (b)(2)(i) of this section only if, in each school attendance area of the LEA in which Chapter 1 projects were carried out during the preceding year, the aggregate per pupil expenditures of funds available under this part and funds from a State program that meets the requirements of section 1018(d)(1)(B) of the Act in the current fiscal year equal or exceed the aggregate per pupil expenditures from those sources in the preceding fiscal year.

(3)(i) An LEA may designate a school that serves an ineligible school attendance area as an eligible school if the proportion of children from low-income families in average daily attendance in that school is substantially equal to the proportion of children from low-income families in an eligible school attendance area.

(ii) If an LEA designates a school serving an ineligible attendance area as an eligible school under paragraph (b)(3)(i) of this section, the LEA shall—

(A) Determine that the school complies with the school attendance area requirements in paragraph (a) of this section; and

(B) At its discretion, apply the special rules for identifying and ranking eligible school attendance areas in paragraph (b) of this section to the school.

(4) With the approval of the SEA, an LEA may designate as eligible and serve a school attendance area with a substantially higher number or percentage of educationally deprived children before school attendance areas with higher concentrations of children from low-income families if—

(i) The LEA does not serve more school attendance areas than could otherwise be served; and

(ii) The SEA determines that the selection of school attendance areas under paragraph (b)(4) of this section will not substantially impair the delivery of services to educationally deprived children from low-income families in project areas served by the LEA.

(5) An LEA may continue to provide for one year Chapter 1 services in a school attendance area that does not qualify under paragraph (a) of this section of that school attendance area was eligible and selected under the standards in paragraph (a) of this section in the immediately preceding year.

(6) With the approval of the SEA, an LEA may skip eligible school attendance areas that have higher proportions or numbers of children from low-income families if the children in those attendance areas are receiving, from non-Federal funds, services of the same nature and scope as would otherwise be provided under Chapter 1, except that the LEA shall—

(i) Determine the number of children in private elementary and secondary schools to receive Chapter 1 services without regard to non-Federal compensatory education funds used to serve eligible children in public elementary and secondary schools; and

(ii) Identify children in private schools to receive Chapter 1 services in accordance with the requirements in paragraphs (a) and (b) (1) through (5) of this section.

(c) For purposes of paragraphs (a) and (b) of this section, an LEA, on the basis of the best available data on children from low-income families, shall annually select and use the same measure of low income—which may be a composite of several indicators—to identify and rank eligible school attendance areas.

(d) *Exemption.* An LEA with a total enrollment of fewer than 1,000 children does not have to comply with the requirements in this section but shall comply with the requirements in § 200.31.

(Authority: 20 U.S.C. 2723(a)–(b); H.R. Rept. 95, 100th Cong., 1st Sess. 21 (1987))

§ 200.31 How does an LEA identify and select children to participate?

(a) *General rule.* Except as provided in paragraph (c) of this section and § 200.36, an LEA shall use funds available under this part only for educationally deprived children, identified under paragraph (b) of this section as having the greatest need for special assistance, in school attendance areas or schools selected under § 200.30.

(b) *Annual assessment of educational needs.* On the basis of an annual assessment of educational needs, an LEA that receives funds under this part shall—

(1) Identify educationally deprived children, as defined in § 200.6(c), in all eligible school attendance areas, including educationally deprived children in private schools;

(2) Identify the general instructional areas on which the program will focus;

(3) Establish educationally related objective criteria, which include written or oral testing instruments, for each grade level and instructional area to select educationally deprived children for participation in the Chapter 1 project;

(4) Uniformly apply the criteria required in paragraph (b)(3) of this section to particular grade levels throughout the LEA;

(5) Select those educationally deprived children who have the greatest need for special assistance; and

(6) Determine the special educational needs, and library resource needs, of participating children with sufficient specificity to ensure concentration on those needs.

(c) *Special rules.* In selecting children to participate in Chapter 1, an LEA may implement the following provisions:

(1) An LEA may use funds available under this part during the current school year to continue to serve educationally deprived children who begin participation in a Chapter 1 project but who, in the same school year, are transferred to a school attendance area or a school not receiving funds under this part.

(2) An LEA may skip educationally deprived children in greatest need for special assistance if those children are receiving, from non-Federal sources, services of the same nature and scope as would otherwise be provided under Chapter 1.

(3) An LEA may use funds available under this part to serve, for a maximum of two additional years, children who were identified in the previous year as being in greatest need for special assistance and who continue to be educationally deprived but are no longer in greatest need for special assistance.

(4) An LEA shall consider as eligible and may serve children who, at any time in the previous two years, received Chapter 1 services under the Chapter 1 Program for Neglected or Delinquent Children.

(5)(i) An LEA may identify as eligible and serve under Chapter 1 children receiving services to overcome handicapping conditions or limited English proficiency if these children—

(A) Have needs stemming from educational deprivation and not needs related solely to their handicapping conditions or limited English proficiency; and

(B) Are selected on the same basis as other children identified as eligible for

and selected to receive services under paragraph (b) of this section.

(ii) In identifying and selecting limited English proficient children for participation in Chapter 1, an LEA shall—

(A) For children with sufficient English language proficiency, use tests written in the English language, with or without bilingual assistance; or

(B) For children whose lack of English language proficiency precludes testing in the English language, use factors such as teacher evaluation of student performance, language dominance tests, or other indicators that may be used separately, as a composite score, or as a composite with weighting, to select children on a basis other than English language deficiency.

(iii) An LEA may not use funds available under this part to provide services that are required by Federal, State, or local laws to overcome children's handicapping conditions or limited English proficiency.

(Authority: 20 U.S.C. 2724; H.R. Rept. 567, 100th Cong., 2d Sess. 322 (1988) (Conf. Rept.))

§ 200.32 What are the size, scope, and quality requirements of a project?

An LEA shall use funds available under this part for a project that is of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting the special educational needs of the children being served.

(Authority: 20 U.S.C. 2722(c)(1))

§ 200.33 How does an LEA allocate resources to project areas and schools?

(a) Except as provided in paragraph (b) of this section, an LEA shall allocate funds available under this part among project areas and schools on the basis of—

(1) The number and needs of children selected for participation under § 200.31;

(2) The degree of educational deprivation of these children; and

(3) The services to be provided.

(b) For the sole purpose of allocating funds available under this part among project areas and schools under paragraph (a) of this section, an LEA may continue to count, for two additional years, children in those areas and schools who—

(1) Received Chapter 1 services in the preceeding school year; but

(2) Are no longer eligible for services because of improved academic achievement attributable to the Chapter 1 services.

(Authority: 20 U.S.C. 2723(c))

§ 200.34 How does an LEA involve parents?

(a) *General rule.* (1) An LEA may receive funds under this part only if it implements programs, activities, and procedures for the involvement of parents in programs assisted under this part. This involvement must include, but is not limited to, parent input into the planning, design, and implementation of these programs.

(2)(i) The activities and procedures required under paragraph (a)(1) of this section must be planned and implemented with the meaningful consultation of parents of participating children.

(ii) The consultation required in paragraph (a)(2)(i) of this section and in other sections in this part must be organized, systematic, ongoing, informed, and timely in relation to decisions about the program.

(3) The activities and procedures for the involvement of parents must be of sufficient size, scope, and quality to give reasonable promise of substantial progress toward achieving the goals under paragraph (b) of this section.

(b) *Goals of parental involvement.* To meet the requirements in paragraph (a) of this section, an LEA shall, in coordination with parents of participating children, develop programs, activities, and procedures that have the following goals:

(1) To inform parents of participating children of the—

(i) Reasons their children are participating in the programs; and

(ii) Specific instructional objectives and methods of the program.

(2) To support the efforts of parents, including training parents, to the maximum extent practicable, to—

(i) Work with their children in the home to attain the instructional objectives of the program; and

(ii) Understand the program requirements.

(iii) To train parents and teachers to build a partnership between home and school.

(4) To train teachers and other staff members involved in the Chapter 1 LEA Program to work effectively with the parents of participating children.

(5) To consult with parents, on an ongoing basis, concerning the manner in which the school and parents can work better together to achieve the program's objectives.

(6) To provide a comprehensive range of opportunities for parents to become informed, in a timely way, about how the program will be designed, operated, and evaluated, allowing opportunities for parental participation, so that parents and educators can work together to achieve the program's objectives.

(7) To ensure opportunities, to the extent practicable, for the full participation of parents who lack literacy skills or whose native language is not English.

(c) *Specific requirements.* An LEA shall implement the following activities:

(1)(i) Develop written policies, after consultation with and review by parents, to ensure that parents are involved in the planning, design, and implementation of the Chapter 1 LEA Program. The written policies must provide for timely response to recommendations by parents.

(ii) Make the policies available to parents of participating children.

(2) Convene an annual meeting, to which all parents of participating children must be invited, to explain the programs and activities provided with funds available under this part. The annual meeting may be districtwide or at the building level so long as all parents of participating children are provided the opportunity to attend.

(3)(i) Provide parents of participating children with reports on their children's progress.

(ii) To the extent practical, conduct a parent-teacher conference with the parents of each participating child to discuss the child's progress, placement, and methods the parent can use to complement the child's instruction.

(iii) Make education personnel under the Chapter 1 LEA Program readily accessible to parents.

(iv) Permit parents of participating children to observe Chapter 1 LEA Program activities.

(4) Provide opportunities for regular meetings of parents to formulate parental input into the program, if parents of participating children so desire.

(5) Provide parents of participating children with timely information about the program.

(6) Make parents aware of parental involvement requirements and other relevant provisions of the program.

(7) Provide reasonable support for parental involvement activities as parents may request.

(8) Coordinate, to the extent possible, parental involvement activities with programs funded under the Adult Education Act.

(9) To the extent practicable, provide information, programs, and activities for parents under this section in a language and form that the parents understand.

(d) *Assessment of the parental involvement program.* An LEA shall annually assess, through consultation

with parents, the effectiveness of the parental involvement program and determine what action needs to be taken, if any, to increase parental participation.

(e) *Allowable activities and costs.* Chapter 1 activities that an LEA may support with funds available under this part to meet the requirements of this section include the following:

(1) Regular parent conferences.

(2) Parent resource centers.

(3) Parent training programs, including reasonable and necessary expenditures associated with parents' attendance at training sessions.

(4) Hiring, training, and utilization of parent involvement liaison workers.

(5) Reporting to parents on children's progress.

(6) Training and support of personnel to work with parents, coordinate parent activities, and make home contacts.

(7) Use of parents as classroom volunteers, tutors, and aides.

(8) Provision of school-to-home complementary curriculum and materials.

(9) Provision of assistance in implementing home-based education activities that reinforce classroom instruction and student motivation.

(10) Provision of timely information on the Chapter 1 LEA Program, including program plans and evaluations.

(11) Solicitation of parents' suggestions in the planning, development, and operation of the program.

(12) Provision of timely responses to parent recommendations.

(13) Parent advisory councils.

(14) Other activities designed to enlist the support and participation of parents in the instruction of their children.

(Authority: 20 U.S.C. 2726, 2731(a)(4); H.R. Rept. 95, 100th Cong., 1st Sess. 27–29 (1987); S. Rept. 222, 100th Cong., 1st Sess. 14–16 (1987))

§ 200.35 What are the requirements for evaluating and reporting project results?

(a) *LEA evaluations.* (1) An LEA shall evaluate, at least once every three years, the effectiveness of its Chapter 1 projects, in terms of basic and more advanced skills that all children are expected to master, on the basis of—

(i) The desired outcomes described in the LEA's application; and

(ii) Except for Chapter 1 children in preschool, kindergarten, and first grade, student achievement, aggregated for the LEA as a whole, in accordance with the national standards in Subpart H.

(2)(i) The LEA shall determine whether improved performance of Chapter 1 participating children is sustained over a period of more than 12 months.

(ii) To make this determination, an LEA shall assess performance of the same children for at least two consecutive 12 month periods, provided these children continue to be enrolled in schools of the LEA.

Example: An LEA provides Chapter 1 services during the 1989–90 school year. The LEA measures the gains made by participating children on a spring-spring testing cycle (spring of 1989, 1990). To determine whether improved performance is sustained over a period of more than 12 months, the LEA measures performance again in the spring of 1991.

(3) The LEA shall report its evaluation results to the SEA at least once during each three-year application cycle.

(b) *SEA evaluations.* (1) An SEA shall evaluate, at least every two years, the Chapter 1 programs in the State on the basis of the local evaluations conducted under paragraph (a) of this section and sections 1107(b), 1202(a)(6), and 1242(d) of the Act.

(2) The SEA shall inform its LEAs, in advance, of the specific data that will be needed and how the data may be collected.

(3) The SEA shall—

(i) By a date established by the Secretary, submit its evaluation to the Secretary; and

(ii) Make public the results of the evaluation.

(4) The SEA may require LEAs, in addition to meeting the requirements in § 200.80(a), to evaluate the effect of Chapter 1 projects on Chapter 1 children's achievement in basic and more advanced skills within the regular program, including, but not limited to, writing, science, history, or other subjects.

(c) *Annual performance report.* (1) An SEA shall annually—

(i) Collect data specified in section 1019 of the Act and by the Secretary in the SEA's annual performance report; and

(ii) Submit those data to the Secretary.

(2) An LEA shall provide to the SEA any data needed by the SEA to complete its annual performance report.

(Authority: 20 U.S.C. 2722(b), 2729, 2835, 2852)

§ 200.36 What are the requirements for schoolwide projects?

(a) *Eligibility for a schoolwide project.* An LEA may conduct a Chapter 1 project to upgrade the entire educational program in a school if the following requirements are met:

(1) The school serves an eligible attendance area or is an eligible school in accordance with § 200.30.

(2) For the first year of the three-year period provided under paragraph (d) of this section, at least 75 percent of the children residing in the school attendance area or enrolled in the school are from low-income families.

(3) The LEA develops a plan for the school that—

(i) Meets the requirements in paragraph (b) of this section; and

(ii) Has been approved by the SEA.

(4) The LEA meets the fiscal requirements in paragraph (c) of this section.

(b) *Required plan.* The plan required under paragraph (a)(3) of this section must—

(1) Provide for a comprehensive assessment of the educational needs of all students in the school, particularly the special needs of educationally deprived children;

(2) Establish goals to—

(i) Meet the special needs of all students; and

(ii) Ensure that educationally deprived children are—

(A) Served effectively; and

(B) Demonstrate performance gains that are comparable to the performance gains of other students;

(3) Describe the instructional program, pupil services, and procedures to be used to implement the goals of the schoolwide project;

(4) Describe the specific uses of funds available under this part in the schoolwide project;

(5) If appropriate, describe how the school will move to implement an effective schools program as defined in section 1471 of the Act;

(6) Be developed with the involvement of individuals who will be engaged in carrying out the plan, including—

(i) Parents;

(ii) Teachers;

(iii) Librarians;

(iv) Education aides;

(v) Pupil services personnel;

(vi) Administrators; and

(vii) If the plan relates to a secondary school, students;

(7) Provide for consultation among the individuals listed in paragraph (b)(6) of this section concerning the—

(i) Educational progress of all students in the school; and

(ii) Development and implementation of the accountability measures required in paragraph (f) of this section;

(8) Provide for appropriate training of parents of children to be served, teachers, librarians, and other instructional, administrative, and pupil services personnel to enable these individuals to carry out the plan; and

(9) Include procedures for measuring progress under paragraph (f) of this

section and a description of the measures to be used.

(c) *Fiscal requirements.* An LEA that uses funds available under this part to conduct a schoolwide project shall meet the following fiscal requirements:

(1)(i) In an LEA with one or more schoolwide projects and one or more other schools serving project areas, the LEA shall provide for each schoolwide project an amount of funds made available under this part that, for each educationally deprived child, equals or exceeds the amount of funds made available under this part that the LEA provides for each educationally deprived child served in other project schools. In determining the number of educationally deprived children in a schoolwide project, the LEA shall use either of the following:

(A) The number of children in the schoolwide project below the highest ranked child served in other project schools in the LEA.

(B) All children meeting the definition of "educationally deprived children" in § 200.6(c).

(ii) The LEA shall allocate to a schoolwide project an amount of funds made available under this part that is sufficient to ensure that the project is of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting the special educational needs of the educationally deprived children served.

(2)(i) Except as provided in paragraph (c)(2)(ii) of this section, during each fiscal year in which a schoolwide project is carried out, the LEA shall, in each schoolwide project, spend per child an amount of State and local funds—excluding amounts spent under a State compensatory program as defined in § 200.45(a)(1)(i) and special supplementary State and local funds required under Chapter 1 of the ECIA for each child in a schoolwide project who was not educationally deprived—that is at least equal to the amount of State and local funds the LEA spent per child in that school during the preceding fiscal year.

(ii) The LEA shall include for each fiscal year the cost of services for State and local programs under § 200.45(a)(2) only in proportion to the number of children served by these programs in the school in the year for which the determinations are made.

(3) The LEA shall ensure that funds made available under this part for a schoolwide project only supplement, and to the extent practical, increase the level of funds that would, in the absence of funds under this part, be made available from non-Federal sources for the school.

(4) The LEA shall comply with the comparability requirements in § 200.43.

(d) *Effect of selection for a schoolwide project.* (1) The SEA shall approve the plan of the LEA for a schoolwide project for a period of three years if the plan meets the requirements in paragraphs (b) and (c) of this section.

(2) For each school that has a schoolwide project plan approved by the SEA, the LEA is not required to—

(i) Comply with any Chapter 1 requirements prohibiting the commingling of funds available under this part with State and local funds;

(ii) Identify particular children as eligible to participate in the schoolwide project, but shall identify educationally deprived children for the purpose of paragraphs (b), (c), and (f) of this section; and

(iii) Demonstrate that the particular services paid for with Chapter 1 funds supplement the services regularly provided in that school.

(e) *Use of funds.* In addition to the activities included in § 200.4, the LEA may use funds made available under this part in schoolwide projects for—

(1) Planning and implementing effective schools programs; and

(2) Other activities to improve the instructional program and pupil services in the school such as—

(i) Reducing class size;

(ii) Training staff and parents; and

(iii) Implementing extended-day programs.

(f) *Accountability requirements.* (1) Except as provided in paragraph (f)(2) of this section, in order to continue a schoolwide project, an LEA must be able to demonstrate after three years for each school participating in a schoolwide project that—

(i) The achievement level of educationally deprived children in the school exceeds the average achievement of comparable participating Chapter 1 children in the LEA as a whole; or

(ii) The achievement of educationally deprived children in the school exceeds the average achievement of comparable educationally deprived children in that school in the three fiscal years prior to the start of the schoolwide project.

(2) For a secondary school, if achievement levels over the three-year schoolwide project period as compared with the three-year period immediately preceding the schoolwide project do not decline, demonstration of lower dropout rates, increased retention rates, or increased graduation rates are acceptable in lieu of increased achievement.

(3) If the SEA determines that a schoolwide project meets the requirements in paragraph (f) (1) or (2) of this section at the end of the three-year period provided in paragraph (d)(1) of this section, the SEA shall allow the LEA to continue the schoolwide project for an additional three years.

(4)(i) For the purpose of paragraph (f) (1) and (2) of this section, the LEA shall annually collect achievement and other assessment data for each school participating in a schoolwide project.

(ii) The LEA shall make the results of the annual collection of achievement and other assessment data available to parents, the public, and the SEA.

(5) The program improvement requirements in §§ 200.37–200.38 apply to schoolwide projects under this section.

(g) *Participation of children enrolled in private schools.* In determining which private school children residing in the school attendance area of a schoolwide project are eligible for Chapter 1 services, the LEA shall apply whichever method it selected under paragraph (c)(1)(i) (A) or (B) of this section.

(Authority: 20 U.S.C. 2725, 2728(c), 2730–2731)

§ 200.37 What are an SEA's responsibilites for program improvement?

(a) *SEA program improvement plan.* (1) An SEA shall develop, in consultation with a committee of practitioners under § 200.70(e), a plan to ensure implementation of the provisions of paragraph (b) of this section and § 200.38.

(2) The SEA's plan must contain, but is not limited to, the following:

(i) The objective measures and standards the SEA and LEAs will use to assess aggregate performance and substantial progress toward meeting desired outcomes, and may include implementation of section 1019 of the Act. The SEA may establish minimum standards to be included in the plan to improve the educational opportunities of educationally deprived children by helping those children succeed in the regular program, attain grade-level proficiency, and improve achievement in basic and more advanced skills.

(ii) The means the SEA will use to develop a joint plan with an LEA that has identified, under § 200.38(b), a school in need of program improvement to attain satisfactory student progress.

(iii) In accordance with § 200.38(b)(6), the timetable for developing and implementing a joint plan with an LEA.

(iv) The program improvement assistance the SEA will provide to a school identified under § 200.38(b)(6), which may include, but is not limited to—

(A) Training and retraining personnel;

(B) Developing curricula that have shown promise in similar schools;

(C) Replicating promising practices in effective school models;

(D) Improving coordination between programs assisted under Chapter 1 and the regular school program; and

(E) Developing innovative strategies to enhance parental involvement.

(3) The SEA shall—

(i) Disseminate its plan to all LEAs and other State agencies that receive funds under Chapter 1; and

(ii) Make the plan available at the SEA for inspection by the Secretary.

(4) The SEA may amend its plan, if necessary, after consultation with the committee of practitioners.

(b) *SEA assistance to LEAs.* (1)(i) If funds are appropriated for the implementation of school improvement programs under section 1405 of the Act, an SEA shall fully implement the program improvement activities described in this section and § 200.38.

(ii) If funds are not appropriate under section 1405 of the Act, the SEA shall at a minimum—

(A) With the least possible paperwork and burden, follow the progress of any school identified by an LEA under § 200.38(b)(1);

(B) Develop and implement with LEAs joint plans for program improvement under § 200.38(b)(6);

(C) Ensure that program improvement assistance is provided to each school identified under § 200.38(b)(6); and

(D) Conduct other program improvement activities to the extent practicable.

(2) An LEA may apply to the SEA for program improvement assistance funds appropriated under section 1405 of the Act.

(Authority: 20 U.S.C. 2730, 2731(d), 2825, 2851(b); H.R. Rept. 95, 100th Cong., 1st Sess. 23 (1987); H.R. Rept. 567, 100th Cong., 2d Sess. 325–26 (1988) (Conf. Rept.))

§ 200.38 What are an LEA's responsibilities for program improvement?

(a) *Local review.* For each project school, an LEA shall—

(1)(i) Conduct an annual review of the effectiveness of its Chapter 1 project in improving student performance as measured by aggregate performance and the desired outcomes described in the LEA's application; and

(ii) Make the results of the review available to teachers, parents of participating children, and other appropriate parties;

(2) Determine whether improved performance is sustained over a period of more than 12 months (see § 200.35(a)(2)); and

(3) Use the results of the review and the LEA's evaluation under section 1019 of the Act in program improvement efforts required by paragraph (b) of this section.

(b) *School program improvement.* (1) Except as provided in paragraph (b)(4) of this section, an LEA shall implement the requirements in paragraph (b)(2) of this section with respect to each school that—

(i) Does not show substantial progress toward meeting the desired outcomes described in the LEA's application; or

(ii) Shows no improvement or a decline in aggregate performance of participating children for a 12-month period as assessed by measures developed under section 1019(a) of the Act or paragraph (a) of this section. No improvement or a decline in aggregate performance occurs if participating children, in the aggregate, in the school fail to make gains beyond that which they would be expected to make in the absence of the additional help the program provided.

(2) For each school identified under paragraph (b)(1) of this section, the LEA shall develop and implement, in coordination with the school, a plan for program improvement that—

(i) Describes how the LEA will identify and modify Chapter 1 programs for schools and children under this section;

(ii) Incorporates those program changes that have the greatest likelihood of improving the performance of educationally deprived children, including—

(A) A description of educational strategies designed to achieve the LEA's desired outcomes or otherwise to improve the performance and meet the needs of participating children;

(B) A description of the resources, and how those resources will be applied, to carry out the strategies selected, including, as appropriate—

(1) Qualified personnel;

(2) Inservice training;

(3) Curriculum materials;

(4) Equipment;

(5) Physical facilities;

(6) Technical assistance;

(7) Alternative curriculum that has shown promise in similar schools;

(8) Improving coordination between the Chapter 1 LEA Program and the regular school program;

(9) Evaluation of parental involvement;

(10) Appropriate inservice training for Chapter 1 staff and other staff who teach participating children; and

(11) Other measures selected by the LEA.

(3) The LEA shall—

(i) Submit the plan to the local school board and the SEA; and

(ii) Make the plan available to parents of participating children in the school.

(4) The LEA is not required to—

(i) Develop a school improvement plan for a school that served 10 or fewer children for the entire school year; or

(ii) Complete and implement a school improvement plan under development if data become available during plan development or prior to plan implementation that demonstrate that there has been a gain in aggregate performance and that substantial progress has been made toward meeting the desired outcomes.

(5)(i) The LEA shall develop a timeline for implementation of each school's plan, taking into consideration the degree of change needed, the nature of the changes, and other relevant factors.

(ii) The plan must be fully implemented as soon as possible but no later than the beginning of the second school year after the school year during which the school did not show substantial progress toward meeting the LEA's desired outcomes or showed no improvement or a decline in aggregate performance of participating children.

Example: An LEA determines that a school, during the 1988–89 school year, has shown a decline in aggregate performance. The LEA must develop and fully implement a school improvement plan in that school as soon as possible but not later than September 1990. For example, if the necessary changes can be accomplished quickly, such as purchasing readily available materials or equipment, the LEA would be able to implement its plan by September 1989. On the other hand, if the needed changes require a complete redesign of the LEA's project, the LEA might not be able to implement the plan fully before September 1990.

(6)(i) If, after the LEA's plan has been in effect for one full school year, the school is still identified as needing improvement under paragraph (b)(1) of this section, the LEA shall, with the SEA, develop and implement by the beginning of the next school year a joint plan for program improvement in the school.

(ii) The joint plan must—

(A) Be developed and implemented in consultation with school staff and parents of participating children; and

(B) Be approved by both the SEA and LEA before the plan may be implemented.

(iii) If the SEA finds that, after the joint plan has been in effect for one full school year, a school continues to need improvement under paragraph (b)(1) of this section, the SEA, with the LEA, shall—

(A) Review the plan;

(B) Make revisions that are designed to improve performance; and

(C) Continue to review and revise the joint plan each consecutive year until improved performance is sustained over a period of more than 12 months.

(iv) Nothing in this section or § 200.37 shall be construed to give the SEA any authority concerning the educational program of an LEA that does not otherwise exist under State law.

Example: Both the LEA and SEA should follow the progress of the LEA's school improvement plan during the first full school year of implementation. In the example following paragraph (b)(5) of this section, if a plan is implemented by September 1989, then school year 1989–90 would be the first full school year. Similarly, if a plan is implemented by September 1990, the first full school year would be 1990–91. After one full year of implementation, if the LEA determines that the school still has not improved, the LEA must develop and implement a joint program improvement plan with the SEA before the beginning of the next school year. Thus, under the example above, the joint plan would have to be developed and implemented by the beginning of the 1990–91 or 1991–92 school year, depending on which year the LEA implemented its plan.

(c) *Local conditions.* (1) The LEA and the SEA, in performing their responsibilities under this section, shall take into consideration—

(i) The mobility of the student population;

(ii) The extent of educational deprivation among participating children that may negatively affect improvement efforts;

(iii) The difficulties involved in dealing with older children in Chapter 1 programs in secondary schools;

(iv) Whether indicators other than improved achievement demonstrate the positive effects on participating children of Chapter 1 activities; and

(v) Whether a change in the review cycle under section 1019 of the Act or paragraph (a)(1) of this section or in the measurement instrument used or other measure-related phenomena has rendered results invalid or unreliable for a particular year.

(2) The local conditions in paragraph (c)(1) of this section may be considered, as appropriate, at any point in the program improvement process, including the following:

(i) Determining the extent of services needed to meet desired outcomes in the LEA's application.

(ii) Allocating resources to schools.

(iii) Determining how substantial progress toward meeting desired outcomes will be measured.

(iv) Identifying a school in need of program improvement under paragraph (b)(1) of this section.

(v) Identifying a school that continues to need program improvement under paragraph (b)(6) of this section.

(d) *Student program improvement.* On the basis of the evaluation under section 1019 of the Act and local reviews under paragraph (a) of this section, an LEA shall—

(1) Identify all students who have been served for a school year and—

(i) Have not shown substantial progress toward meeting the desired outcomes established for participating children under § 200.20(a)(4); or

(ii) Whose achievement shows no improvement or a decline;

(2) Consider modifications in the LEA's Chapter 1 project to serve those students better;

(3) Conduct a thorough assessment of the educational needs of children who remain in the LEA's Chapter 1 project after two consecutive years of participation and—

(i) Have not shown substantial progress toward meeting the desired outcomes established for participating children under § 200.20(a)(4); or

(ii) Whose achievement shows no improvement or a decline; and

(4) If appropriate, use the results of the needs assessment to modify the project to meet the children's needs.

(e) *Private school children.* Program improvement and student improvement activities under this section must include children in private schools in accordance with section 1017 of the Act.

(f) *Effective date.* An LEA shall begin identifying schools and students in need of program improvement based on information gathered before or during the 1988–89 school year.

(g) *Technical assistance centers.* In carrying out the program improvement and student improvement activities under this section, an LEA and SEA shall utilize the resources of the regional technical assistance centers and appropriate regional rural assistance programs established under section 1456 of the Act to the full extent those resources are available.

(Authority: 20 U.S.C. 2727, 2731; H.R. Rept. 95, 100th Cong., 1st Sess. 23 (1987); H.R. Rept. 567, 100th Cong., 2d Sess. 325–26 (1988) (Conf. Rept.))

§ 200.39 How may personnel be assigned supervisory duties?

(a) An LEA may assign public school personnel paid entirely with funds available under this part to limited supervisory duties that may provide some benefit to children not participating in the Chapter 1 project if—

(1) Similarly situated personnel at the same school site, who are not paid with funds available under this part, are assigned these duties; and

(2) The time spent by Chapter 1 personnel on these duties does not exceed the least of the following:

(i) The proportion of total work time that similarly situated non-Chapter 1 personnel at the same school site spend performing these duties.

(ii) One period per day.

(iii) Sixty minutes per day.

(b) The amount of time referred to in paragraph (a)(2) of this section may be calculated on a daily, weekly, monthly, or annual basis.

(c) The limited supervisory duties in paragraph (a) of this section need not be limited to classroom instruction and may include, but are not limited to, the following:

(1) Supervision of halls, playgrounds, lunchrooms, study halls, bus loading and unloading, and homerooms.

(2) Participation as a member of a school or district curriculum committee.

(3) Participation in the selection of regular curriculum materials and supplies.

(Authority: 20 U.S.C. 2853; H.R. Rept. 95, 100th Cong., 1st Sess. 34–35 (1987))

Subpart E—What Fiscal Requirements Apply to the Chapter 1 LEA Program?

§ 200.40 What is the prohibition against using funds under this part to provide general aid?

An LEA may use funds available under this part only for projects that are designed and implemented to meet the special educational needs of educationally deprived children who are—

(a) Identified and selected in accordance with § 200.31; and

(b) Included in the LEA's application that has been approved by the SEA.

(Authority: 20 U.S.C. 2721(a), 2722(b), 2724)

§ 200.41 What maintenance of effort requirements apply to this program?

(a)(1) *Basic standard.* Except as provided in § 200.42, an SEA shall pay an LEA its allocation of funds under this part if the SEA finds that either the combined fiscal effort per student or the aggregate expenditures of State and local funds with respect to the provision of free public education in the LEA for the preceding fiscal year was not less than 90 percent of the combined fiscal effort per student or the aggregate expenditures for the second preceding fiscal year.

(2) *Meaning of "preceding fiscal year."* For purposes of determining maintenance of effort, the "preceding fiscal year" is the Federal fiscal year or

the twelve-month fiscal period most commonly used in a State for official reporting purposes prior to the beginning of the Federal fiscal year in which funds are available.

Example: For funds first made available only July 1, 1989, if a State is using the Federal fiscal year, the "preceding fiscal year" is Federal fiscal year 1988 (which began on October 1, 1987) and the "second preceding fiscal year" is fiscal year 1987 (which began on October 1, 1986). If a State is using a fiscal year that begins on July 1, 1989, the "preceding fiscal year" is the twelve-month period ending on June 30, 1988 and the "second preceding fiscal year" is the period ending on June 30, 1987.

(3) *Expenditures*—(i) *To be considered.* In determining an LEA's compliance with the maintenance of effort requirement, the SEA shall consider the LEA's expenditures from State and local funds for free public education. These include expenditures for administration, instruction, attendance, health services, pupil transportation, plant operation and maintenance, fixed charges, and net expenditures to cover deficits for food services and student body activities.

(ii) *Not to be considered.* The SEA shall not consider the following expenditures in determining an LEA's compliance with the maintenance of effort requirement:

(A) Any expenditures for community services, capital outlay, or debt service.

(B) Any expenditures made from funds provided under Chapter 1 and Chapter 2 of Title I of the Act or Chapter 1 and Chapter 2 of the ECIA.

(b) *Failure to maintain effort.* (1) If an LEA fails to maintain effort and a waiver under § 200.42 is not granted, the SEA shall reduce the LEA's allocation of funds under this part in the exact proportion by which the LEA fails to meet 90 percent of both the combined fiscal effort per student and aggregate expenditures (using the measure most favorable to the LEA) for the second preceding fiscal year.

(2) In determining maintenance of effort for the fiscal year immediately following the fiscal year in which the LEA failed to maintain effort, the SEA shall consider the LEA's fiscal effort for the second preceding fiscal year to be no less than 90 percent of the combined fiscal effort per student or aggregate expenditures (using the measure most favorable to the LEA) for the third preceding fiscal year.

Example: In Federal fiscal year 1990, an LEA fails to maintain effort because its fiscal effort in the preceding fiscal year (1988) is less than 90 percent of its fiscal effort in the second preceding fiscal year (1987). In assessing whether the State maintained effort during the next fiscal year (1991), the SEA may consider the LEA's expenditures for the second preceding fiscal year (1988) (the year that caused the LEA's failure to maintain effort) to be no less than 90 percent of the LEA's expenditures in the prior fiscal year (1987).

(Authority: 20 U.S.C. 2728(a) (1), (2))

§ 200.42 Under what circumstances may an SEA waive the maintenance of effort requirement?

(a)(1) An SEA may waive, for one fiscal year only, the maintenance of effort requirement in § 200.41 if the SEA determines that a waiver would be equitable due to exceptional or uncontrollable circumstances. These circumstances include but are not limited to the following:

(i) A natural disaster.

(ii) A precipitous and unforeseen decline in the financial resources of the LEA.

(2) An SEA may not consider tax initiatives or referenda to be exceptional or uncontrollable circumstances.

(b)(1) If the SEA grants a waiver under paragraph (a) of this section, the SEA shall not reduce the amount of funds available under this part the LEA is otherwise entitled to receive.

(2) In determining maintenance of effort for the fiscal year immediately following the fiscal year for which the waiver was granted, the SEA shall consider the LEA's fiscal effort for the second preceding fiscal year to be no less than 90 percent of the combined fiscal effort per student or aggregate expenditures (using the measure most favorable to the LEA) for the third preceding fiscal year.

Example: In Federal fiscal year 1990, an LEA secures a waiver because its fiscal effort in the preceding year (1988) is less than 90 percent of its fiscal effort in the second preceding fiscal year (1987) due to exceptional or uncontrollable circumstances. In assessing whether the LEA maintained effort during the next fiscal year (1991), the SEA may consider the LEA's expenditures for the second preceding fiscal year (1988) (the year for which the LEA needed a waiver) to be no less than 90 percent of the LEA's expenditures in the prior fiscal year (1987).

(Authority: 20 U.S.C. 2728(a)(3))

§ 200.43 What comparability of services requirements apply to this program?

(a) Except as provided in paragraph (b) of this section and § 200.45, an LEA may receive funds under this part only if, on a districtwide or grade span basis,—

(1) The LEA uses State and local funds to provide services in project areas that, taken as a whole, are at least comparable to services being provided in school atttendance areas that are not receiving funds under this part; or

(2) In the event the LEA selects all its school attendance areas as project areas, the LEA uses State and local funds to provide services that, taken as a whole, are substantially comparable in each project area.

(b) An LEA with not more than one school building for each grade span is not required to meet the comparability requirements in paragraph (a) of this section.

(c)(1) To meet the comparability requirements in paragraph (a) of this section, an LEA shall—

(i) Establish and implement—

(A) A districtwide salary schedule;

(B) A policy to ensure equivalence among schools in teachers, administrators, and auxiliary personnel; and

(C) A policy to ensure equivalence among schools in the provision of curriculum materials and instructional supplies;

(ii) Develop written procedures to ensure compliance with paragraph (a) of this section; and

(iii) Maintain annual records documenting compliance with paragraph (a) of this section.

(2) In determining compliance with paragraph (a) of this section, an LEA does not need to consider unpredictable changes in student enrollment or personnel assignments that occur after the beginning of a school year.

(d)(1) In accordance with the rulemaking requirements in § 200.70, an SEA may establish standards to ensure that an LEA's policies under paragraph (c)(1)(i) (B) through (C) of this section result in the provision of equivalent staffing, materials, and supplies among the schools of the LEA.

(2) In the absence of standards established by the SEA, an LEA shall establish standards, approved by the SEA under § 200.21(a)(3), to ensure that the policies required under paragraph (c)(1)(i) (B) through (C) of this section result in the provision of equivalent staffing, materials, and supplies among the schools of the LEA.

(e)(1) The SEA shall monitor each LEA's compliance with the comparability requirements.

(2) If an LEA is found not to be in compliance with the comparability requirements, the amount to be withheld or repaid is the amount or percentage by which the LEA failed to comply with the standards established under paragraph (d) of this section.

(Authority: 20 U.S.C. 2728(c), (d))

§ 200.44 What supplement-not-supplant requirement applies to this program?

(a) Except as provided in § 200.45(a)(1), an LEA may use funds available under this part only to supplement and, to the extent practicable, increase the level of non-Federal funds that would, in the absence of funds under this part, be made available for the education of pupils participating in Chapter 1 projects, and in no case may funds available under this part be used to supplant those non-Federal funds.

(b) To meet the requirement in paragraph (a) of this section, an LEA is not required to provide services under this part through use of a particular instructional method or in a particular instructional setting.

(Authority: 20 U.S.C. 2728(b), (d))

§ 200.45 How may an LEA exclude special State and local funds from comparability and supplement-not-supplant determinations?

(a) *General rule.* (1) For the purpose of determining compliance with the comparability requirements in § 200.43 and the supplement-not-supplant requirement in § 200.44, an LEA may exclude State and local funds spent in carrying out the following types of program:

(i) Special State programs designed to meet the educational needs of educationally deprived children, including compensatory education for educationally deprived children, that the Secretary has determined in advance under paragraph (b) of this section meet the requirements in section 1018(d)(1)(B) of the Act.

(ii) Special local programs designed to meet the educational needs of educationally deprived children, including compensatory education for educationally deprived children, that the SEA has determined in advance under paragraph (c) of this section meet the requirements in section 1018(d)(1)(B) of the Act.

(2) For the purpose of determining compliance with the comparability requirements in § 200.43 only, an LEA may also exclude State and local funds spent in carrying out the following types of programs:

(i) Bilingual education for children of limited English proficiency.

(ii) Special education for handicapped children.

(iii) State phase-in programs that the Secretary has determined in advance under paragraph (b) of this section meet the requirements in section 1018(d)(2)(B) of the Act.

(b) *Secretarial determination regarding State programs.* (1) In order for an LEA to exclude State and local funds spent on State programs under paragraph (a) (1)(i) and (2)(iii) of this section, an SEA shall request the Secretary to make an advance determination of whether—

(i) A special State program under paragraph (a)(1)(i) of this section meets the requirements in section 1018(d)(1)(B) of the Act; or

(ii) A State phase-in program under paragraph (a)(2)(iii) of this section meets the requirements in section 1018(d)(2)(B) of the Act.

(2) Before making a determination, the Secretary requires the SEA to submit copies of the State law and implementing rules, regulations, orders guidelines, and interpretations that the Secretary may need to make the determination.

(3) The Secretary makes the determination in writing and includes the reasons for the determination.

(4) If there is any material change in the pertinent State law affecting the program, the SEA shall submit those changes to the Secretary.

(c) *SEA determination regarding local programs.* (1) In order for an LEA exclude State and local funds spent on a special local program under paragraph (a)(1)(ii) of this section, the LEA shall request the SEA to make an advance determination of whether that program meets the requirements in section 1018(d)(1)(B) of the Act.

(2) Before making a determination, the SEA shall require the LEA to submit copies of the local law and implementing rules, regulations, guidelines, and interpretations that the SEA may need to make the determination.

(3) The SEA shall make the determination in writing and include the reasons for its determination.

(4) If there is any material change in the pertinent local requirements affecting the program, the LEA shall submit those changes to the SEA.

(Authority: 20 U.S.C. 2728(b), (c), (d))

§ 200.46 What is the maximum amount of funds an LEA may carry over?

(a) *Limitation on carryover.* The amount of funds allocated to an LEA under §§ 200.22 through 200.25 that remain available for obligation for one additional year under section 412(b) of GEPA is limited to—

(1) No more than 25 percent of the funds allocated to the LEA from the Federal fiscal year 1989 appropriation (allocated to the LEA for the period July 1, 1989–September 30, 1990); and

(2) No more than 15 percent of the funds allocated to the LEA from the Federal fiscal year 1990 appropriation (allocated to the LEA for the period July 1, 1990–September 30, 1991) and each subsequent year's appropriation.

(b) *Exceptions.* (1) The percentage limitations in paragraph (a) of this section do not apply to an LEA that receives less than $50,000 under §§ 200.22 through 200.25 for any fiscal year.

(2) An SEA may grant an LEA a waiver of the percentage limitations in paragraph (a) of this section if—

(i) The SEA determines, on a one-time basis, that the LEA's request for the waiver is reasonable and necessary; or

(ii) A supplemental Chapter 1 appropriation becomes available for obligation in any fiscal year.

(Authority: 20 U.S.C. 2832(b), 1225(b); H.R. Rept. 567, 100th Cong., 2d Sess. 341 (1988) (Conf. Rept.))

§ 200.47 What is the prohibition against considering payments under this part in determining State aid?

A State may not take into consideration payments under this part in determining—

(a) The eligibility of an LEA for State aid; or

(b) The amount of State aid to be paid to an LEA for free public education.

(Authority: 20 U.S.C. 2854)

§§ 200.48 through 200.49 [Reserved]

Subpart F—What Requirements Govern Participation in the Chapter 1 LEA Program of Educationally Deprived Children in Private Schools?

General

§ 200.50 What are an LEA's responsibilities for providing Chapter 1 services to children in private schools?

(a)(1) An LEA shall provide to educationally deprived children, who reside in a project area of the LEA and who are enrolled in private elementary and secondary schools, special educational services and arrangements as will ensure those children's participation on an equitable basis in accordance with the requirements in §§ 200.50 through 200.55 and section 1017 of the Act.

(2) The LEA shall provide the opportunity to participate in a manner that is consistent with the number and special educational needs of the educationally deprived children in private schools.

(3) The LEA shall exercise administrative direction and control over funds and property made available under this part that benefit educationally deprived children in private schools.

(4)(i) Services to children enrolled in private schools must be provided by employees of a public agency or through contract by the public agency with a person, an association, agency, or corporation who or which, in the provision of those services, is independent of the private school and of any religious organization.

(ii) This employment or contract must be under the control and supervision of the public agency.

(b)(1) If an LEA allegedly fails to provide for the equitable participation of children in private schools, a parent, teacher, or other concerned individual or organization may file a complaint with the Secretary.

(2) For the purpose of this section, a complaint is a signed, written statement, including documentary evidence, alleging that an LEA has failed to meet its obligation under section 1017(a) of the Act to provide equitable services to children enrolled in private schools.

(3) The Secretary investigates a complaint and issues a letter of finding within 120 days after receipt of the complaint.

(Authority: 20 U.S.C. 2727 (a), (b); H.R. Rept. 95, 100th Cong., 1st Sess. 30 (1987))

§ 200.51 What are the requirements for consultation with private school officials?

(a) An LEA shall consult with appropriate private school officials—

(1) During all phases of the design and development of the LEA's Chapter 1 project, including consideration of—

(i) Which children will receive services;

(ii) How the children's needs will be identified;

(iii) What services will be offered;

(iv) How and where the services will be provided; and

(v) How the project will be evaluated; and

(2) Before the LEA makes any decision that affects the opportunities of eligible private school children to participate in the LEA's Chapter 1 project.

(b) The LEA shall give private school officials a genuine opportunity to express their views regarding each matter subject to the consultation requirement in paragraph (a) of this section.

(Authority: 20 U.S.C. 2727(a), 2722(c); H.R. Rept. 95, 100th Cong., 1st Sess. 30 (1987))

§ 200.52 What factors does an LEA use in determining equitable participation?

(a) *Equal expenditures.* (1) Expenditures of funds made available under this part for educational services and arrangements for educationally deprived children in private schools must be equal (taking into account the number of children to be served and the special educational needs of such children) to expenditures of funds made available under this part for children enrolled in the public schools of the LEA.

(2) Before determining equal expenditures under paragraph (a)(1) of this section, an LEA shall pay for reasonable and necessary administrative costs of providing services to public and private school children, including special capital expenses defined in § 200.57(a)(2), from the LEA's whole allocation of funds under this part.

(b) *Services on an equitable basis.* (1) The Chapter 1 services that an LEA provides for educationally deprived children in private schools must be equitable (in relation to the services provided to public school children) and must be of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting the special educational needs of the private school children to be served.

(2) Services are equitable if the LEA—

(i) Assesses, addresses, and evaluates the specific needs and educational progress of eligible private school children on the same basis as public school children;

(ii) Provides, in the aggregate, approximately the same amount of instructional time and materials for each private school child as it provides for each public school child;

(iii) Expends equal amounts on services for public and private school children in accordance with paragraph (a) of this section; and

(iv) Provides private school children with an opportunity to participate that is equitable to the opportunity provided to public school children.

(Authority: 20 U.S.C. 2727(a))

§ 200.53 What are the requirements to ensure that funds do not benefit a private school?

(a) An LEA shall use funds under this part to provide services that supplement the level of services that would, in the absence of Chapter 1 services, be available to children in private schools.

(b) An LEA shall use funds under this part to meet the special educational needs of children in a private school, but not for—

(1) The needs of the private school; or

(2) The general needs of children in the private school.

(Authority: 20 U.S.C. 2727(a), 2728(b))

§ 200.54 What are the requirements concerning equipment and supplies for the benefit of private school children?

(a) To meet the requirements of section 1017 of the Act, a public agency must keep title to and exercise continuing administrative control of all equipment and supplies that the LEA acquires with funds under this part for the benefit of educationally deprived children in private schools.

(b) The public agency may place equipment and supplies in a private school for the period of time needed for the program.

(c) The public agency shall ensure that the equipment or supplies placed in a private school—

(1) Are used only for Chapter 1 purposes; and

(2) Can be removed from the private school without remodeling the private school facility.

(d) The public agency shall remove equipment or supplies from a private school if—

(1) The equipment or supplies are no longer needed for Chapter 1 purposes; or

(2) Removal is necessary to avoid unauthorized use of the equipment or supplies for other than Chapter 1 purposes.

(e) For the purpose of this section, the term "public agency" includes the LEA.

(Authority: 20 U.S.C. 2727(a))

§ 200.55 May funds be used for construction of private school facilities?

No funds under this part may be used for repairs, minor remodeling, or construction of private school facilities.

(Authority: 20 U.S.C. 2727(a))

Capital Expenses

§ 200.56 How does a State receive a payment for capital expenses?

(a) From the amount appropriated for capital expenses under section 1017(d) of the Act, the Secretary pays a State an amount that bears the same ratio to the amount appropriated as the number of private school children in the State who were served under Chapter 1 of the ECIA during the period Juy 1, 1984 through June 30, 1985 bears to the total number of private school children served during that period in all States.

(b) The Secretary reallocates funds not used by a State for purposes of § 200.57 among other States on the basis of need.

(Authority: 20 U.S.C. 2727(d); H.R. Rept. 95, 100th Cong., 1st Sess. 30 (1987); H.R. Rept. 567, 100th Cong., 2d Sess. 323 (1988) (Conf. Rept.))

§ 200.57 How does an LEA receive a payment for capital expenses?

(a) (1) An LEA may apply to the SEA for a payment to cover capital expenses that the LEA, in providing equitable Chapter 1 services to eligible children in private schools,—

(i) Has paid from funds provided under Chapter 1 of the ECIA since July 1, 1985;

(ii) Is currently paying from funds provided under this part; or

(iii) Would incur because of an expected increase in the number or percentage of private school children to be served.

(2) "Capital expenses" means only expenditures for noninstrumental goods and services that are incurred as a result of implementation of alternative delivery systems to comply with the requirements of *Aguilar v. Felton*. These expenditures—

(i) Include—

(A) The purchase, lease, and renovation of real and personal property (including but not limited to mobile educational units and leasing of rental sites or space);

(B) Insurance and maintenance costs;

(C) Transportation; and

(D) Other comparable goods and services; and

(ii) Do not include the purchase of instrumental equipment such as computers.

(b) The LEA's application for payments under this section must contain—

(1) The amount, by fiscal year, of capital expenses paid from funds under this part and Chapter 1 of the ECIA since July 1, 1985;

(2) The nature of the capital expenses;

(3) An assurance that the LEA will use payments received under this section in accordance with § 200.58;

(4) An assurance that the LEA has consulted with appropriate private school officials in preparation of its application; and

(5) Any other information the SEA may need to make a determination of need under paragraph (c) of this section.

(c) An SEA shall distribute funds it receives under § 200.56 to LEAs that apply on the basis of need. In determining need, the SEA shall establish criteria such as the following:

(1) (i) The extent to which an LEA is providing Chapter 1 services to at least the same number or percentage of private school children the LEA served during the period July 1, 1984 through June 30, 1985; or

(ii) The extent to which payments under this section would be used by an LEA to increase the number or percentage of private school children served.

(2) The degree to which the quality of services an LEA is providing or would provide to private school children equals or exceeds the quality of services provided during the period July 1, 1984 through June 30, 1985.

(3) The percentage of funs the LEA has paid for capital expenses in relation to its basic Chapter 1 grant.

(Authority: 20 U.S.C. 2727(d))

§ 200.58 How does an LEA use payments for capital expenses?

(a) An LEA shall use payments received under § 200.57 for the following:

(1) To provide Chapter 1 services to benefit, to the extent possible, the children who were or are adversely affected by the LEA's expenditures for capital expenses.

(2) To cover capital expenses the LEA is incurring or will incur to increase the number or percentage of private school children being served.

(b) The LEA may not take the payment received under § 200.57 into account in meeting the requirements in § 200.52.

(Authority: 20 U.S.C. 2727 (a), (d))

§ 200.59 [Reserved]

Bypass

§ 200.60 What general requirements govern the implementation of a bypass?

(a) The Secretary implements a bypass in accordance with the procedures in 34 CFR 76.670 though 76.677 if—

(1) An LEA is prohibited by law from providing Chapter 1 services for private school children on an equitable basis; or

(2) The Secretary determines, following a complaint or an investigation, that an LEA has substantially failed to provide for the participation on an equitable basis of private school children.

(b) If the Secretary implements a bypass, the Secretary—

(1) Waives the LEA's responsibility for providing Chapter 1 services for private school children and arranges to provide the required services;

(2) Consults with appropriate public and private school officials; and

(3) Deducts the costs of the services, including any addministrative costs, from the appropriate allocations of funds provided under this part to the affected LEA and SEA.

(c) Pending the final resolution of an investigation or a complaint that could result in a bypass action, the Secretary may withhold from the allocation of the affected LEA or SEA the amount the Secretary estimates is necessary to pay the cost of the services referred to in paragraph (b) of this section.

(Authority: 20 U.S.C. 2727(b))

§§ 200.61 through 200.69 [Reserved]

Subpart G—What are Other State Responsibilities for the Chapter 1 LEA program?

§ 20.70 Does a State have authority to issue State regulations for the Chapter 1 LEA Program?

(a)(1) Except as provided in paragraph (b) of this section, Chapter 1 does not preempt, prohibit, or encourage State rules, regulations, or policies issued pursuant to State law.

(2) If a State issues rules, regulations, or policies, they may not be inconsistent with the provisions of the following:

(1) The Chapter 1 statute.

(2) The regulations in this part.

(3) Other applicable Federal statutes and regulations.

(b) A State may not issue rules, regulations, or policies that limit LEAs' decisions affecting funds received under this part regarding—

(1) Grade levels to be served;

(2) Basic skill areas to be addressed;

(3) Instructional settings, materials, or teaching techniques to be used;

(4) Instructional staff to be employed, so long as the staff meets State certification and licensing requirements for education personnel; or

(5) Other essential support services.

(c) Nothing in paragraph (b) of this section limits an SEA's—

(1) Responsibility to work jointly with LEAs, in suggesting various activities and approaches for program improvement under §§ 200.37 through 200.38; or

(2) Authority to review and approve LEAs' applications or to ensure that LEAs use Chapter 1 funds in accordance with all applicable requirements.

(d) The State shall identify any State rule, regulation, or policy relating to the administration and operation of Chapter 1 programs funded under this part, including those based on State interpretation of any Federal law, regulation, or guideline, as a State-imposed requirement.

(e)(1)(i) Except as provided in paragraph (e)(2) of this section, if a State issues rules or regulations relating to the administration and operation of Chapter 1 programs funded under this part, a State committee of practitioners shall review before publication—

(A) Any proposed rule or regulation if one is required by State law; or

(B) Any final rule or regulation if a proposed rule or regulation is not required by State law.

(ii) The State is encouraged to convene the committee of practitioners for the purpose of the review required under paragraph (e)(1)(i) of this section.

(2) In an emergency situation in which a rule or regulation must be issued within a limited time, the State—

(i) May issue a regulation without the prior consultation required in paragraph (e)(1) of this section; and

(ii) Shall immediately convene a committee of practitioners to review the emergency regulation prior to issuance in final form.

(3)(i) The committee of practitioners must include—

(A) Administrators;

(B) Teachers;

(C) Parents;

(D) Members of local boards of education; and

(E) Representatives of private school children.

(ii) A majority of the committee must be representatives of LEAs.

(4) SEAs are encouraged to request from appropriate organizations recommendations for membership on the committee.

(Authority: 20 U.S.C. 2851; H.R. Rept. 95, 100th Cong., 1st Sess. 34 (1987))

§ 200.71 How may State personnel paid with funds available under this part be assigned to State programs?

(a) As provided in paragraph (b) of this section, an SEA may use funds received under § 200.73(a) to pay the salary costs for any employee assigned to programs funded under this part and special State programs that meet the requirements of § 200.45 (a)(1)(i) and (a)(2).

(b) Salary costs are allowable charges to funds received under § 200.73(a)(1) if the following conditions are met:

(1) An employee's assignments are related to the SEA's administrative, training, and technical assistance responsibilities under the programs.

(2) The SEA maintains contemporaneous time distribution records reflecting the actual amount of time the employee spends on the programs.

(3) The time distribution records are signed by the employee's supervisor.

(4) Actual costs are charged to the programs on the basis of the employee's time distribution records.

(Authority: 20 U.S.C. 2728(d), 2853; H.R. Rept. 95, 100th Cong., 1st Sess. 34 (1987))

§ 200.72 What complaint procedures must an SEA adopt?

(a) *Definition of a complaint.* For the purpose of this section, a complaint is a signed, written statement that includes—

(1) An allegation that a requirement applicable to the Chapter 1 LEA Program has been violated; and

(2) Information that supports the allegation.

(b) *Who may complain.* Any parent, teacher, or other concerned individual or organization may file a complaint.

(c) *Where to file.* (1) Unless a complaint meets the standards for a direct complaint to the SEA under paragraph (d)(2)(iii) of this section, a complaint must be filed initially with the appropriate LEA.

(2) A complainant who is dissatisfied with the initial decision of the LEA may file an appeal with the SEA.

(d) *Procedures for complaint resolution.* (1) An SEA shall develop and implement written procedures to govern—

(i) Investigation and resolution of complaints by an LEA;

(ii) Review by the SEA of appeals of complaints resolved by an LEA; and

(iii) Investigation and resolution of direct complaints filed with the SEA.

(2) The procedures required under paragraph (d)(1) of this section must include—

(i) Specific time limits for investigation and resolution of complaints by an LEA;

(ii) Specific time limits for resolution of direct complaints and appeals by the SEA; and

(iii) Standards for—

(A) Accepting direct complaints under paragraph (d)(1)(iii) of this section; or

(B) Referring a direct complaint to the appropriate LEA for resolution.

(Authority: 20 U.S.C. 2831(a); H.R. Rept. 567, 100th Cong., 2d Sess. 341 (1988) (Conf. Rept.))

§ 200.73 What funds are available for an SEA to carry out its responsibilities?

(a) *Funds for State administration.* (1) Except for programs under Part C of Chapter 1 and as provided in paragraph (a)(2) of this section, an SEA shall use funds received under section 1404(a) of the Act for the proper and efficient performance of its duties under Chapter 1.

(2) The SEA may not use more than 15 percent of the funds referred to in paragraph (a)(1) of this section for indirect costs.

(b) *Funds for implementing school improvement programs.* (1) An SEA shall use funds made available under section 1405 of the Act for direct educational services in schools implementing program improvement plans under § 200.38(b).

(2) Parents of participating children, school staff, the LEA, and the SEA shall jointly agree to the selection of providers of technical assistance and the best use of funds available under paragraph (b)(1) of this section, which may include assistance from—

(i) An institution of higher education;

(ii) A federally supported educational laboratory or center;

(iii) State personnel with expertise in educational improvement;

(iv) Locally, State, or nationally based consultants; and

(v) Other providers of the specific services required by a school's program improvement plan.

(3) The SEA may not use the funds referred to in paragraph (b)(1) of this section for State administration.

(Authority: 20 U.S.C. 2824, 2825)

§§ 200.74 through 200.79 [Reserved]

Subpart H—What Are the National Evaluation Standards?

Evaluation by an LEA

§ 200.80 How does an LEA evaluate student achievement?

(a) An LEA shall evaluate student achievement under § 200.35(a)(1)(ii) by—

(1) Assessing (i) the Chapter 1 children's achievement in reading, mathematics, and language arts, not including projects designed to teach English to limited English speaking children, in grades 2 through 12, as appropriate, after receiving Chapter 1 services, compared to (ii) an estimate of what their achievement would have been in the absence of Chapter 1 services; and

(2) With regard to more advanced skills, assessing the progress of Chapter 1 children as measured by—

(i)(A) The "comprehension" score of a nationally normed reading test; and

(B) The "problems and applications" score of a nationally normed mathematics test; or

(ii) A test without national norms if—

(A) It is the instrument used for other required achievement reporting under this part;

(B) It provides an appropriate "comprehension" and "problems and applications" score; and

(C) The LEA meets the conditions in § 200.82(b)(ii).

(b)(1) The LEA shall measure student achievement under paragraph (a) of this section over a period of approximately 12 months.

(2) The LEA shall report on either a spring-to-spring testing interval or a fall-to-fall testing interval.

(c)(1) At least once during the three-year evaluation period required under § 200.35(a), the LEA shall collect

additional information to determine whether student achievement gains are sustained over a period of more than 12 months (see § 200.35(a)(2)).

(2) The LEA shall report this information on either a spring-spring-spring testing interval or a fall-fall-fall testing interval.

(d) In estimating expected performance under paragraph (a)(1)(ii) of this section and elsewhere in this subpart, the LEA shall use the performance of children in a norm sample developed locally, by the SEA, or by a test publisher.

(e) Any test instrument used by the LEA under this subpart must be the current edition or the immediately previous edition.

(Authority: 20 U.S.C. 2729 (a), (c), 2835; H.R. Rept. 567, 100th Cong., 2d Sess. 324 (1988) (Conf. Rept.))

§ 200.81 What technical standards does an LEA apply in evaluating student achievement?

An LEA shall ensure that its procedures for evaluating the achievement of children in programs under this part are consistent with the following technical standards:

(a) Representativeness of evaluation findings.

(b) Reliability and validity of evaluation instruments and procedures.

(c) Valid assessment of achievement gains.

(d) Quality control mechanisms to minimize error in evaluation procedures.

(Authority: 20 U.S.C. 2729(a), 2835)

§ 200.82 What procedures does an LEA use in evaluating student achievement?

Unless it is using approved alternative procedures under § 200.83, an LEA shall use the following procedures to evaluate student achievement in each Chapter 1 project funded under this part that provides instructional services in reading, language arts, or mathematics in grades 2 through 12 during the regular school year:

(a) The LEA shall administer a pretest and a posttest separated by approximately 12 months.

(b) The LEA may use a test with or without national norms as follows:

(1) If the LEA uses a test with national norms, the LEA shall administer the test within the appropriate range of the test publisher's norming dates.

(2) If the LEA uses a test without national norms, the LEA shall adhere to technical requirements for equating this test with a nationally normed test as specified by the Title I Evaluation and Reporting System or other valid methods accepted by the Secretary.

(Authority: 20 U.S.C. 2729(a), 2835)

§ 200.83 What alternative procedures may an LEA use?

(a) An LEA may use alternative procedures to those in § 200.82 for evaluating student achievement if, before using the alternative procedures, the LEA obtains the approval of, first, the SEA and, then, the Secretary.

(b) In order for the SEA and the Secretary to approve alternative procedures, the LEA shall demonstrate that the procedures—

(1) Yield a valid and reliable measure of—

(i) The Chapter 1 children's performance in reading, language arts, or mathematics; and

(ii) The children's expected performance; and

(2) Produce results that can be expressed in the common reporting scale established by the Secretary for SEA reporting.

(Authority: 20 U.S.C. 2729(a), 2835)

§ 200.84 How does an LEA report the results of student achievement to the SEA?

(a)(1) In reporting the results of student achievement evaluated under §§ 200.80 through 200.83, an LEA shall use—

(i) The common reporting scale established by the Secretary for SEA reporting; or

(ii) Another form of local reporting approved by the SEA.

(2) If the SEA approves another form of reporting, the LEA shall include sufficient information to enable the SEA to convert the achievement results to the common reporting scale.

(b) Unless requested by the SEA, the LEA is not required to include in its evaluation report the results of the long-term evaluation required under § 200.80(c).

(Authority: 20 U.S.C. 2729(a), 2835)

Evaluation by an SEA

§ 200.85 What technical standards does an SEA use in conducting its evaluation?

In conducting its evaluation under § 200.35(b), an SEA shall use technical standards that are commensurate with and appropriately reinforce those required of LEAs in § 200.81.

(Authority: 20 U.S.C. 2729(b), 2835)

§ 200.86 What requirements govern an SEA sampling plan?

(a) If the SEA wishes to use sampling in its evaluation of programs conducted under this part, the SEA shall submit, for prior approval by the Secretary, a proposed sampling plan designed to ensure that evaluations will be conducted in a representative sample of its LEAs in any school year.

(b) The Secretary approves a sampling plan that will provide reliable and representative data under this subpart.

(c)(1) The SEA shall review its sampling plan at least once every three years.

(2) If, based on this review or other circumstances, the sampling plan requires changes, the SEA shall request reapproval of the plan by the Secretary.

(Authority: 20 U.S.C. 2835; H.R. Rept. 567, 100th Cong., 2d Sess. 324 (1988) (Conf. Rept.))

§ 200.87 How does an SEA aggregate LEA student achievement data for inclusion in its evaluation?

(a) An SEA shall include, for all LEAs, or a sample of LEAs if a sampling plan has been approved by the Secretary, the following information in its evaluation:

(1) A statewide average of student achievement gains resulting from participation in Chapter 1 projects under this part reported for—

(i) Each participating grade level from 2 through 12; and

(ii) Each of the following subjects: reading, mathematics, and language arts.

(2) A statewide average of progress students are making in more advanced skills, separately for reading and mathematics.

(3) Additional data specified by the Secretary.

(4) If applicable—

(i) The number of students excluded from the evaluation because of erroneous or missing data; and

(ii) The reasons for the exclusion.

(b) The SEA shall—

(1) Report student achievement gains on either a spring-to-spring or fall-to-fall basis; and

(2) Express each statewide average achievement gain in the common reporting scale established by the Secretary.

(Authority: 20 U.S.C. 2729(b), 2835)

Allowable and Nonallowable Costs

§ 200.88 For what evaluation activities may an LEA or SEA use funds available under this part?

(a) An LEA or SEA may use funds made available under this part for any of the following evaluation activities:

(1) Identifying specific strengths and weaknesses of a project.

(2) Determining the results of a project.

(3) Disseminating the results of Chapter 1 evaluations.

(b) In addition to the requirement concerning the supplementary nature of funds available under this part in

§ 200.44 and other rules governing the allowability of Chapter 1 expenditures, the provisions of paragraph (c) of this section apply to the use of funds available under this part to support the purchase, administration, scoring, and analysis of evaluation instruments.

(c) Except for cases in which data meeting these needs are already available, the LEA or SEA may use funds available under this part for any of the following:

(1) Testing Chapter 1 participants for evaluation purposes only.

(2) In order to permit the LEA or SEA to convert its evaluation results to the common scale, administering a nationally normed test to all, or a representative sample of, the Chapter 1 participants if the LEA or SEA has used a test without national norms for evaluation purposes.

(3) Testing an appropriate number of children no longer receiving Chapter 1 services to determine whether achievement gains are sustained over a period of more than 12 months (see § 200.35(a)(2)).

(Authority: 20 U.S.C. 2721(a), 2728(b), 2729(a), 2835)

§ 200.89 For what evaluation activities may an LEA or SEA not use funds available under this part?

An LEA or SEA may not use funds available under this part for any of the following evaluation activities:

(a) General districtwide or statewide testing programs.

(b) Establishing local or State norms.

(c) Test development activities.

(Authority: 20 U.S.C. 2721(a), 2728(b))

PART 75—DIRECT GRANT PROGRAMS

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

Authority: 20 U.S.C. 1221e–3(a)(1), unless otherwise noted.

3. A new § 75.910 is added to read as follows:

§ 75.910 Cooperation with audits.

A grantee shall cooperate with the Secretary and the Comptroller General of the United States or any of their authorized representatives in the conduct of audits authorized by Federal law. This cooperation includes access without unreasonable restrictions to records and personnel of the grantee for the purpose of obtaining relevant information.

(Authority: 5 U.S.C. App. 4(a)(1); 20 U.S.C. 1221e–3(a)(1), 1232f)

PART 76—STATE-ADMINISTERED PROGRAMS

4. The authority citation for Part 76 continues to read as follows:

Authority: 20 U.S.C. 1221e–3(a)(1), unless otherwise noted.

5. Section 76.401 is amended by adding, as the first item in the chart in paragraph (a), an entry to read as follows:

§ 76.401 Disapproval of an application—opportunity for a hearing.

(a) * * *

Chapter 1 Program in Local Educational Agencies.	Chapter 1, Title I, Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 2701 *et seq.*)	200

6. A new subheading "Procedures for Bypass" containing §§ 76.670 through 76.677 is added to Subpart F to read as follows:

Procedures for Bypass

§ 76.670 Applicability.

The regulations in §§ 76.671 through 76.677 apply to the following programs under which the Secretary is authorized to waive the requirements for providing services to private school children and to implement a bypass:

CFDA No. and name of program	Authorizing statute	Implementing regulations Title 34 CFR Part
84.010 Chapter 1 Program in Local Educational Agencies.	Chapter 1, Title I, Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 2701 *et seq.*)	200
84.151 Federal, State, and Local Partnership for Educational Improvement.	Chapter 2, Title I, Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 2911–2952, 2971–2976)	298
84.164 Mathematics and Science Education.	Title II, Part A, Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 2981–2993)	208
84.186 State and Local Programs.	Part B, Drug Free Schools and Communities Act of 1986 (20 U.S.C. 3191–3197)	None.

(Authority: 20 U.S.C. 2727(b), 2972(d)–(e), 2990(c), 3223(c))

§ 76.671 Notice by the Secretary.

(a) Before taking any final action to implement a bypass under a program listed in § 76.670, the Secretary provides the affected grantee and subgrantee, if appropriate, with written notice.

(b) In the written notice, the Secretary—

(1) States the reasons for the proposed bypass in sufficient detail to allow the grantee and subgrantee to respond;

(2) Cites the requirement that is the basis for the alleged failure to comply; and

(3) Advises the grantee and subgrantee that they—

(i) Have at least 45 days after receiving the written notice to submit written objections to the proposed bypass; and

(ii) May request in writing the opportunity for a hearing to show cause why the bypass should not be implemented.

(c) The Secretary sends the notice to the grantee and subgrantee by certified mail with return receipt requested.

(Authority: 20 U.S.C. 2727(b)(4)(A), 2972(h)(1), 2990(c), 3223(c))

§ 76.672 Bypass procedures.

Sections 76.673 through 76.675 contain the procedures that the Secretary uses in conducting a show cause hearing. The hearing officer may modify the procedures for a particular case if all parties agree the modification is appropriate.

(Authority: 20 U.S.C. 2727(b)(4)(A), 2972(h)(1), 2990(c), 3223(c))

§ 76.673 Appointment and functions of a hearing officer.

(a) If a grantee or subgrantee requests a hearing to show cause why the Secretary should not implement a bypass, the Secretary appoints a hearing officer and notifies appropriate representatives of the affected private school children that they may participate in the hearing.

(b) The hearing officer has no authority to require or conduct discovery or to rule on the validity of any statute or regulation.

(c) The hearing officer notifies the grantee, subgrantee, and representatives of the private school children of the time and place of the hearing.

(Authority: 20 U.S.C. 2727(b)(4)(A), 2972(h)(1), 2990(c), 3223(c))

§ 76.674 Hearing procedures.

(a) The following procedures apply to a show cause hearing regarding implementation of a bypass:

(1) The hearing officer arranges for a transcript to be taken.

(2) The grantee, subgrantee, and representatives of the private school children each may—

(i) Be represented by legal counsel; and

(ii) Submit oral or written evidence and arguments at the hearing.

(b) Within 10 days after the hearing, the hearing officer—

(1) Indicates that a decision will be issued on the basis of the existing record; or

(2) Requests further information from the grantee, subgrantee, representatives of the private school children, or Department officials.

(Authority: 20 U.S.C. 2727(b)(4)(A), 2972(h)(1), 2990(c), 3223(c))

§ 76.675 Posthearing procedures.

(a)(1) Within 120 days after the record of a show cause hearing is closed, the hearing officer issues a written decision on whether a bypass should be implemented.

(2) The hearing officer sends copies of the decision to the grantee, subgrantee, representatives of the private school children, and the Secretary.

(b) Within 30 days after receiving the hearing officer's decision, the grantee, subgrantee, and representatives of the private school children may each submit to the Secretary written comments on the decision.

(c) The Secretary may adopt, reverse, modify, or remand the hearing officer's decision.

(Authority: 20 U.S.C. 2727(b)(4)(A), 2972(h)(1), 2990(c), 3223(c))

§ 76.676 Judicial review of a bypass action.

If a grantee or subgrantee is dissatisfied with the Secretary's final action after a proceeding under §§ 76.672 through 76.675, it may, within 60 days after receiving notice of that action, file a petition for review with the United States Court of Appeals for the circuit in which the State is located.

(Authority: 20 U.S.C. 2727(b)(4)(B)–(D), 2972(h)(2)–(4), 2990(c), 3223(c))

§ 76.677 Continuation of a bypass.

The Secretary continues a bypass until the Secretary determines that the grantee or subgrantee will meet the requirements for providing services to private school children.

(Authority: 20 U.S.C. 2727(b)(3)(D), 2972(f), 1221e–3(a)(1)) 7. A new § 76.910 is added to read as follows:

§ 76.910 Cooperation with audits.

A grantee or subgrantee shall cooperate with the Secretary and the Comptroller General of the United States or any of their authorized representatives in the conduct of audits authorized by Federal law. This cooperation includes access without unreasonable restrictions to records and personnel of the grantee or subgrantee for the purpose of obtaining relevant information.

(Authority: 5 U.S.C. App. 4(a)(1); 20 U.S.C. 1221e–3(a)(1), 1232f)

PART 78—EDUCATION APPEAL BOARD

8. The authority citation for Part 78 is revised to read as follows:

Authority: 20 U.S.C. 1234–1234c (Supp. IV 1986), unless otherwise noted.

§ 78.2 [Amended]

9. Section 78.2 is amended by removing the paragraph designation for paragraph (a), removing paragraph (b), and redesignating paragraphs (a)(1), (a)(2), (a)(3), (a)(4), (a)(4)(i), (a)(4)(ii), (a)(4)(iii), and (a)(5) as paragraphs (a), (b), (c), (d), (d)(1), (d)(2), (d)(3), and (e), respectively.

§ 78.3 [Amended]

10. Section 78.3 is amended by removing "§ 78.2(a)(4)" in paragraph (c) of the definition of "Appellant" and adding, in its place, "§ 78.2(d)", and by removing "§ 78.2(a)(4)" in paragraph (b)(2) of the definition of "Party" and adding, in its place, "§ 78.2(d)".

§ 78.6 [Amended]

11. Section 78.6 is amended by removing the paragraph designation for paragraph (a), removing paragraph (b), and redesignating paragraphs (a)(1), (a)(2), (a)(3), (a)(4), (a)(5), (a)(6), and (a)(7), as paragraphs (a), (b), (c), (d), (e), (f), and (g), respectively.

§ 78.21 [Amended]

12. Section 78.21 is amended by removing "(a)(4) through (a)(6)" in paragraph (a)(2) and adding, in its place, "(d) through (f)".

§ 78.22 [Amended]

13. Section 78.22 is amended by removing "(a)(4) through (a)(6)" in paragraph (a) and adding, in its place, "(d) through (f)".

§ 78.42 [Amended]

14. Section 78.42 is amended by removing paragraph (c).

PART 204—[REMOVED]

15. Part 204 is removed.

[FR Doc. 88–24236 Filed 10–20–88; 8:45 am]

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Friday
October 21, 1988

Part IV

Department of Labor

Employment Standards Administration,
Wage and Hour Division

29 CFR Part 801

Application of the Employee Polygraph
Protection Act of 1988; Final Rule

DEPARTMENT OF LABOR

Employment Standards Administration, Wage and Hour Division

29 CFR Part 801

Application of the Employee Polygraph Protection Act of 1988

AGENCY: Wage and Hour Division, ESA, Labor.

ACTION: Interim final rule; request for comments.

SUMMARY: This document provides interim final regulations for the implementation of the Employee Polygraph Protection Act of 1988, which was signed into law June 27, 1988, and is effective December 27, 1988.

The purpose of the regulations is to provide protection for most private-sector employees from lie detector testing, either pre-employment or during the course of employment, with certain limited exceptions.

DATES: *Effective Date:* The interim final rule is effective December 27, 1988. Any covered employer, not otherwise exempt, who wishes to use a lie detector test after that date will be subject to this interim final rule.

Comments: Comments are due on or before February 27, 1989.

ADDRESSES: Submit written comments (preferably in triplicate) to Paula V. Smith, Administrator, Wage and Hour Division, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW., Washington, DC 20210. Commenters who wish to receive notification of receipt of comments are requested to include a self-addressed stamped post card.

FOR FURTHER INFORMATION CONTACT: Paula V. Smith, Administrator, Wage and Hour Division, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW., Washington, DC 20210, (202) 523–8305. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

I. Background

On June 27, 1988, the Employee Polygraph Protection Act of 1988 (EPPA or the Act) was enacted into law. EPPA prohibits most private employers (Federal, State and local government employers are exempted from the Act) from using any lie detector tests either for pre-employment screening or during the course of employment. In addition, testing by the Federal Government of experts, consultants, or employees of Federal contractors engaged in national security intelligence or counterintelligence functions is permitted. The law contains several limited exemptions which authorize polygraph tests under certain conditions, including: (1) The testing of employees who are reasonably suspected of involvement in a workplace incident that results in economic loss or injury to the employer's business; (2) the testing of some prospective employees of private armored car, security alarm, and security guard firms; and (3) the testing of some current and prospective employees in firms authorized to manufacture, distribute, or dispense controlled substances. Employers who violate any of the Act's provisions may be assessed civil money penalties up to $10,000.

While the law provides for an effective date six months from the date of enactment, it also provides that the Secretary of Labor issue appropriate regulations "not later than 90 days after the date of enactment." Given the constraints of time and the statutory mandate to issue final regulations within 90 days of enactment, the Department of Labor is publishing this final rule on an interim basis, simultaneously inviting comments from interested parties. After review of the comments, the Department will either issue a proposal or a final regulation, based on the comments received.

II. Paperwork Reduction Act

Recordkeeping requirements contained in the regulation (§ 801.30) are being submitted to the Office of Management and Budget under the provisions of the Paperwork Reduction Act of 1980 (Pub. L. 96–511) for review.

Public reporting burden for this collection of information is estimated to average as follows: 1. (A) Written Notice to Examinee of Polygraph Testing—5 minutes per response; (B) Additional Information in Notice to Examinee of Polygraph Testing for Ongoing Investigations—½ hour per response; 2. Written Notice to Polygraph Examiner Identifying Persons to be Examined—5 minutes per response; 3. Written Notice of Test Results to Examinee Prior to Adverse Action—1 minute per response; 4. Record of number of tests conducted daily and length of each test—½ minute per response; 5. Maintenance of test record—1 minute per response; (see 29 CFR 801.30), including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Information Management, U.S. Department of Labor, Room N–1301, 200 Constitution Avenue NW., Washington, DC 20210; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

III. Summary of Rule

The regulations in this Part are divided into six subparts. Subpart A contains the provisions generally applicable to covered employers, including the requirements relating to the prohibitions on lie detector use and the posting of notices. Subpart A also sets forth interpretations regarding the effect of section 10 of the Act on other laws or collective bargaining agreements. Subpart B sets forth rules regarding the statutory exemptions from application of the Act. Subpart C sets forth the restrictions on polygraph usage under such exemptions. Subpart D sets forth the recordkeeping requirements and the rules on disclosure of polygraph test information. Subpart E deals with the authority of the Secretary of Labor and the enforcement provisions under the Act. Subpart F contains the procedures and rules of practice necessary for the administrative enforcement of the Act.

The Department met informally with outside parties who provided background information with respect to the preparation of this rule. Included in such meetings were representatives of security service companies and related trade associations; representatives of retail trade associations; representatives of the polygraph industry; and representatives of trade associations involved with controlled substances. Meetings were also held with officials of the Drug Enforcement Administration and the Department of Defense.

In developing this rule, a number of issues have been identified and explored. The Department has tentatively resolved these issues as described below, and it particularly invites comments on the following issues:

(1) The legislative intent as to the scope of the security service industry exemption is not entirely clear on the treatment of employees hired to install alarms in or guard commercial or retail establishments and residences. We have tentatively concluded that the section 7(e)(1)(B) exemption does not apply to security guard or security alarm firms protecting private homes or businesses not primarily engaged in the handling,

trading, transferring, or storing of the assets enumerated in the statute. There is an argument, however, that the exemption should be interpreted more broadly, so as to include such employees. If the exemption were so interpreted, it appears that virtually all employees in this industry would be subject to pre-employment polygraph tests. Such an interpretation is not easily reconciled with the language of the statute itself, which identifies specific types of security work as included within the exemption. Comment is specifically invited on the scope of the exemption as provided in § 801.14.

(2) The Congress specifically directed the Department to develop regulations which would list the types of "facilities, materials, or operations" having a significant impact on the health or safety of any State or political subdivision or the national security. It is evident the legislative intent was to protect the safety and health of the general public. The Department has listed a number of such "facilities, materials, or operations" in § 801.14(i). Comments are specifically requested on the scope of this list.

(3) The rule broadly interprets the term "prospective employee" for purposes of the security service and controlled substance exemptions. In particular, current employees of the employer, who were initially hired to perform duties which do not fall within the scope of the exemptions (and who, therefore, are not subject to pre-employment polygraph tests), could be tested as "prospective employees" the first time (only) they are re-assigned or promoted to a position with duties that do fall within the scope of the exemptions. We have found no pertinent legislative history on this issue. We believe, however, that some latitude is necessary in the definition of "prospective employee" for purposes of the exemption, so that current employees of an employer will not be unfairly disadvantaged, with respect to non-employees, in competition for positions which may be subject to the exemption. We believe that this construction, contained in §§ 801.13(d) and 801.14(b), is reasonable, given the realities of the workplace.

(4) Except as noted above, the rule makes no allowances for pre-employment testing to be conducted after an applicant is initially hired by an employer. It has been suggested that there are situations in which it is not feasible or practical to conduct the test prior to the actual hiring date and that it would be consistent with the purposes of the Act to permit testing subsequent to hiring in some circumstances. Comment is invited on the question whether it would be consistent with the Act to permit such testing. If so, under what circumstances, and what would be a reasonable period (e.g., one day, one week, one month) subsequent to hiring in which such testing should be permitted?

(5) The rule interprets the terms "direct access" and "access" differently for purposes of the controlled substance exemption (§ 801.13). This, "direct access", which is one of the elements necessary for pre-employment testing, is more narrowly defined than "access", an element required for testing of current employees during an ongoing investigation. In the latter case, however, the "access" must be to the specific person or property that is the subject of the investigation. The Department believes this interpretation is consistent with the statute and legislative history.

(6) The legislative history of the Act indicates Congress' intention that the controlled substance exemption not be applicable to truck drivers and that the exemption extend only to persons or entities registered with the Drug Enforcement Administration. The Controlled Substances Act exempts from registration requirements comon or contract carriers and warehouses whose possession of a controlled substance is in the usual course of their business. Accordingly, § 801.13(b)(2) excludes employees of common or contract carriers or public warehouses from this exemption.

(7) Inventory shortages are common throughout many industries. Section 801.12 is intended to preclude the mere existence of an inventory shortage, in and of itself, from being a basis for testing of current employees since it does not meet the specific incident requirement of the exemption. Are the safeguards in the rule sufficient to prevent the random testing of employees, or classes of employees, on a routine or regular basis?

(8) The Act provides several examples of events which would constitute an economic loss or injury for purposes of the ongoing investigation exemption, including theft, embezzlement, and sabotage. Section 801.12 adds other examples, including check-kiting and money-laundering, which were contained in the legislative history. Comment is invited on the question whether there are other examples, or other classes of activity, which should be included in the scope of "economic loss" for purposes of this exemption.

(9) Section 801.14 defines the statutory term "primary business purpose" to mean the activity from which 50 percent or more of the employer's business income is derived. Thus, at least 50 percent of an employer's annual dollar volume of business must be derived from the types of security activities within the scope of the exemption in order for the exemption to apply. Would some alternative definition of "primary business purpose" better effectuate the statutory scheme, or be more workable?

(10) The Act requires that individuals must be given "reasonable written notice" of the date, time, location and other information about a polygraph test. Sections 801.12(g)(2) and 801(c)(1)(A) define "reasonable" as at least 48 hours prior to the examination. Should some other minimum time frame be used to define "reasonable", and if so, why?

Executive Order 12291

This rule is not classified as a "major rule" under Executive Order 12291 on Federal Regulations, because it is not likely to result in: (1) An annual effect on the economy of $100 million or more; (2) a major increase in 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 enterprises in domesic or export markets. Therefore no regulatory impact analysis is required.

The Department's determination that the regulation is not subject to a regulatory impact analysis is based on the following:

(a) The Congressional Budget Office estimated the cost for EPPA to be $1 million to the Federal Government and that EPPA will have no impact on State and local governments.

(b) Further, the legislative history on EPPA shows a lack of any evidence that internal theft rates are higher in States which prohibit the use of polygraph tests. Also, there are no conclusive studies which show that polygraph testing reduces employee crime.

(c) Section 7 of EPPA permits certain employers to continue to conduct polygraph testing and permits all employers to request an employee to take a test, under certain conditions, when it is administered as part of an ongoing investigation. Consequently, any economic costs due to increased theft attributable to the absence of polygraph testing will be minimized.

(d) The net employment effect of EPPA will not be significant. As

employers turn to different hiring procedures and screening techniques, employment gains in the occupations associated with these alternative hiring procedures will offset any employment loss in the polygraph testing field.

Preliminary Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980 requires agencies to prepare regulatory flexibility analyses, and to develop alternatives whenever possible, in drafting regulations that will have "a significant economic impact on a substantial number of small entities." The following analysis assesses the impact of these regulations on small entities required by the Act.

(1) Reasons Why Action by Agency Is Being Considered

On June 27, 1988 the Employee Polygraph Protection Act of 1988 was enacted into law. This Act, which is effective December 27, 1988, generally prevents employers engaged in interstate commerce from using any lie detector tests, with certain exemptions, either for pre-employment screening or during the course of employment. Section 5 of the Act requires the Secretary of Labor to promulgate such rules and regulations as may be necessary to carry out the Act. This interim final rule is being issued to implement the Act.

(2) Objectives of and Legal Basis for Rule

This interim final rule is issued pursuant to section 5 of the Employee Polygraph Protection Act of 1988. Its objective is to enable employers and polygraph examiners to comply with the requirements of the Act, and to advise employees and job applicants of the protections afforded by the Act.

(3) Number of Small Entities Covered Under Rule

This interim final rule is applicable to all private sector employers engaged in or affecting "commerce" or in the production of goods for "commerce". The scope of the term "commerce" is accorded the same meaning as provided by section 3(b) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(b)). Approximately 6.5 million employers are covered by these regulations, and the majority of such employers would be classified as small entities. In addition, these regulations contain provisions applying to over 3,500 polygraph examiners and an undetermined number of others who administer lie detector-type tests, most of which are prohibited by the Act. It is estimated that nearly all of these examiners are either individual practitioners or associated with firms that would be classified as small entities.

(4) Reporting, Recordkeeping and Other Compliance Requirements of the Rule

The interim final rule establishes recordkeeping requirements for employers with respect to the maintenance and preservation of records for each polygraph test administered, as well as for each polygraph examiner who administers such tests on behalf of employers.

(5) Relevant Federal Rules Duplicating, Overlapping or Conflicting With the Rule

There is no duplication of existing Wage-Hour requirements, nor is similar information required by any other Federal agency or statute.

(6) Differing Compliance and Recordkeeping Requirements

The language sets forth in this interim final regulation closely adheres to the requirements imposed by the language of the Act and accompanying legislative history. The burdens imposed by these requirements on employers, and the polygraph examiners used by employers, are those imposed by statute, and those necessary to enforce the statute.

However, in developing this interim final rule, consideration was given to requiring a standard form for written statements which employers must provide to examinees, in certain instances, as a condition for administering polygraph tests under the several exemptions to the Act's general prohibition of such tests. For example, an employer is required to furnish an employee with a written statement setting the employee's rights under the law, prior to administering a polygraph test. It was concluded that employers, especially small entities, should have the flexibility to formulate and maintain such required written statements in any order or form deemed most appropriate to their needs, and that standard formats would not be required. However, to assist such employers, a sample format is set forth in the Appendix to this Part.

(7) Clarification, Consolidation and Simplification of Compliance and Reporting Requirements

As noted above, the recordkeeping requirements in this interim final rule are those imposed by statute, and those necessary to determine compliance with the Act. Employers are permitted to use any format that meets enforcement and compliance needs.

(8) Use of Other Standards

Appropriate alternative standards that would impose fewer regulatory burdens on covered employers, especially small entities, are not available.

(9) Exemptions of Small Entities from Coverage of the Rule

An exemption from the requirements of the interim final rule for small entities is not permitted by the provisions of the Act.

Publication as an Interim Final Rule

Request for Comments

The Secretary has determined that the public interest requires the immediate issuance of these interim final regulations in order to comply with the statutory requirement that regulations be issued well in advance of the effective date of the Act. Insufficient time existed since the enactment of the EPPA for the Department to issue an in-depth proposal for comments, review the comments, and promulgate a final rule in the time provided by the Act.

The failure to have this rule in place substantially in advance of the effective date of the Act (December 27, 1988) would lead to unnecessary, unwarranted and potentially costly uncertainty on the part of affected employers, employees, job applicants, and polygraph examiners, concerning the scope of the statutory coverage and of the exemptions thereunder and concerning their rights and obligations under the Act.

Accordingly, the Secretary finds good cause, pursuant to 5 U.S.C. 553(b)(3)(B), that prior notice and public comment are impracticable and contrary to the public interest. However, interested persons are invited to submit comments on this regulation by February 27, 1989. Following evaluation of the comments received, a proposed rule or a final regulation, modified as necessary, will be published.

This document was prepared under the direction and control of Paula V. Smith, Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor.

List of Subjects in 29 CFR Part 801

Employment, Investigations, Labor, Law enforcement.

Signed at Washington, DC, on this 18th day of October 1988.

Ann McLaughlin,

Secretary of Labor.

Fred W. Alvarez,

Assistant Secretary for Employment Standards.

Paula V. Smith,

Administrator, Wage and Hour Division.

Accordingly, Title 29, Chapter V, of the Code of Federal Regulations is amended by adding a new Subchapter C consisting of Part 801 to read as follows.

SUBCHAPTER C—OTHER LAWS

PART 801—APPLICATION OF THE EMPLOYEE POLYGRAPH PROTECTION ACT OF 1988

Subpart A—General

Sec.
801.1 Purpose and scope.
801.2 Definitions.
801.3 Coverage.
801.4 Prohibitions on lie detector use.
801.5 Effect on other laws or agreements.
801.6 Notice of protection.
801.7 Authority of the Secretary.

Subpart B—Exemptions

801.10 Exclusion for public sector employers.
801.11 Exemption for national defense and security.
801.12 Exemption for employers conducting investigations of economic loss or injury.
801.13 Exemption for employers authorized to manufacture, distribute, or dispense controlled substances.
801.14 Exemption for employers providing security services.

Subpart C—Restrictions on Polygraph Usage Under Exemptions

801.20 Adverse employment action under ongoing investigation exemption.
801.21 Adverse employment action under security service and controlled substance exemptions.
801.22 Rights of examinee.
801.23 Qualifications of and requirements for examiners.

Subpart D—Recordkeeping and Disclosure Requirements

801.30 Records to be preserved for 3 years.
801.35 Disclosure of test information.

Subpart E—Enforcement

801.40 General.
801.41 Representation of the Secretary.
801.42 Civil money penalties—assessment.
801.43 Civil money penalties—payment and collection.

Subpart F—Administrative Proceedings

General

801.50 Applicability of procedures and rules.

Procedures Relating to Hearing

801.51 Written notice of determination required.
801.52 Contents of notice.
801.53 Request for hearing.

Rules of Practice

801.58 General.
801.59 Service and computation of time.
801.60 Commencement of proceeding.
801.61 Designation of record.
801.62 Caption of proceeding.

Referral for Hearing

801.63 Referral to Administrative Law Judge.
801.64 Notice of docketing.

Procedures Before Administrative Law Judge

801.65 Appearances; representation of the Department of Labor.
801.66 Consent findings and order.
801.67 Decision and Order of Administrative Law Judge.

Modification or Vacation of Decision and Order of Administrative Law Judge

801.68 Authority of the Secretary.
801.69 Procedures for initiating review.
801.70 Implementation by the Secretary.
801.71 Filing and service.
801.72 Responsibility of the Office of Administrative Law Judges.
801.73 Final decision of the Secretary.

Record

801.74 Retention of official record.
801.75 Certification of official record.

Appendix A—Notice to examine

Authority: Pub. L. 100–347, 102 Stat. 646, 29 U.S.C. 2001–2009.

Subpart A—General

§ 801.1 Purpose and scope.

(a) Effective December 27, 1988, the Employee Polygraph Protection Act of 1988 (EPPA or the Act) prohibits most private employers (Federal, State, and local government employers are exempted from the Act) from using any lie detector tests either for pre-employment screening or during the course of employment. Polygraph tests, but no other types of lie detector tests, are permitted under limited circumstances subject to certain restrictions. The purpose of this part is to set forth the regulations to carry out the provisions of EPPA.

(b) The regulations in this part are divided into six subparts. Subpart A contains the provisions generally applicable to covered employers, including the requirements relating to the prohibitions on lie detector use and the posting of notices. Subpart A also sets forth interpretations regarding the effect of section 10 of the Act on other laws or collective bargaining agreements. Subpart B sets forth rules regarding the statutory exemptions from application of the Act. Subpart C sets forth the restrictions on polygraph usage under such exemptions. Subpart D sets forth the recordkeeping requirements and the rules on the disclosure of polygraph test information. Subpart E deals with the authority of the Secretary of Labor and the enforcement provisions under the Act. Subpart F contains the procedures and rules of practice necessary for the administrative enforcement of the Act.

§ 801.2 Definitions.

For purposes of this part:

(a) "Act" or "EPPA" means the Employee Polygraph Protection Act of 1988 (Pub. L. 100–347, 102 Stat. 646, 29 U.S.C. 2001–2009).

(b) (1) The term "commerce" has the meaning provided in section 3(b) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(b)). As so defined, "commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

(2) The term "State" means any of the fifty States and the District of Columbia and any Territory or possession of the United States.

(c) The term "employer" means any person acting directly or indirectly in the interest of an employer in relation to an employee or prospective employee. A polygraph examiner either employed for or whose services are retained for the sole purpose of administering polygraph tests ordinarily would not be deemed an "employer" with respect to the examinees.

(d) (1) The term "lie detector" means a polygraph, deceptograph, voice stress analyzer, psychological stress evaluator, or any other similar device (whether mechanical or electrical) that is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual.

(2) The term "lie detector" does not include medical tests used to determine the presence or absence of controlled substances or alcohol in bodily fluids. Also not included in the definition of "lie detector" are written or oral tests commonly referred to as "honesty" or "paper and pencil" tests, machine-scored or otherwise.

(e) The term "polygraph" means an instrument that—

(1) Records continuously, visually, permanently, and simultaneously changes in cardiovascular, respiratory, and electrodermal patterns as minimum instrumentation standards; and

(2) Is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual.

(f) The terms "manufacture", "dispense", "distribute", and "deliver" have the meanings set forth in the Controlled Substances Act, 21 U.S.C. 802.

(g) The term "Secretary" means the Secretary of Labor or authorized representative.

(h) "Employment Standards Administration" means the agency within the Department of Labor, which includes the Wage and Hour Division.

(i) "Wage and Hour Division" means the organizational unit in the Employment Standards Administration of the Department of Labor to which is assigned primary responsibility for enforcement and administration of the Act.

(j) "Administrator" means the Administrator of the Wage and Hour Division, or authorized representative.

§ 801.3 Coverage.

Any employer engaged in or affecting commerce or in the production of goods for commerce is subject to the provisions of the Act, unless otherwise exempt pursuant to section 7 of the Act and §§ 801.10 through 801.14 of this part.

§ 801.4 Prohibitions on lie detector use.

Section 3 of EPPA provides that, unless otherwise exempt pursuant to section 7 of the Act and §§ 801.10 through 801.14 of this part, covered employers are prohibited from:

(a) Requiring, requesting, suggesting or causing, directly or indirectly, any employee or prospective employee to take or submit to a lie detector test;

(b) Using, accepting, or inquiring about the results of a lie detector test of any employee or prospective employee; and

(c) Discharging, disciplining, discriminating against, denying employment or promotion, or threatening any employee or prospective employee to take such action for refusal or failure to take or submit to such test, on the basis of the results of a test, for filing a complaint, for testifying in any proceeding, or for exercising any rights afforded by the Act.

§ 801.5 Effect on other laws or agreements.

(a) Section 10 of EPPA provides that the Act, except for subsections (a), (b), and (c) of section 7, does not preempt any provision of a State or local law, or any provision of a collective bargaining agreement, that prohibits lie detector tests or is more restrictive with respect to the use of lie detector tests.

(b) (1) This provision applies to all aspects of the use of lie detector tests, including procedural safeguards, the use of test results, the rights and remedies provided examinees, and the rights, remedies, and responsibilities of examiners and employers.

(2) For example, if the State prohibits the use of polygraphs in all private employment, polygraph examinations could not be conducted pursuant to the limited exemptions provided in the Act; a collective bargaining agreement that provides greater protection to an examinee would apply in addition to the protection provided in the Act; or more stringent licensing or bonding requirements in a State law would apply in addition to the Federal bonding requirement.

(3) On the other hand, industry exemptions and applicable restrictions thereon, provided in EPPA, would preempt less restrictive exemptions established by State law for the same industry, e.g., random testing of current employees in the drug industry not prohibited by State law but limited by this Act to tests administered in connection with ongoing investigations.

(c) EPPA does not impede the ability of State and local governments to enforce existing statutes or to enact subsequent legislation restricting the use of lie detectors with respect to public employees.

(d) Nothing in section 10 of the Act restricts or prohibits the Federal Government from administering polygraph tests to its own employees or to experts, consultants, or employees of contractors, as provided in subsections 7(b) and 7(c) of the Act, and § 801.11 of this part.

§ 801.6 Notice of protection.

Every employer subject to EPPA shall post and keep posted on its premises a notice explaining the Act, as prescribed by the Secretary. Such notice must be posted in a prominent and conspicuous place in every establishment of the employer where it can readily be observed by employees and applicants for employment. Copies of such notice may be obtained from local offices of the Wage and Hour Division.

§ 801.7 Authority of the Secretary.

(a) Pursuant to section 5 of the Act, the Secretary is authorized to:

(1) Issue such rules and regulations as may be necessary or appropriate to carry out the Act;

(2) Cooperate with regional, State, local, and other agencies, and cooperate with and furnish technical assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of the Act; and

(3) Make investigations and inspections as necessary or appropriate, through complaint or otherwise, including inspection of such records (and copying or transcription thereof), questioning of such persons, and gathering such information as deemed necessary to determine compliance with the Act or these regulations; and

(4) Require the keeping of records necessary or appropriate for the administration of the Act.

(b) Section 5 of the Act also grants the Secretary authority to issue subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in connection with any investigation or hearing under the Act. The Secretary may administer oaths, examine witnesses, and receive evidence. For the purpose of any investigation or hearing provided for in the Act, the authority contained in sections 9 and 10 of the Federal Trade Commission Act (15 U.S.C. 49, 50), relating to the attendance of witnesses and the production of books, papers, and documents, shall be available to the Secretary.

(c) In case of disobedience to a subpoena, the Secretary may invoke the aid of a United States District Court which is authorized to issue an order requiring the person to obey such subpoena.

(d) Any person may report a violation of the Act or these regulations to the Secretary by advising any local office of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, or any authorized representative of the Administrator. The office or person receiving such a report shall refer it to the appropriate office of the Wage and Hour Division, Employment Standards Administration, for the region or area in which the reported violation is alleged to have occurred.

(e) The Secretary shall conduct investigations in a manner which, to the extent practicable, protects the confidentiality of any complainant or other party who provides information to the Secretary in good faith.

(f) It is a violation of these regulations for any person to resist, oppose, impede, intimidate, or interfere with any official of the Department of Labor assigned to perform an investigation, inspection, or law enforcement function pursuant to the Act during the performance of such duties.

Subpart B—Exemptions

§ 801.10 Exclusion for public sector employers.

(a) Section 7(a) provides an exclusion from the Act's coverage for the United

States Government, any State or local government, or any political subdivision of a State or local government, acting in the capacity of an employer. This exclusion from the Act also extends to any interstate governmental agency.

(b) The term "United States Government" means any agency or instrumentality, civilian or military, of the executive, legislative, or judicial branches of the Federal Government, and includes independent agencies, wholly-owned government corporations, and nonapprporiated fund instrumentalities.

(c) This exclusion from the Act applies only to the Federal, State, and local government entity. It does not extend to contractors or nongovernmental agents of a government entity.

§ 801.11 Exemption for national defense and security.

(a) The Exemptions allowing for the administration of polygraph tests in the following paragraphs (b) through (e) of this section apply only to the Federal Government; they do not allow private employers/contractors to administer such test.

(b) Section 7(b)(1) provides that nothing in the Act shall be construed to prohibit the administration of any lie detector test by the Federal Govenment, in the performance of any counterintelligence function, to any expert, consultant or employee of any contractor to the Department of Defense; or the Department of Energy, in connection with the atomic energy defense activities of such Department.

(c) Section 7(b)(2)(A) provides that nothing in the Act shall be construed to prohibit the administration of any lie detector test by the Federal Government, in the performance of any intelligence or counterintelligence function of the National Security Agency, the Defense Intelligence Agency, or the Central Intelligence Agency, to any individual employed by, asigned to, or detailed to any such agency; or any expert or consultant under contract to any such agency; or any individual applying for a position in any such agency; or any individual assigned to a space where sensitive cryptologic information is produced, processed, or stored for any such agency.

(d) Section 7(b)(2)(B) provides that nothing in the Act shall be construed to prohibit the administration of any lie detector test by the Federal Government, in the performance of any intelligence or counterintelligence function, to any expert, or consultant (or employee of such expert or consultant) under contract with any Federal Government department, agency, or program whose duties involve access to information that has been classified at the level of top secret or designated as being within a special access program under section 4.2 (a) of Executive Order 12356 (or a successor Executive Order).

(e) Section 7(c) provides that nothing in the Act shall be construed to prohibit the administration of any lie detector test by the Federal Government, in the performance of any counterintelligence function, to any employee of a contractor of the Federal Bureau of Investigation of the Department of Justice who is engaged in the performance of any work under a contract with the Bureau.

(f) "Counterintelligence" for purposes of the above paragraphs means information gathered and activities conducted to protect against espionage and other clandestine intelligence activities, sabotage, terrorist activities, or assassinations conducted for or on behalf of foreign governments, or foreign or domestic organizations or persons.

(g) Lie detector tests of persons described in the above paragraphs shall be administered in accordance with applicable Deparment of Defense directives and regulations, or other regulations and directives governing the use of such tests by the United States Government, as applicable.

§ 810.12 Exemption for employers conducting investigations of economic loss or injury.

(a) Section 7(d) of the Act provides a limited exemption from the general prohibition on lie detector use in private employment settings for employers conducting ongoing investigations of economic loss or injury to the employer's business. An employer may request an employee, subject to the conditions set forth in sections 8 and 10 of the Act and §§ 801.20, 801.22, 801.23, and 801.35 of this part, to submit to a polygraph test, but no other type of lie detector test, only if—

(1) The test is administered in connection with an ongoing investigation involving economic loss or injury to the employer's business, such as theft, embezzlement, misappropriation or an act of industrial espionage or sabotage;

(2) The employee has access to the property that is the subject of the investigation;

(3) The employer has a reasonable suspicion that the employee was involved in the incident or activity under investigation;

(4) The employer provides the examinee with a statement, in a language understood by the examinee, prior to the test which fully explains with particularity the specific incident or activity being investigated and the basis for testing particular employees and which contains, at a minimum:

(i) An identification with particularity of the specific economic loss or injury to the business of the employer;

(ii) A statement specifically describing the employee's access to the property that is the subject of the investigation;

(iii) A statement describing in detail the basis of the employer's reasonable suspicion that the employee was involved in the incident or activity under investigation; and

(iv) Signature of a person (other than a polygraph examiner) authorized to legally bind the employer; and

(5) The employer retains a copy of the statement described in paragraph (a)(4) of this section for at least 3 years and makes it available for inspection by the Wage and Hour Division on request. (See § 801.30(a).)

(b) For the exemption to apply, the condition of an "ongoing investigation" must be met. As used in section 7(d) of the Act, the ongoing investigation must be of a specific incident or activity. Thus, for example, an employer may not request that an employee or employees submit to a polygraph test in an effort to determine whether or not any thefts have occurred. Such random testing by an employer is specifically precluded by the Act. Further, by limiting the exemption to a specific incident or activity, an employer is precluded from using the exemption in situations where the so-called "ongoing investigation" is continuous. For example, the fact that items in inventory are frequently missing from a warehouse would not be a sufficient basis for administering a polygraph test. Even if the employer can establish that unusually high amounts of inventory are missing from the warehouse in a given month, this, in and of itself, would not be sufficient basis to meet the specific incident requirement without evidence of intentional wrongdoing. Administering a polygraph test in such circumstances, without identification of a specific incident or activity and a "reasonable suspicion that the employee was involved" would amount to little more than a fishing expedition.

(c) (1) The term "economic loss or injury to the employer's business" includes losses or injuries resulting from theft, embezzlement, misappropriation, industrial espionage or sabotage. These examples, cited in the Act, are intended to be illustrative and not exhaustive. Other specific incidents which would

meet the economic loss or injury requirement include check-kiting, money laundering, or the misappropriation of confidential or trade secret information. Similarly, instances such as theft from property managed by an employer, or property held by an employer as a fiduciary or custodian, would meet the required injury standard.

(2) The eonomic loss must result from intentional wrongdoing. Thus, losses which would not serve as a basis for the administration of a polygraph test include those apparently unintentional losses stemming from a truck, car, workplace or other similar type accidents. Any economic loss incident to lawful union or employee activity also would not satisfy this requirement.

(3) It is the business of the employer which must suffer the economic loss or injury. Thus, a theft committed by one employee against another employee of the same employer would not satisfy the requirement.

(d) While nothing in the Act prohibits the use of medical tests to determine the presence of controlled substances or alcohol in bodily fluids, the section 7(d) exemption does not permit the use of a polygraph test to learn whether an employee has used drugs or alcohol, even where such possible use may have contributed to an economic loss to the employer (e.g., an accident involving a company vehicle).

(e) Section 7(d)(2) provides that, as a condition for the use of the exemption, the employee must have had access to the property that is the subject of the investigation.

(1) The word "access", as used in section 7(d)(2), refers to the opportunity which an employee had to cause, or to aid or abet in causing, the specific economic loss or injury under investigation.

The term "access", thus, includes more than direct or physical contact during the course of employment. For example, all employees working in or with authority to enter a warehouse storage area have "access" to the property in the warehouse. All employees with the combination to a safe have "access" to the property in a locked safe. Employees also have "access" who have the ability to divert possession or otherwise affect the disposition of the property that is the subject of investigation. For example, a bookkeeper in a jewelry store with access to inventory records may aid or abet a clerk who steals an expensive watch by removing the watch from the employer's inventory records. In such a situation, it is clear that the bookkeeper effectively has "access" to the property that is the subject of the investigation.

(2) As used in section 7(d)(2), "property" refers to specifically identifiable property, but also includes such things of value as security codes and computer data, and proprietary financial or technical information which by its availability to competitors or others would cause economic harm to the employer.

(f)(1) As used in section 7(d)(3), the term "reasonable suspicion" refers to an observable, articulable basis in fact which indicates that a particular employee was involved in, or responsible for, an economic loss. Thus, for example, access in the sense of possible or potential opportunity, standing alone, does not constitute a basis for "reasonable suspicion". Information from a co-worker, or an employee's behavior, demeanor, or conduct may be factors in the basis for reasonable suspicion. Likewise, inconsistencies between facts, claims, or statements that surface during an investigation can serve as a sufficient basis for reasonable suspicion. While access or opportunity, standing alone, does not constitute a basis for reasonable suspicion, the totality of circumstances surrounding the access or opportunity (such as its unauthorized or unusual nature) may constitute a factor in determining whether there is a reasonable suspicion.

(2) For example, in an investigation of a theft of an expensive piece of jewelry, an employee authorized to open the establishment's safe no earlier than 9:00 a.m., in order to place the jewelry in a window display case, is observed opening the safe at 7:30 a.m. In such a situation, the opening of the safe by the employee one and one-half hours prior to the specified time may serve as the basis for reasonable suspicion. On the other hand, in the example given, if the employer asked the employee to bring the piece of jewelry to his or her office at 7:30, and the employee then opened the safe and reported the jewelry missing, such access, standing alone, would not constitute a basis for reasonable suspicion that the employee was involved in the incident.

(3) The employer has the burden of establishing that the specific individual or individuals to be tested are "reasonably suspected" of involvement in the specific economic loss or injury for the requirement in section 7(d)(3) to be met.

(g)(1) As discussed in paragraph (a)(4) of this section, section 7(d)(4) of the Act sets forth what information, at a minimum, must be provided to an employee if the employer wishes to claim the exemption.

(2) The statement required under paragraph (a)(4) of this section must be received by the employee at least 48 hours prior to the time of the examination. This will provide the employee with adequate pre-test notice of the specific incident or activity being investigated and afford the employee sufficient time prior to the test to obtain and consult with legal counsel or an employee representative.

(3) The statement to be provided to the employee must set forth with particularity the specific incident or activity being investigated and the basis for testing particular employees. However, section 7(d)(4)(A) requires specificity beyond the mere assertion of general statements regarding economic loss, employee access, and reasonable suspicion. For example, an employer's assertion that an expensive watch was stolen, and that the employee had access to the watch and is therefore a suspect, would not meet the "with particularity" criterion. If the basis for an employer's requesting an employee (or employees) to take a polygraph test cannot be articulated, and reduced to writing, then the standard would not be met. The identity of a co-worker or other individual providing information used to establish reasonable suspicion need not be revealed in the statement.

(4) It is further required that the statement provided to the examinee be signed by a person authorized to legally bind the employer. The standard would not be met if the person signing the statement is not authorized to legally bind the employer, and accordingly the exemption would not apply in such a case.

(h) Polygraph tests administered pursuant to this exemption are subject to the limitations set forth in sections 8 and 10 of the Act, as discussed in §§ 801.20, 801.22, 801.23, and 801.35 of this part. As provided in these sections, the exemption will apply only if certain requirements are met. Failure to satisfy any of the specified requirements nullifies the statutory authority for polygraph test administration and may subject the employer to the assessment of civil money penalties and other remedial actions, as provided for in section 6 of the Act (see Subpart E, § 801.42 of this part). The administration of such tests is also subject to State or local laws, or collective bargaining agreements, which may either prohibit lie detector tests, or contain more restrictive provisions with respect to polygraph testing.

§ 801.13 Exemption for employers authorized to manufacture, distribute, or dispense controlled substances.

(a) Section 7(f) provides an exemption from the Act's general prohibition regarding the use of polygraph tests for employers authorized to manufacture, distribute, or dispense a controlled substance listed in schedule I, II, III, or IV of section 202 of the Controlled Substances Act (21 U.S.C. 812). This exemption permits the administration of polygraph tests, subject to the conditions set forth in sections 8 and 10 of the Act and §§ 801.21, 801.22, 801.23, and 801.35 of this part, to:

(1) A prospective employee who would have direct access to the manufacture, storage, distribution, or sale of any such controlled substance; or

(2) A current employee if the following conditions are met:

(i) The test is administered in connection with an ongoing investigation of criminal or other misconduct involving, or potentially involving, loss or injury to the manufacture, distribution, or dispensing of any such controlled substance by such employer; and

(ii) The employee had access to the person or property that is the subject of the investigation.

(b)(1) The terms "manufacture", "distribute", "distribution", "dispense", "storage", and "sale", for the purposes of this exemption, are construed within the meaning of the Controlled Substances Act (21 U.S.C. 801 *et seq.*), as administered by the Drug Enforcement Administration (DEA), U.S. Department of Justice.

(2) The exemption in section 7(f) of the Act applies only to employers who are authorized by DEA to manufacture, distribute, or dispense a controlled substance. Section 302 of the Controlled Substances Act (21 U.S.C. 822) requires every person who manufactures, distributes, or dispenses any controlled substance to register with the Attorney General (i.e., with DEA). Common or contract carriers and warehouses whose possession of the controlled substance is in the usual course of their business or employment are not required to register. Since this exemption is intended to apply only to employees and prospective employees of persons or entities registered with DEA, and is not intended to apply to truck drivers employed by persons or entities who are not so registered, it has no application to employees of common or contract carriers or public warehouses. Truck drivers and warehouse employees of the persons or entities registered with DEA and authorized to manufacture, distribute, or dispense controlled substances, are within the scope of the exemption where they have direct access or access to the controlled substances, as discussed below.

(c) In order for a polygraph examination to be performed, section 7(f) of the Act requires that a prospective employee have "direct access" to the controlled substance(s) manufactured, dispensed, or distributed by the employer. Where a current employee is to be tested as a part of an ongoing investigation, section 7(f) requires that the employee have "access" to the person or property that is the subject of the investigation.

(1) A propective employee would have "direct access" if the position being applied for has responsibilities which include contact with or which affect the disposition of a controlled substance, including participation in the process of obtaining, dispensing, or otherwise distributing a controlled substance. This includes contact or direct involvement in the manufacture, storage, testing, distribution, sale or dispensing of a controlled substance and may include, for example, packaging, repackaging, ordering, licensing, shipping, receiving, taking inventory, providing security, prescribing, and handling of a controlled substance. A prospective employee would have "direct access" if the described job duties would give such person access to the products in question, whether such employee would be in physical proximity to controlled substances or engaged in activity which would permit the employee to divert such substances to his or her possession.

(2) A current employee would have "access" within the meaning of section 7(f) if the employee had access to the specific person or property which is the subject of the on-going investigation, as discussed in § 801.12(e) of this part. Thus, to test a current employee, the employee need not have had "direct" access to the controlled substance, but may have had only infrequent, random, or opportunistic access. Such access would be sufficient to test the employee if the employee could have caused, or could have aided or abetted in causing, the loss of the specific property which is the subject of the investigation. In addition, a maintenance worker in a drug warehouse, whose job duties include the cleaning of areas where the controlled substances which are the subject of the investigation were present, but whose job duties do not include the handling of controlled substances, would be deemed to have "access", but normally not "direct access", to the controlled substances. On the other hand, a drug warehouse truck loader, whose job duties include the handling of outgoing shipment orders which contain controlled substances, would have "direct access" to such controlled substances. A pharmacy department in a supermarket is another common situtation which is useful in illustrating the distinction between "direct access" and "access". Store personnel receiving pharmaceutical orders, i.e., the pharmacist, pharmacy intern, and other such employees working in the pharmacy department, would ordinarily have "direct access" to controlled substances. Other store personnel whose job duties and responsibilities do not include the handling of controlled substances but who had occasion to enter the pharmacy department where the controlled substances which are the subject of the investigation were stored, such as maintenance personnel or pharmacy cashiers, would have "access". Certain other store personnel whose job duties do not permit or require entrance into the pharmacy department for any reason, such as produce or meat clerks, checkout cashiers, or baggers, would not ordinarily have "access" of any type. In the case of "direct access", the prospective employee's access to controlled substances would be as a part of the manufacturing, dispensing or distribution process, while a current employee's "access" to the controlled substances which are the subject of the investigation need only be opportunistic.

(d) The term "prospective employee", for the purposes of this section, includes a current employee who presently holds a position which does not entail direct access to controlled substances, and therefore is outside the scope of the exemption's provisions for preemployment polygraph testing, provided the employee has applied for and is being considered for transfer or promotion to another position which entails such direct access. For example, an office secretary may apply for promotion to a position in the vault or cage areas of a drug warehouse, where controlled substances are kept. In such a situation, the current employee would be deemed a "prospective employee" for the purposes of this exemption, and thus would be subject to preemployment polygraph screening, at the time of such a change in position. However, any adverse action which is based in part on a polygraph test against a current employee who is treated as a "prospective employee" may be taken only with respect to the prospective position and may not affect the

employee's employment in the current position.

(e) Section 7(f) of the Act makes no specific reference to a requirement that employers provide current employees with a written statement prior to polygraph testing. Thus, employers to whom this exemption is available are not required to furnish a written statement such as that specified in section 7(d) of the Act and § 801.12(a)(4) of this part.

(f) For the section 7(f) exemption to apply, the polygraph testing of current employees must be administered "in connection with an ongoing investigation of criminal or other misconduct involving, or potentially involving, loss or injury to the manufacture, distribution, or dispensing of any such controlled substance by such employer * * *".

(1) Current employees may only be administered polygraph tests in connection with an ongoing investigation, relating to a specific incident or activity, or potential incident or activity, as discussed in § 801.12(b) of this part. Thus an employer is precluded from using the exemption in connection with continuing investigations or on a random basis to determine if thefts are occurring.

(2) In addition, the test must be administered in connection with loss or injury, or potential loss or injury, to the manufacture, distribution, or dispensing of a controlled substance.

(i) Retail drugstores and wholesale drug warehouses typically carry inventory of so-called health and beauty aids, cosmetics, over-the-counter drugs, and a variety of other similar products, in addition to their product lines of controlled drugs. The noncontrolled products usually constitute the majority of such firms' sales volumes. An economic loss or injury related to such noncontrolled substances would not constitute a basis of applicability of the section 7(f) exemption. For example, an investigation into the theft of a gross of cosmetic products could not be a basis for polygraph testing under section 7(f), but the theft of a container of valium could be.

(ii) Polygraph testing, with respect to an ongoing investigation concerning products other than controlled substances might be initiated under section 7(d) of the Act and § 801.12 of this part. However, the exemption in section 7(f) of the Act and this section is limited solely to losses or injury associated with controlled substances.

(g) Polygraph tests administered pursuant to this exemption are subject to the limitations set forth in sections 8 and 10 of the Act, as discussed in §§ 801.21, 801.22, 801.23, and 801.35 of this part. As provided in these sections, the exemption will apply only if certain requirements are met. Failure to satisfy any of the specified requirements nullifies the statutory authority for polygraph test administration and may subject the employer to the assessment of civil money penalties and other remedial actions, as provided for in section 6 of the Act (see Subpart E, § 801.42 of this part). The administration of such tests is also subject to State or local laws, or collective bargaining agreements, which may either prohibit lie detector tests, or contain more restrictive provisions with respect to polygraph testing.

§ 801.14 Exemption for employers providing security services.

(a) Section 7(e) of the Act provides an exemption from the general prohibition against polygraph tests for certain armored car, security alarm, and security guard employers. Subject to the conditions set forth in sections 8 and 10 of the Act and §§ 801.21, 801.22, 801.23, and 801.35 of this part, section 7(e) permits the use of polygraph tests on prospective employees provided that such employers have as their primary business purpose the providing of armored car personnel, personnel engaged in the design, installation, and maintenance of security alarm systems, or other uniformed or plainclothes security personnel; and provided the prospective employees are being hired to protect:

(1) Facilities, materials, or operations having a significant impact on the health or safety of any State or political subdivision thereof, or the national security of the United States, such as—

(i) Facilities engaged in the production, transmission, or distribution of electric or nuclear power,

(ii) Public water supply facilities,

(iii) Shipments or storage of radioactive or other toxic waste materials, and

(iv) Public transportation; or

(2) Currency, negotiable securities, precious commodities or instruments, or proprietary information.

(b)(1) Section 7(e) permits the administration of polygraph tests only to prospective employees. However, security service employers may administer polygraph tests to current employees in connection with an ongoing investigation, subject to the conditions of section 7(d) of the Act and § 801.12 of this part.

(2) The term "prospective employee" generally refers to an individual who is being considered for employment, for the first time, by an employer. However, the term "prospective employee" also includes current employees under circumstances similar to those discussed in paragraph (d) of § 801.13 of this part. Thus, for example, a security guard may be hired for a job outside the scope of the exemption's provisions for pre-employment polygraph testing, such as a position at a supermarket. If subsequently this guard is transferred or promoted to a job at a nuclear power plant, this currently-employed individual would be considered to be a "prospective employee" for purposes of this exemption, at the time of such proposed transfer or promotion. However, any adverse action which is based in part on a polygraph test against a current employee who is treated as a "prospective employee" may be taken only with respect to the prospective position and may not affect the employee's employment in the current position.

(c) Section 7(e) applies to any private employer whose "primary business purpose" consists of providing armored car personnel, personnel engaged in the design, installation, and maintenance of security alarm systems, or other uniformed or plainclothes security personnel. Thus, the exemption is limited to firms primarily in the business of *providing* such security services to others. (For example, a utility company which employs its own security personnel could not qualify.) In the case of diversified firms, the term "primary business purpose" shall mean that at least 50% of the employer's annual dollar volume of business is derived from the provision of the types of security services specifically identified in section 7(e).

(d)(1) As used in section 7(e)(1)(A), the terms "facilities, materials, or operations having a significant impact on the health or safety of any State or political subdivision thereof, or the national security of the United States" include protection of electric or nuclear power plants, public water supply facilities, radioactive or other toxic waste shipments or storage, and public transportation. These examples are intended to be illustrative, and not exhaustive. However, the types of "facilities, materials, or operations" within the scope of the exemption are not to be construed so broadly as to include low priority or minor security interests. The "facilities, materials, or operations" in question only consist of those having a "significant impact" on public health or safety, or national security. However, the "facilities, materials, or operations" may be either privately or publicly owned.

(2) The specific "facilities, materials, or operations" contemplated by this exemption would include those against which acts of sabotage, espionage, terrorism, or other hostile, destructive, or illegal acts could have a serious effect on the general public's safety or health, or national security. In addition to the specific examples set forth in the Act, the terms would include:

(i) Facilities, materials, and operations owned or leased by Federal, State, or local governments, including instrumentalities or interstate agencies thereof, for which an authorized public official has determined that a need for security exists, utilizing private armored car, security alarm system, or uniformed or plainclothes security personnel, or a combination thereof, such as:

(A) Government office buildings;

(B) Prisons and correction facilities;

(C) Public schools;

(D) Public libraries;

(E) Water supply;

(F) Military reservations, installations, posts, camps, arsenals, laboratories, and other similar facilities vital to defense and security;

(ii) Commercial and industrial assets and operations which—

(A) Are designated in writing by an appropriate Federal agency to be vital to national security interests (such as those of defense contractors and researchers), including factories, plants, buildings, or structures used for researching, designing, testing, manufacturing, producing, processing, repairing, assembling, storing, or distributing products or components related to the national defense; or

(B) Would pose a serious threat to public health or safety in the event of a breach of security (such as a plant engaged in the manufacture or processing of hazardous materials or chemicals);

(iii) Public and private energy and precious mineral facilities, supplies, and reserves, including—

(A) Public or private power plants and utilities;

(B) Oil or gas refineries and storage facilities;

(C) Strategic petroleum reserves; and

(D) Major dams, such as those which provide hydroelectric power; or

(iv) Major public or private transportation and communication facilities and operations, including—

(A) Airports;

(B) Train terminals, depots, and switching and control facilities;

(C) Major bridges and tunnels;

(D) Communications centers, such as receiving and transmission centers, and control centers; and

(E) Transmission and receiving operations for radio, television, and satellite signals; or

(v) The Federal Reserve System and stock and commodity exchanges;

(vi) Hospitals and health research facilities; and

(vii) Large public events, such as political conventions and major parades, concerts, and sporting events.

(3) Whether given "facilities, materials, or operations" fall within the contemplated purview of this exemption will be determined by the Administrator on request prior to the administration of the polygraph test, based on all the facts and circumstances. It is not possible to exhaustively account for all "facilities, materials, or operations" which fall within the purview of section 7(e)(1)(A). While it is likely that additional entities may fall within the exemption's scope, any such "facilities, materials, or operations" must meet the "significant impact" test. Thus, "facilities, materials, or operations" which would be of vital importance during periods of war or civil emergency, or whose sabotage would greatly affect the public health or safety, could fall within the scope of the term "significant impact".

(e) Section 7(e)(1)(B) of the Act extends the exemption to firms whose function includes protection of "currency, negotiable securities, precious commodities or instruments, or proprietary information". These terms collectively are construed to be assets handled by financial institutions such as banks, credit unions, savings and loan institutions, stock and commodity exchanges, brokers, or security dealers. These terms also refer to assets which are typically handled by, protected for and transported between and among commercial and financial institutions. Services provided by the armored car industry are thus clearly within the scope of the exemption, as are security alarm and security guard services provided to financial institutions of the type referred to above. However, security alarm or guard services provided to private homes, or to businesses not primarily engaged in handling, trading, transferring, or storing currency, negotiable securities, precious commodities or instruments, or proprietary information, are outside the scope of the exemption. This is true even though such places may physically house some such assets.

(f) An employer who falls within the scope of the exemption is one "whose function includes" protection of "facilities, materials, or operations", discussed in paragraph (e) of this section or of "currency, negotiable securities, precious commodities or instruments, or proprietary information" discussed in paragraph (f) of this section. Thus, assuming that the employer has met the "primary business purpose" test, as set forth in paragraph (d) of this section, the employer's operations then must simply "include" protection of at least one of the facilities within the scope of the exemption.

(g)(1) Section 7(e)(2) provides that the exemption shall not apply if a polygraph test is administered to a prospective employee who would not be employed to protect the "facilities, materials, operations, or assets" referred to in section 7(e)(1) of the Act, and discussed in paragraphs (e) and (f) of this section. Thus, while the exemption applies to employers whose function "includes" protection of certain facilities, employers would be permitted to administer polygraph tests only to prospective employees who are being hired to perform such functions.

(2) The phrase "employed to protect" in section 7(e)(2) has reference to a wide spectrum of prospective employees in the security industry, and includes all employees whose job duties affect the security of any qualifying "facilities, materials, operations, or assets," either directly or indirectly.

(3) In many cases, it will be readily apparent that certain positions within security companies would, by virtue of the individual's official job duties, entail "protection". For example, armored car drivers and guards, security guards, and alarm system installers and maintenance personnel all would be employed to protect in the most direct and literal sense of the term.

(4) The scope of the exemption is not limited, however, to those security personnel having direct, physical access to the facilities being protected. Various support personnel may also have "access" to the process of providing security services due to the position's exposure to knowledge of security plans and operations, employee schedules, delivery schedules, and other such activities. Where a position entails the opportunity to cause or participate in a breach of security, an employee to be hired for the position would also be deemed to be "employed to protect" the facility within the exemption's scope.

(5) For example, in the armored car industry, the duties of personnel other than guards and drivers may include taking customer orders for currency and commodity transfers, issuing security badges to guards, coordinating routes of travel and times for pick-up and delivery, issuing access codes to customers, route planning and other sensitive responsibilities. Similarly, in

the security alarm industry, several types of employees would have access to the process of providing security services, such as designers of security systems, system monitors, service technicians, and billing clerks (who may review the system design drawings to ensure proper customer billing). In the security industry, generally, administrative employees may have access to customer accounts, schedules, information relating to alarm system failures, and other security information, such as security employee absences due to illness that create "holes" in a security plan. Employees of this type are a part of the overall security services provided by the employer. Such employees possess the ability to affect, on an opportunistic basis, the security of protected operations, by virtue of the knowledge gained through their job duties.

(6) On the other hand, there are certainly some types of employees in the security industry who "would not be employed to protect" the functions within the purview of the exemption, and who would not have "access" to the process of providing security services. For example, custodial and maintenance employees typically would not have access, either directly or indirectly, to the operations or clients of the employer. Any employee whose "access" to secured areas or to sensitive information is occasional, or on a controlled basis, such as by escort, would also be outside the scope of the exemption. In cases where security service companies also provide janitorial, food and beverage, or other services unrelated to security, the exemption would clearly not extend to any employee considered for employment in such activity.

(h) Polygraph tests administered pursuant to this exemption are subject to the limitations set forth in sections 8 and 10 of the Act, as discussed in §§ 801.21, 801.22, 801.23, and 801.35 of this part. As provided in these sections, the exemption will apply only if certain requirements are met. Failure to satisfy any of the specified requirements nullifies the statutory authority for polygraph test administration and may subject the employer to the assessment of civil money penalties and other remedial actions, as provided for in section 6 of the Act (see Subpart E, § 801.42 of this part). The administration of such tests is also subject to State or local laws, or collective bargaining agreements, which may either prohibit lie detectors test, or contain more restrictive provisions with respect to polygraph testing.

Subpart C—Restrictions on Polygraph Usage Under Exemptions

§ 801.20 Adverse employment action under ongoing investigation exemption.

(a) Section 8(a)(1) of the Act provides that the limited exemption in section 7(d) of the Act and § 801.12 of this part for ongoing investigations shall not apply if an employer discharges, disciplines, denies employment or promotion or otherwise discriminates in any manner against a current employee based upon the analysis of a polygraph test chart or the refusal to take a polygraph test, without additional supporting evidence.

(b) "Additional supporting evidence", for purposes of section 8(a) of the Act, includes, but is not limited to, the following:

(1)(i) Evidence indicating that the employee had access to the missing or damaged property that is the subject of an ongoing investigation; and

(ii) Evidence leading to the employer's reasonable suspicion that the employee was involved in the incident or activity under investigation; or

(2) Admissions or statements made by an employee before, during or following a polygraph examination.

(c) Analysis of a polygraph test chart or refusal to take a polygraph test may not serve as a basis for adverse employment action, even with additional supporting evidence, unless the employer observes all the requirements of sections 7(d) and 8(b) of the Act, as described in §§ 801.12 and 801.22 of this part.

§ 801.21 Adverse employment action under security service and controlled substance exemptions.

(a) Section 8(a)(2) of the Act provides that the security service exemption in section 7(e) of the Act and § 801.14 of this part and the controlled substance exemption in section 7(f) of the Act and § 801.13 of this part shall not apply if an employer discharges, disciplines, denies employment or promotion, or otherwise discriminates in any manner against a current employee or prospective employee based solely on the analysis of a polygraph test chart or the refusal to take a polygraph test.

(b) Analysis of a polygraph test chart or refusal to take a polygraph test may serve as one basis for adverse employment actions of the type described in paragraph (a) of this section, *provided* that the adverse action was also based on another *bona fide* reason. For example, traditional factors such as prior employment experience, education, job performance, etc. may be used as a basis for employment decisions. Employment decisions based on admissions or statements made by an employee or prospective employee before, during or following a polygraph examination may, likewise, serve as a basis for such decisions.

(c) Analysis of a polygraph test chart or the refusal to take a polygraph test may not serve as a basis for adverse employment action, even with another legitimate basis for such action, unless the employer observes all the requirements of section 7 (e) or (f) of the Act, as appropriate, and section 8(b) of the Act, as described in §§ 801.13, 801.14 and 801.22 of this part.

§ 801.22 Rights of examinee.

(a) Pursuant to section 8(b) of the Act, the limited exemption in section 7(d) of the Act for ongoing investigations, and the security service and controlled substance exemptions in 7 (e) and (f) of the Act (described in §§ 801.12, 801.13, and 801.14 of this part) shall not apply unless all of the requirements set forth in this section are met.

(b)(1) During all phases of the polygraph testing the person being examined has the following rights:

(i) The examinee may terminate the test at any time;

(ii) The examinee may not be asked any questions in a degrading or unnecessarily intrusive manner;

(iii) The examinee may not be asked any questions dealing with:

(A) Religious beliefs or affiliations;

(B) Beliefs or opinions regarding racial matters;

(C) Political beliefs or affiliations;

(D) Sexual preferences or behavior; or

(E) Beliefs, affiliations, opinions, or lawful activities concerning unions or labor organizations;

(iv) The examinee may not be subjected to a test when there is sufficient written evidence by a physician that the examinee is suffering from any medical or psychological condition or undergoing any treatment that might cause abnormal responses during the actual testing phase. "Sufficient written evidence" shall constitute, at a minimum, a statement by a physician specifically describing the examinee's medical or psychological condition or treatment and the basis for the physician's opinion that the condition or treatment might result in such abnormal responses.

(2) An employee or prospective employee who exercises the right to terminate the test, or to decline the test for medical reasons with sufficient supporting evidence, shall be subject to adverse employment action only on the same basis as one who refuses to take a

polygraph test, as described in §§ 801.20 and 801.21 of this part.

(c) Any polygraph examination shall consist of one or more pretest phases, actual testing phases, and post-test phases.

(1) *Pretest phase.* The pretest phase consists of the questioning and other preparation of the prospective examinee before the actual use of the polygraph instrument.

(i) During the initial pretest phase, the examinee must be:

(A) Provided with written notice, in a language understood by the examinee, as to when and where the examination will take place and that the examinee has the right to consult with counsel or an employee representative before each phase of the test. Such notice shall be furnished to the examinee at least forty-eight hours, excluding weekend days and holidays, before the time of the examination. The purpose of this requirement is to provide a sufficient opportunity prior to the examination for the examinee to consult with counsel or an employee representative. While an employee has the right to obtain and consult with legal counsel before each phase of the test, the attorney or representative may be excluded from the room where the examination is administered during the actual testing phase.

(B) Informed orally and in writing of the nature and characteristics of the polygraph instrument and examination, including an explanation of the physical operation of the polygraph instrument and the procedure used during the examination.

(C) Provided with a written notice, in a language understood by the examinee, which shall be read to and signed by the examinee. The notice may be in any format (a suggested format is set forth in Appendix A to this part), but must contain at least the following information:

(*1*)(*i*) Whether or not the polygraph examination area contains a two-way mirror, a camera, or other device through which the examinee may be observed;

(*ii*) Whether or not any other device, such as those used in conversation or recording will be used during the examination;

(*iii*) That both the examinee and the employer have the right, with the other's knowledge, to record electronically the entire examination;

(*2*)(*i*) That the examinee has the right to terminate the test at any time;

(*ii*) That the examinee has the right, and will be given the opportunity, to review all questions to be asked during the test;

(*iii*) That the examinee may not be asked questions in a manner which degrades, or needlessly intrudes;

(*iv*) That the examinee may not be asked any questions concerning religious beliefs or opinions; beliefs regarding racial matters; political beliefs or affiliations; matters relating to sexual behavior; beliefs, affiliations, opinions, or lawful activities regarding unions or labor organizations;

(*v*) That the test may not be conducted if there is sufficient written evidence by a physician that the examinee is suffering from a medical or psychological condition or undergoing treatment that might cause abnormal responses during the examination;

(*3*)(*i*) That the test is not and cannot be required as a condition of employment;

(*ii*) That the employer may not discharge, dismiss, discipline, deny employment or promotion, or otherwise discriminate against the examinee based on the analysis of a polygraph test, or based on the examinee's refusal to take such a test, without additional evidence which would support such action;

(*iii*)(*A*) In connection with an ongoing investigation, that the additional evidence required for the employer to take adverse action against the examinee, including termination, may be evidence that the examinee had access to the property that is the subject of the investigation, together with evidence supporting the employer's reasonable suspicion that the examinee was involved in the incident or activity under investigation;

(*B*) That any statement made by the examinee before or during the test may serve as additional supporting evidence for an adverse employment action, as described in paragraph (c)(1)(i)(C)(*3*)(*ii*) of this section, and that any admission of criminal conduct by the examinee may be transmitted to an appropriate government law enforcement agency;

(*4*) That information acquired from a polygraph test may be disclosed by the examiner or by the employer only:

(*i*) To the examinee or any other person specifically designated in writing by the examinee to receive such information;

(*ii*) To the employer that requested the test;

(*iii*) To a court, governmental agency, arbitrator, or mediator that obtains a court order;

(*iv*) To a U.S. Department of Labor official when specifically designated in writing by the examinee to receive such information;

(*v*) By the employer, to an appropriate governmental agency without a court order where, and only insofar as, the information disclosed is an admission of criminal conduct;

(*5*) That if any of the examinee's rights or protections under the law are violated, the examinee has the right to file a complaint with the Wage and Hour Division of the U.S. Department of Labor, or to take action in court against the employer. Employers who violate this law are liable to the affected examinee, who may recover such legal or equitable relief as may be appropriate, including employment, reinstatement, and promotion, payment of lost wages and benefits, and reasonable costs, including attorney's fees. The Secretary of Labor may also bring action to restrain violations of the Act, or may assess civil money penalties against the employer.

(*6*) That the employee's rights under the Act may not be waived, either voluntarily or involuntarily, by contract or otherwise, except as part of a written settlement to a pending action or complaint under the Act, agreed to and signed by the parties.

(ii) During the initial or any subsequent pretest phases, the examinee must be given the opportunity, prior to the actual testing phase, to review all questions in writing that the examiner will ask during each testing phase.

(2) *Actual testing phase.* The actual testing phase refers to that time during which the examiner administers the examination by using a polygraph instrument with respect to the examinee and then analyzes the charts derived from the test. Throughout the actual testing phase, the examiner shall not ask any question that was not presented in writing for review prior to the test. In the case of an ongoing investigation, the examiner shall ensure that all relevant questions pertain to the investigation.

(3) *Post-test phase.* The post-test phase refers to any questioning or other communication with the examinee following the use of the polygraph instrument, including review of the results of the test with the examinee. Before any adverse employment action, the employer must:

(i) Further interview the examinee on the basis of the test results; and

(ii) Give to the examinee a written copy of any opinions or conclusions rendered in response to the test, as well as the questions asked during the test, with the corresponding charted responses.

(4) No testing period shall be less than ninety minutes in length. Such "test period" begins at the time that the examiner begins informing the examinee

of the nature and characteristics of the examination and the instruments involved, as prescribed in section (b)(2)(B) of the Act and § 801.22(e)(1)(i)(B) of this part, and ends when the examiner completes the review of the test results with the examinee. The ninety-minute minimum duration shall not apply if the examinee voluntarily acts to terminate the test.

§ 801.23 Qualifications of and requirements for examiners.

(a) Section 8 (b) and (c) of the Act provides that the limited exemption in section 7(d) of the Act for ongoing investigations, and the security service and controlled substances exemptions in section 7 (e) and (f) of the Act, shall not apply unless the person conducting the polygraph examination meets specified qualifications and requirements.

(b) An examiner must meet the following qualifications:

(1) Have a valid current license, if required by the State in which the test is to be conducted; and

(2) Carry a minimum bond of $50,000 provided by a surety incorporated under the laws of the United States or of any State, which may under those laws guarantee the fidelity of persons holding positions of trust, or carry an equivalent amount of professional liability coverage.

(c) An examiner must also, with respect to examinees identified by the employer pursuant to § 801.30(c) of this part:

(1) Observe all rights of examinees, as set out in § 801.22 of this part.

(2) Administer no more than five polygraph examinations in any one calendar day, not counting those instances where an examinee voluntarily terminates an examination prior to the actual testing phase, as decribed in § 801.22(c)(2) of this part.

(3) Administer no polygraph examination which is less than ninety minutes in duration, as described in § 801.22(c)(4) of this part.

(4) Render any opinion or conclusion regarding truthfulness or deception in writing. Such opinion or conclusion must be based solely on the polygraph test results. The written report shall not contain any information other than admissions, information, case facts, and interpretation of the charts relevant to the stated purpose of the polygraph test and shall not include any recommendation concerning the employment of the examinee.

(5) Maintain all opinions, reports, charts, written questions, lists, and other records relating to the test, including statements signed by examinees advising them of rights under the Act (as described in § 801.22(c)(1)(i)(C) of this part) and any electronic recordings of examinations, for at least three years from the date of the administration of the test. (See § 801.30 of this part for recordkeeping requirements.)

Subpart D—Recordkeeping and Disclosure Requirements

§ 801.30 Records to be preserved for 3 years.

(a) The following records shall be kept for a minimum period of three years from the date of the polygraph examination is conducted (or from the date the examination is requested if no examination is conducted):

(1) Each employer who requests an employee to submit to a polygraph examination in connection with an ongoing investigation involving economic loss or injury shall retain a copy of the statement that sets forth the specific incident or activity under investigation and the basis for testing that particular employee, as required by section 7(d)(4) of the Act and described in § 801.12(a)(4) of this part.

(2) Each employer who administers a polygraph examination under the exemption provided by section 7(f) of the Act (described in § 801.13 of this part) in connection with an ongoing investigation of criminal or other misconduct involving, or potentially involving, loss or injury to the manufacture, distribution or dispensing of a controlled substance, shall retain records specifically identifying the loss or injury in question and the nature of the employee's access to the person or property that is the subject of the investigation.

(3) Each employer shall identify in writing to the examiner persons to be examined pursuant to any of the exemptions under section 7(d), (e) or (f) of the Act (described in § 801.12, 801.13, and 801.14 of this part), and shall retain a copy of such notice.

(4) Each examiner retained to administer examinations to persons identified by employers under paragraph (d) shall maintain all opinions, reports, charts, written questions, lists, and other records relating to polygraph tests of such persons. In addition, the examiner shall maintain records of the number of examinations conducted each day (whether or not conducted pursuant to the Act), and, with regard to tests administered to persons identified by their employer under paragraph (d), the duration of each test period, as defined in § 801.22(c)(4) of this part.

(5) Each employer who retains an examiner to administer examinations pursuant to any of the exemptions under section 7 (d), (e) or (f) of the Act (described in § 801.12, 801.13, and 801.14 of this part) shall maintain copies of all opinions, reports or other records furnished to the employer by the examiner relating to such examinations.

(b) Each employer shall keep the records required by this Part safe and accessible at the place or places of employment or at one or more established central recordkeeping offices where employment records are customarily maintained. Where the records are maintained at a central recordkeeping office, other than in the place or places of employment, such records shall be made available within 72 hours following notice from the Secretary or an authorized representative.

(c) Each examiner shall keep the records required by this Part safe and accessible at the place or places of business or at one or more established central recordkeeping offices where examination records are customarily maintained. Where the records are maintained at a central recordkeeping office, other than in the place of places of business, such records shall be made available within 72 hours following notice from the Secretary or an authorized representative.

(d) All records shall be available for inspection and copying by the Secretary or an authorized representative. Information whose disclosure is restricted under section 9 of the Act and § 801.35 of this part shall be made available to the Secretary or the Secretary's representative where the examinee has designated the Secretary, in writing, to receive such information, or by order of a court of competent jurisdiction.

§ 801.35 Disclosure of test information.

Section 9 of the Act prohibits the unauthorized disclosure of any information obtained during a polygraph test by any person, other than the examinee, directly or indirectly, except as follows:

(a) A polygraph examiner or an employer (other than an employer exempt under section 7 (a), (b) or (c) of the Act (described in §§ 800.10 and 801.11 of this part)) may disclose information acquired from a polygraph test only to:

(1) The examinee or an individual specifically designated in writing by the examinee to receive such information;

(2) The employer that requested the polygraph test pursuant to the provisions of this Act;

(3) Any court, governmental agency, arbitrator, or mediator that obtains an order from a court of competent jurisdiction requiring the production of such information;

(4) The Secretary of Labor, or the Secretary's representative, when specifically designated in writing by the examinee to receive such information.

(b) An employer may disclose information from the polygraph test at any time to an appropriate governmental agency without the need of a court order where, and only insofar as, the information disclosed is an admission of criminal conduct.

(c) A polygraph examiner may disclose test charts, without identifying information (but not other examination materials and records) to another examiner(s) for examination and analysis, *provided* that such disclosure is for the sole purpose of consultation and review of the initial examiner's opinion concerning the indications of truthfulness or deception. Such action would not constitute disclosure under this Part provided that the other examiner has no direct or indirect interest in the matter.

Subpart E—Enforcement

§ 801.40 General.

(a) Whenever the Secretary believes that the provisions of the Act or these regulations have been violated, such action shall be taken and such proceedings instituted as deemed appropriate, including the following:

(1) Petitioning any appropriate District Court of the United States for temporary or permanent injunctive relief to restrain violation of the provisions of the Act or this part by any person, and to require compliance with the Act and this part, including such legal or equitable relief incident thereto as may be appropriate, including, but not limited to, employment, reinstatement, promotion, and the payment of lost wages and benefits;

(2) Assessing a civil penalty against any employer who violates any provision of the Act or this part in an amount of not more than $10,000 for each violation, in accordance with regulations set forth in this part; or

(3) Referring any unpaid civil money penalty which has become a final and unappealable order of the Secretary or a final judgment of a court in favor of the Secretary to the Attorney General for recovery.

(b)(1) Any employer who violates this Act shall be liable to the employee or prospective employee affected by such violation for such legal or equitable relief as may be appropriate, including, but not limited to, employment, reinstatement, promotion, and the payment of lost wages and benefits.

(2) An action under this subsection may be maintained against the employer in any Federal or State court of competent jurisdiction by an employee or prospective employee for or on behalf of such employee, prospective employee and others similarly situated. Such action must be commenced within a period not to exceed 3 years after the date of the alleged violation. The court, in its discretion, may allow reasonable costs (including attorney's fees) to the prevailing party.

(c) The taking of any one of the actions referred to in paragraph (a) of this section shall not be a bar to the concurrent taking of any other appropriate action.

§ 801.41 Representation of the Secretary.

(a) Except as provided in section 518(a) of Title 28, U.S. Code, relating to litigation before the Supreme Court, the Solicitor of Labor may appear for and represent the Secretary in any civil litigation brought under section 6 of the Act, as described in § 801.40 of this part.

(b) The Solicitor of Labor, through authorized representatives, shall represent the Administrator in all administrative hearings under the provisions of section 6 of the Act and this part.

§ 801.42 Civil money penalties—assessment.

(a) A civil money penalty in an amount not to exceed $10,000 for any violation may be assessed against any employer for:

(1) Requiring, requesting, suggesting or causing an employee or prospective employee to take a lie detector test or using, accepting, referring to or inquiring about the results of any lie detector test or any employee or prospective employee, other than as provided in the Act of this part;

(2) Taking an adverse action or discriminating in any manner against any employee or prospective employee on the basis of the employee's or prospective employee's refusal to take a lie detector test, other than as provided in the Act or this part;

(3) Discriminating or retaliating against an employee or prospective employee for the exercise of any rights under the Act;

(4) Disclosing information obtained during a polygraph test, except as authorized by the act or this part;

(5) Failing to maintain the records required by the Act or this part;

(6) Resisting, opposing, impeding, intimidating, or interfering with an official of the Department of Labor during the performance of an investigation, inspection, or other law enforcement function under the Act or this part; or

(7) Violating any other provision of the Act or this part.

(b) In determining the amount of penalty to be assessed for any violation of the Act or this part, the Administrator shall consider the previous record of the employer in terms of compliance with the Act and regulations, the gravity of the violations, and other pertinent factors. The matters which may be considered include, but are not limited to, the following:

(1) Previous history of investigation(s) or violation(s) of the Act or this part;

(2) The number of employees or prospective employees affected by the violation or violations;

(3) The seriousness of the violation or violations;

(4) Efforts made in good faith to comply with the provisions of the Act and this part;

(5) If the violations resulted from the actions or inactions of an examiner, the steps taken by the employer to ensure the examiner complied with the Act and the regulations in this part, and the extent to which the employer could reasonably have foreseen the examiner's actions or inactions;

(6) The explanation of the employer, including whether the violations were the result of a bona fide dispute of doubtful legal certainty;

(7) The extent to which the worker(s) suffered loss or damage;

(8) Commitment to future compliance, taking into account the public interest and whether the person has previously violated the provisions of the Act or this part.

§ 801.43 Civil money penalties—payment and collection.

Where the assessment is directed in a final order of the Department, the amount of the penalty is immediately due and payable to the United States Department of Labor. The person assessed such penalty shall remit promptly the amount thereof as finally determined, to the Administrator by certified check or by money order, made payable to the order of "Wage and Hour Division, Labor". The remittance shall be delivered or mailed to the Wage and Hour Division Regional Office for the area in which the violations occurred.

Subpart F—Administrative Proceedings

General

§ 801.50 Applicability of procedures and rules.

The procedures and rules contained in this subpart prescribe the administrative process for assessment of civil money penalties for violations of the Act or of these regulations.

Procedures Relating to Hearing

§ 801.51 Written notice of determination required.

Whenever the Administrator determines to assess a civil money penalty for a violation of the Act or this part, the person against whom such penalty is assessed shall be notified in writing of such determination. Such notice shall be served in person or by certified mail.

§ 801.52 Contents of notice.

The notice required by § 801.51 of this part shall:

(a) Set forth the determination of the Administrator and the reason or reasons therefore;

(b) Set forth a description of each violation and the amount assessed for each violation;

(c) Set forth the right to request a hearing on such determination;

(d) Inform any affected person or persons that in the absence of a timely request for a hearing, the determination of the Administrator shall become final and unappealable; and

(e) Set forth the time and method for requesting a hearing, and the procedures relating thereto, as set forth in § 801.53 of this part.

§ 801.53 Request for hearing.

(a) Any person desiring to request an administrative hearing on a civil money penalty assessment pursuant to this part shall make such request in writing to the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, no later than thirty (30) days after the service of the notice referred to in §801.59 of this part.

(b) No particular form is prescribed for any request for hearing permitted by this subpart. However, any such request shall:

(1) Be typewritten or legibly written;

(2) Specify the issue or issues stated in the notice of determination giving rise to such request;

(3) State the specific reason or reasons why the person requesting the hearing believes such determination is in error;

(4) Be signed by the person making the request or by an authorized representative of such person; and

(5) Include the address at which such person or authorized representative desires to receive further communications relating thereto.

(c) The request for hearing must be received by the Administrator at the address set forth in paragraph (a) of this section, within the time set forth in that paragraph. For the affected person's protection, if the request is by mail, it should be by certified mail, return receipt requested.

Rules of Practice

§ 801.58 General.

Except as specifically provided in this subpart, and to the extent they do not conflict with the provisions of this subpart, the "Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges" established by the Secretary at 29 CFR Part 18 shall apply to administrative proceedings under this subpart.

§ 801.59 Service and computation of time.

(a) Service of documents under this subpart shall be made by personal service to the individual, officer of a corporation, or attorney of record or by mailing the determination to the last known address of the individual, officer, or attorney. If done by certified mail, service is complete upon mailing. If done by regular mail, service is complete upon receipt by addressee.

(b) Two (2) copies of all pleadings and other documents required for any administrative proceeding provided by this part shall be served on the attorneys for the Department of Labor. One copy shall be served on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, and one copy on the Attorney representing the Department in the proceeding.

(c) Time will be computed beginning with the day following the action and includes the last day of the period unless it is a Saturday, Sunday, or federally-observed holiday, in which case the time period includes the next business day.

§ 801.60 Commencement of proceeding.

Each administrative proceeding permitted under the Act and these regulations shall be commenced upon receipt of a timely request for hearing filed in accordance with § 810.53 of this part.

§ 801.61 Designation of record.

(a) Each administrative proceeding instituted under the Act and this Part shall be identified of record by a number preceded by the year and the letters "EPPA".

(b) The number, letter, and designation assigned to each such proceeding shall be clearly displayed on each pleading, motion, brief, or other formal document filed and docketed of record.

§ 801.62 Caption of proceeding.

(a) Each administrative proceeding instituted under the Act and this part shall be captioned in the name of the person requesting such hearing, and shall be styled as follows:

In Matter of———————, Respondent.

(b) For the purposes of administrative proceedings under the Act and this part the "Secretary of Labor" shall be identified as plaintiff and the person requesting such hearing shall be named as respondent.

Referral for Hearing

§ 801.63 Referral to Administrative Law Judge.

(a) Upon receipt of a timely request for a hearing filed pursuant to and in accordance with § 801.53 of this part, the Administrator, by the Associate Solicitor for the Division of Fair Labor Standards or by the Regional Solicitor for the Region in which the action arose, shall by Order of Reference, promptly refer a copy of the notice of administrative determination complained of, and the original or a duplicate copy of the request for hearing signed by the person requesting such hearing or the authorized representative of such person, to the Chief Administrative Law Judge, for a determination in an administrative proceeding as provided herein. The notice of administrative determination and request for hearing shall be filed of record in the Office of the Chief Administrative Law Judge and shall, respectively, be given the effect of a complaint and answer thereto for purposes of the administrative proceeding, subject to any amendment that may be permitted under this part.

(b) A copy of the Order of Reference, together with a copy of this part, shall be served by counsel for the Secretary upon the person requesting the hearing, in the manner provided in 29 CFR 18.3.

§ 801.64 Notice of docketing.

The Chief Administrative Law Judge shall promptly notify the parties of the docketing of each matter.

Procedures Before Administrative Law Judge

§ 801.65 Appearances; representation of the Department of Labor.

The Associate Solicitor, Division of Fair Labor Standards, or Regional Solicitor shall represent the Department in any proceeding under this part.

§ 801.66 Consent findings and order.

(a) *General.* At any time after the commencement of a proceeding under this part, but prior to the reception of evidence in any such proceeding, a party may move to defer the receipt of any evidence for a reasonable time to permit negotiation of an agreement containing consent findings and an order disposing of the whole or any part of the proceeding. The allowance of such deferment and the duration thereof shall be at the discretion of the Administrative Law Judge, after consideration of the nature of the proceeding, the requirements of the public interest, the representations of the parties, and the probability of an agreement being reached which will result in a just disposition of the issues involved.

(b) *Content.* Any agreement containing consent findings and an order disposing of a proceeding or any part thereof shall also provide:

(1) That the order shall have the same force and effect as an order made after full hearing;

(2) That the entire record on which any order may be based shall consist solely of the notice of administrative determination (or amended notice, if one is filed), and the agreement;

(3) A waiver of any further procedural steps before the Administrative Law Judge; and

(4)A waiver of any right to challenge or contest the validity of the findings and order entered into, in accordance with the agreement.

(c) *Submission.* On or before the expiration of the time granted for negotiations, the parties or their authorized representatives or their counsel may:

(1) Submit the proposed agreement for consideration by the Administrative Law Judge; or

(2) Inform the Administrative Law Judge that agreement cannot be reached.

(d) *Disposition.* In the event an agreement containing consent findings and an order is submitted within the time allowed therefor, the Administrative Law Judge, within thirty (30) days thereafter, shall, if satisfied with its form and substance, accept such agreement by issuing a decision based upon the agreed findings.

§ 801.67 Decision and Order of Administrative Law Judge.

(a) The Administrative Law Judge shall prepare, as promptly as practicable after the expiration of the time set for filing proposed findings and related papers, a decision on the issues referred by the Secretary.

(b) The decision of the Administrative Law Judge shall be limited to a determination whether the respondent has violated the Act or these regulations and the approporiateness of the remedy or remedies imposed by the Secretary. The Administrative Law Judge shall not render determinations on the legality of a regulatory provision or the constitutionality of a statutory provision.

(c) The decision of the Administrative Law Judge, for purposes of the Equal Access to Justice Act (5 U.S.C. 504), shall be limited to determinations of attorney fees and/or other litigation expenses in adversary proceedings requested pursuant to § 801.53 of this part which involve the imposition of a civil money penalty assessed for a violation of the Act or this Part.

(d) The decision of the Administrative Law Judge shall include a statement of findings and conclusions, with reasons and basis therefor, upon each material issue presented on the record. The decision shall also include an appropriate order which may be to affirm, deny, reverse, or modify, in whole or in part, the determination of the Secretary. The reason or reasons for such order shall be stated in the decision.

(e) The Administrative Law Judge shall serve copies of the decision on each of the parties.

(f) If any party desires review of the decision of the Administrative Law Judge, a petition for issuance of a Notice of Intent shall be filed in accordance with § 801.69 of this subpart.

(g) The decision of the Administrative Law Judge shall constitute the final order of the Secretary unless the Secretary, pursuant to § 801.70 of this subpart issues a Notice of Intent to Modify or Vacate the Decision and Order.

Modification or Vacation of Decision and Order of Administrative Law Judge

§ 801.68 Authority of the Secretary.

The Secretary may modify or vacate the Decision and Order of the Administrative Law Judge whenever the Secretary concludes that the Decision and Order:

(a) Is inconsistent with a policy or precedent established by the Department of Labor;

(b) Encompasses determinations not within the scope of the authority of the Administrative Law Judge;

(c) Awards attorney fees and/or other litigation expenses pursuant to the Equal Access to Justice Act which are unjustified or excessive; or

(d) Otherwise warrants modifying or vacating.

§ 801.69 Procedures for initiating review.

(a) Within twenty (20) days after the date of the decision of the Administrative Law Judge, the respondent, the Administrator, or any other party desiring review thereof, may file with the Secretary an original and two copies of a petition for issuance of a Notice of Intent as described under § 801.70. The petition shall be in writing and shall contain a concise and plain statement specifying the grounds on which review is sought. A copy of the Decision and Order of the Administrative Law Judge shall be attached to the petition.

(b) Copies of the petition shall be served upon all parties to the proceeding and on the Chief Administrative Law Judge.

§ 801.70 Implementation by the Secretary.

(a) Whenever, on the Secretary's own motion or upon acceptance of a party's petition, the Secretary believes that a Decision and Order may warrant modifying or vacating, the Secretary shall issue a Notice of Intent to modify or vacate the Decision and Order in question.

(b) The Notice of Intent to Modify or Vacate a Decision and Order shall specify the issue or issues to be considered, the form in which submission shall be made (i.e., briefs, oral argument, etc.), and the time within which such presentation shall be submitted. The Secretary shall closely limit the time within which the briefs must be filed or oral presentations made, so as to avoid unreasonable delay.

(c) The Notice of Intent shall be issued within thirty (30) days after the date of the Decision and Order in question.

(d) Service of the Notice of Intent shall be made upon each party to the proceeding, and upon the Chief Administrative Law Judge, in person or by certified mail.

§ 801.71 Filing and service.

(a) *Filing.* All documents submitted to the Secretary shall be filed with the Secretary of Labor, U.S. Department of Labor, Washington, DC 20210.

(b) *Number of copies.* An original and two copies of all documents shall be filed.

(c) *Computation of time for delivery by mail.* Documents are not deemed filed with the Secretary until actually received by the Secretary. All documents, including documents filed by mail, must be received by the Secretary either on or before the due date. No additional time shall be added where service of a document requiring action within a prescribed time thereafter, was made by mail.

(d) *Manner and proof of service.* A copy of all documents filed with the Secretary shall be served upon all other parties involved in the proceeding. Service under this section shall be by personal delivery or by mail. Service by mail is deemed effected at the time of mailing to the last known address.

§ 801.72 Responsibility of the Office of Administrative Law Judges.

Upon receipt of the Secretary's Notice of Intent to Modify or Vacate the Decision and Order of an Administrative Law Judge, the Chief Administrative Law Judge shall, within (15) days, fifteen forward a copy of the complete hearing record to the Secretary.

§ 801.73 Final decision of the Secretary.

The Secretary's final Decision and Order shall be served upon all parties and the Chief Administrative Law Judge, in person or by certified mail.

Record

§ 801.74 Retention of offical record.

The official record of every completed administrative hearing provided by this part shall be maintained and filed under the custody and control of the Chief Administrative Law Judge.

§ 801.75 Certification of official record.

Upon receipt of timely notice of appeal to a United States District Court of a Decision and Order issued under this part, the Chief Administrative Law Judge shall promptly certify and file with the appropriate United States District Court, a full, true, and correct copy of the entire record, including the transcript of proceedings.

Appendix A—Notice to Examinee

Section 8(b) of the Employee Polygraph Protection Act, and Department of Labor regulations (29 CFR 801.22) require that you be given the following information before taking a polygraph examination:

1. (a) The polygraph examination area [does] [does not] contain a two-way mirror, a camera, or other device through which you may be observed.

(b) Another device, such as those used in conversation or recording, [will] [will not] be used during the examination.

(c) Both you and the employer have the right, with the other's knowledge, to record electronically the entire examination.

2. (a) You have the right to terminate the test at any time.

(b) You have the right, and will be given the opportunity, to review all questions to be asked during the test.

(c) You may not be asked questions in a manner which degrades, or needlessly intrudes.

(d) You may not be asked any questions concerning: Religious beliefs or opinions; beliefs regarding racial matters; political beliefs or affiliations; matters relating to sexual behavior; beliefs, affiliations, opinions, or lawful activities regarding unions or labor organizations.

(e) The test may not be conducted if there is sufficient written evidence by a physician that you are suffering from a medical or psychological condition or undergoing treatment that might cause abnormal responses during the examination.

3. (a) The test is not and cannot be required as a condition of employment.

(b) The employer may not discharge, dismiss discipline, deny employment or promotion, or otherwise discriminate against you based on the analysis of a polygraph test, or based on your refusal to take such a test without additional evidence which would support such action.

(c)(1) In connection with an ongoing investigation, the additional evidence required for an employer to take adverse action against you, including termination, may be (A) evidence that you had access to the property that is the subject of the investigation, together with (B) the evidence supporting the employer's reasonable suspicion that you were involved in the incident or activity under investigation.

(2) Any statement made by you before or during the test may serve as additional supporting evidence for an adverse employment action, as described in 3(b) above, and any admission of criminal conduct by you may be transmitted to an appropriate government law enforcement agency.

4. (a) Information acquired from a polygraph test may be disclosed by the examiner or by the employer only:

(1) To you or any other person specifically designated in writing by you to receive such information;

(2) To the employer that requested the test;

(3) To a court, governmental agency, arbitrator, or mediator that obtains a court order;

(4) To a U.S. Department of Labor official when specifically designated in writing by you to receive such information.

(b) Information acquired from a polygraph test may be disclosed by the employer to an appropriate governmental agency without a court order where, and only insofar as, the information disclosed is an admission of criminal conduct.

5. If any of your rights or protections under the law are violated, you have the right to file a complaint with the Wage and Hour Division of the U.S. Department of Labor, or to take action in court against the employer. Employers who violate this law are liable to the affected examinee, who may recover such legal or equitable relief as may be appropriate, including employment, reinstatement, and promotion, payment of lost wages and benefits, and reasonable costs, including attorney's fees. The Secretary of Labor may also bring action to restrain violations of the Act, or may assess civil money penalties against the employer.

6. Your rights under the Act may not be waived, either voluntarily or involuntarily, by contract or otherwise, except as part of a written settlement to a pending action or complaint under the Act, and agreed to and signed by the parties.

I acknowledge that I have received a copy of the above notice, and that it has been read to me.

_____

(Date)

_____

(Signature)

[FR Doc. 88-24377 Filed 10-20-88; 8:45 am]

BILLING CODE 4510-27-M

federal register

Friday
October 21, 1988

Part V

Department of Transportation

Federal Aviation Administration

14 CFR Part 71

Proposed Alteration of Airport Radar Service Area; Metropolitan Oakland International, CA; Notice of Proposed Rulemaking

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 87-AWA-54]

Proposed Alteration of Airport Radar Service Area; Metropolitan Oakland International, CA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice proposes to amend the Metropolitan Oakland International Airport, CA, Airport Radar Service Area (ARSA). This proposal would adjust the lateral limits of the ARSA to remove the airspace that is within the outer core of the ARSA, north of Interstate 580, from regulatory status.

DATES: Comments must be received on or before December 23, 1988.

ADDRESSES: Send comments on the proposal in triplicate to: Director, FAA, Western-Pacific Region, Attention: Manager, Air Traffic Division, Docket No. 87-AWA-54, Federal Aviation Administration, P.O. Box 92007, Worldway Postal Center, Los Angeles, CA 90009.

The official docket may be examined in the Rules Docket, weekdays, except Federal holidays, between 8:30 a.m. and 5:00 p.m. The FAA Rules Docket is located in the Office of the Chief Counsel, Room 916, 800 Independence Avenue, SW., Washington, DC.

An informal docket may also be examined during normal business hours at the office of the Regional Air Traffic Division.

FOR FURTHER INFORMATION CONTACT: Betty Harrison, Airspace Branch (ATO-240), Airspace-Rules and Aeronautical Information Division, Air Traffic Operations Service, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC. 20591; telephone: (202) 267-9254.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposal. Communications should identify the airspace docket and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Airspace Docket No. 87-AWA-54." The postcard will be date/time stamped and returned to the commenter. All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in the light of comments received. All comments submitted will be available for examination in the Rules Docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRM's

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Inquiry Center, APA-230, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267-3484. Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for future NPRM's should also request a copy of Advisory Circular No. 11-2 which describes the application procedure.

The Proposal

The FAA is considering an amendment to Part 71 of the Federal Aviation Regulations (14 CFR Part 71) to modify the Metropolitan Oakland International ARSA as follows:

Eliminate the area within the outer core, north of Interstate 580. Interstate 580 is a well-known, easily recognizable landmark for visual flight rules (VFR) aircraft. During user forums and feedback sessions following the original implementation of this ARSA, substantial comments were received supporting the exclusion of this area so that the heavily used VFR route, north of Interstate 580, would not be compressed below 2,100 feet MSL. Interstate 580 is located north of the final approach courses of the standard instrument approach procedures for Oakland Airport's Runway 27; thus, the final approach courses would still be protected by the remainder of the outer core. More airspace outside the ARSA would be available in the Lake Chabot area, which would reduce aircraft congestion and provide users more freedom without adversely affecting the Oakland ARSA. Environmentally, aircraft noise could be reduced by allowing nonparticipating aircraft to cross Castro Valley at higher altitudes.

For the reasons discussed under "Regulatory Evaluation," the FAA has determined that this proposed regulation is not a "major rule" under Executive Order 12291 and is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979).

Regulatory Evaluation Summary

The following is a summary of the cost impact and benefit assessment of an NPRM to amend Part 71 of the Federal Aviation Regulations (14 CFR Part 71). A more detailed regulatory evaluation has been placed in the docket (87-AWA-54).

Summary of Costs

The FAA estimates the costs associated with the NPRM to be very minimal. The rationale for this determination is based upon two factors:

1. Cost evaluation for the final rule (ASD 85-AW-4, 51 FR 8284, March 10, 1986, "Establishment of Airport Radar Service Areas") determined potential costs would not materialize to any appreciable degree, and if they did occur, such costs would be transitional, relatively low in magnitude, or attributable to specific implementation problems that have been experienced at a very small minority of ARSA sites.

2. Since the NPRM seeks to restore airport radar service area airspace to airport traffic area airspace, there should be little or no cost to the aviation public. Furthermore, since the rule would reduce congestion in the affected airspace and allow the final approach course to Metropolitan Oakland International's Runway 27 to remain protected, sectional charts would be updated during the regular chart cycle.

Summary of Benefits

Many of the benefits of the modification are not quantifiable. The FAA expects the benefits of this proposal will accrue in terms of efficiency and environmental factors. First, controllers would have less airspace to monitor thereby enabling them to concentrate more fully on targets in and around the Metropolitan Oakland International traffic patterns. Second, increased airspace in the Lake Chabot area outside the ARSA would reduce congestion and provide users with more freedom without adversely affecting the Oakland ARSA or posing a safety threat. Finally, aircraft noise would be reduced considerably by

allowing nonparticipating pilots to cross Castro Valley at a higher altitude.

Conclusion

On balance, the FAA believes that the restoration of the airspace would benefit various users at a near zero cost and expects that the establishment of this proposal would produce long term, ongoing benefits far in excess of any costs which may be incurred.

Regulatory Flexibility Determination

The proposal to eliminate the ARSA area north of Interstate 580 would release ARSA controlled airspace not required for safety reasons. The establishment of this proposed rule would, in effect, lessen government regulation in the affected areas; thus, it would not pose an economic burden upon independently owned and operated small businesses and small not-for-profit organization.

Trade Impact Statement

The proposed regulation would only impact the Metropolitan Oakland International ARSA. As such, it would have no effect on the sale of foreign aviation products or services in the United States, nor would it affect the sale of American products or services in foreign countries.

Federalism Implications

The regulation proposed herein would not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12616 it is determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed under "Regulatory Evaluation Summary," the FAA certifies that the proposed regulation, if adopted, will not result in a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Aviation safety, Airport radar service areas.

The Proposed Amendment

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

PART 71—DESIGNATION OF FEDERAL AIRWAYS, AREA LOW ROUTES, CONTROLLED AIRSPACE AND REPORTING POINTS

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

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

§ 71.50 [Amended]

2. § 71.501 is amended as follows:

Metropolitan Oakland International Airport, CA [Revised]

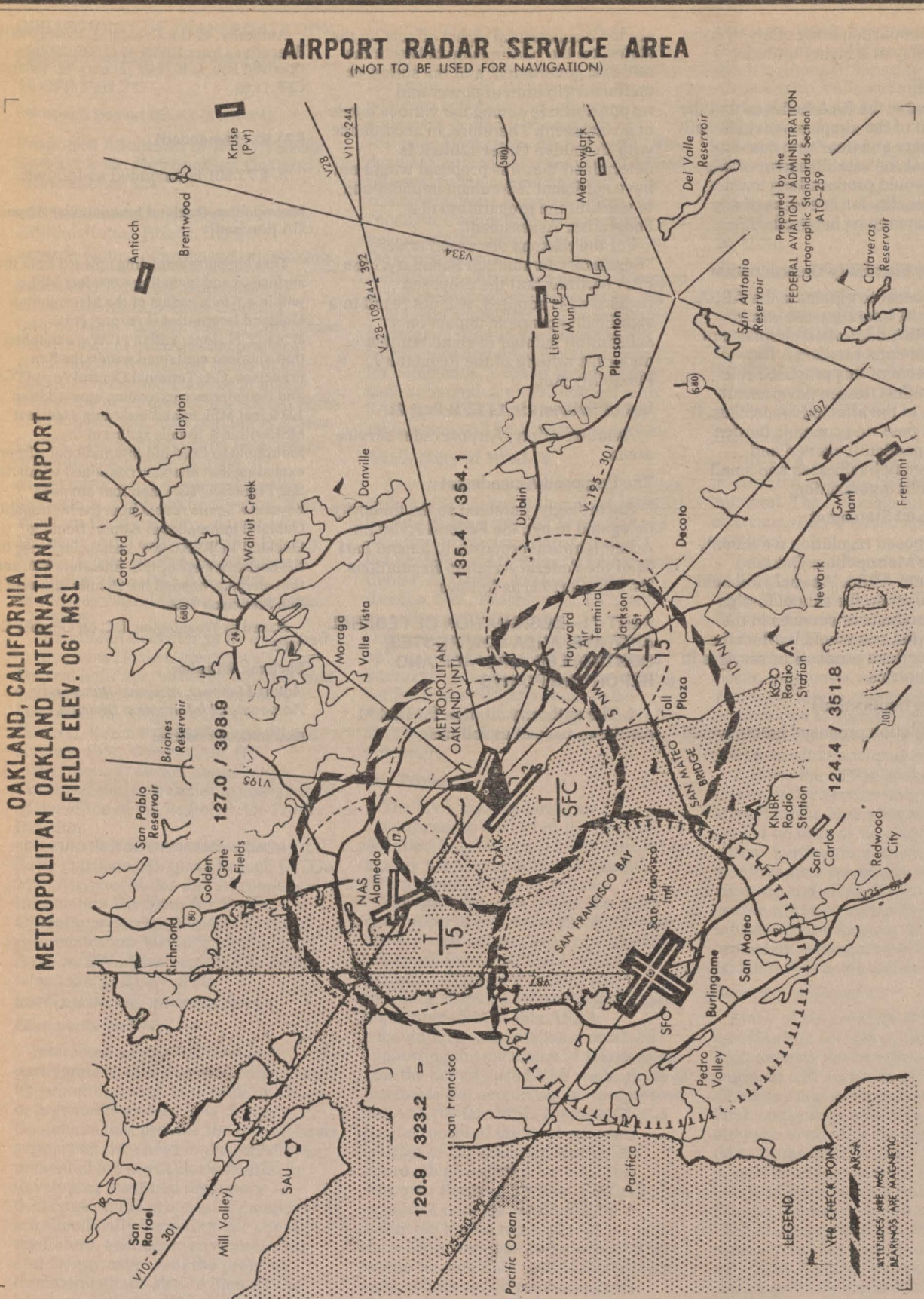
That airspace extending upward from the surface to and including 4,000 feet MSL within a 5-mile radius of the Metropolitan Oakland International Airport (lat. 37°43'17"N., long. 122°13'11"W.), excluding that airspace contained within the San Francisco, CA, Terminal Control Area (TCA); and that airspace extending upward from 1,500 feet MSL to and including 4,000 feet MSL within a 10-mile radius of the Metropolitan Oakland International Airport, excluding that airspace contained within the San Francisco TCA, and that airspace beyond a 5-mile radius from the Metropolitan Oakland International Airport from the Oakland VORTAC 004° radial clockwise to the northern edge of U.S. Interstate 580, and that airspace beyond the 15-mile radius of the San Francisco TCA.

Issued in Washington, DC, on October 17, 1988.

Shelomo Wugalter,

Acting Manager, Airspace-Rules and Aeronautical Information Division.

BILLING CODE 4910-13-M



[FR Doc. 88-24422 Filed 10-20-88; 8:45 am]
BILLING CODE 4910-13-C

federal register

Friday
October 21, 1988

Part VI

Department of Health and Human Services

Food and Drug Administration

21 CFR Parts 312 and 314

Investigational New Drug, Antibiotic and Biological Drug Product Regulations; Procedures for Drugs Intended To Treat Life-Threatening and Severely Debilitating Illnesses; Interim Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 312 and 314

[Docket No. 88N-0359]

Investigational New Drug, Antibiotic, and Biological Drug Product Regulations; Procedures for Drugs Intended To Treat Life-Threatening and Severely Debilitating Illnesses

AGENCY: Food and Drug Administration.

ACTION: Interim rule; opportunity for public comment.

SUMMARY: The Food and Drug Administration (FDA) is issuing interim regulatory procedures designed to speed the availability of new therapies to desperately ill patients, while preserving appropriate guarantees for safety and effectiveness. These procedures are intended to facilitate the development, evaluation, and marketing of such products, especially where no satisfactory alternative therapies exist. These procedures reflect the recognition that physicians and patients are generally willing to accept greater risks or side effects from products that treat life-threatening and severely-debilitating illnesses, than they would accept from products that treat less serious illnesses. These procedures also reflect the recognition that the benefits of the drug need to be evaluated in light of the severity of the disease being treated. The procedures apply to products intended to treat acquired immunodeficiency syndrome (AIDS), some cancers, and other life-threatening or severely-debilitating illnesses. FDA is issuing these procedures as an interim rule with opportunity for public comment.

DATES: Interim rule effective October 21, 1988; comments by December 20, 1988.

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

FOR FURTHER INFORMATION CONTACT:

Steven H. Unger, Center for Drug Evaluation and Research (HFD-362), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-295-8049,

or

Steven F. Falter, Center for Biologics Evaluation and Research (HFB-130), Food and Drug Administration, 8800 Rockville Pike, Bethesda, MD 20892, 301-295-8046.

SUPPLEMENTARY INFORMATION: Expediting the availability of promising new therapies has been a major priority of FDA over the past several years. In the **Federal Register** of May 22, 1987 (52 FR 19466), FDA issued new regulations designed to increase the availability to desperately ill patients of promising investigational new drug (IND) and biological products before general marketing begins. This rulemaking initiative, known as the treatment IND program, was endorsed by the President's Task Force on Regulatory Relief, chaired by Vice President George Bush. The final rule has received broad support from the medical and patient communities. The significance and utility of the treatment IND program has also been recognized and endorsed by the President's Commission on the Human Immunodeficiency Virus (HIV) Epidemic.

The treatment IND regulations became effective on June 22, 1987. Since that time, seven promising experimental therapies have been made available to patients stricken with AIDS, cancer, Parkinson's disease, and other serious conditions. In February 1988, the American Medical Association and FDA cosponsored a major national conference intended to educate physicians and health care organizations about the treatment IND program. FDA has also publicized specific treatment IND approval actions in both medical and lay journals (Refs. 1 through 8).

The treatment IND program is part of FDA's comprehensive efforts to facilitate the development and availability of significant new therapies. For example, through its implementation of the Orphan Drug Act, enacted in 1983, FDA has given special emphasis to potential new therapies for rare diseases or conditions. Since 1983, FDA has granted orphan drug designation to over 200 products, many of which are for life-threatening illnesses. (Orphan drug designation provides the commercial sponsor with certain economic incentives to encourage drug development, including tax credits for the cost of clinical development and exclusive marketing rights for the designated indication upon marketing approval.) FDA has approved for marketing 27 such orphan products, including therapies to treat such life-threatening illnesses as leukemia and AIDS.

FDA has also instituted a number of management improvements designed to expedite the evaluation of AIDS-related products in particular. These include establishment of a top "1-AA" priority for the review of all AIDS products, and the creation of two new divisions—one for drugs and one for biologicals—to give special focus to the review of such products. FDA's actions have led to the approval in record time of the first drug, zidovudine (formerly called AZT), to treat the AIDS virus, as well as approval for human testing of the first potential AIDS vaccines.

Building on these achievements, on August 3, 1988, Vice President Bush, in his capacity as chairman of the Presidential Task Force on Regulatory Relief, requested FDA to develop procedures for expediting the marketing of new therapies intended to treat AIDS and other life-threatening illnesses. This charge recognized the urgency felt by desperately ill patients and their families. The charge was directed to FDA as the Federal agency that regulates the transfer of the fruits of biomedical research to the marketplace.

The procedures contained in this notice respond to the Vice President's charge. In developing these procedures, FDA met informally with representatives of AIDS interest groups as well as with representatives of consumer, health professional, academic, orphan drug, and industry organizations. FDA also met informally with leadership of the National Institutes of Health.

As described further below, FDA is issuing these new procedures as an interim rule, effective immediately, with an opportunity for public comment. Highlights of the interim rule are summarized below, followed by a section-by-section description of the new procedures.

I. Highlights of the Regulations

New procedures are being codified as part of FDA's IND regulations, by adding a new Subpart E consisting of §§ 312.80 through 312.88, and by adding a conforming amendment to FDA's new drug application (NDA) regulations, new paragraph (c) of § 314.25. The purpose of these new procedures (§ 312.80) is to expedite the development, evaluation, and marketing of new therapies intended to treat persons with life-threatening or severely-debilitating illnesses, especially where no satisfactory alternative therapies exist. The procedures themselves focus on the entire drug development and evaluation process—from early preclinical and clinical testing, through FDA evaluation of controlled clinical trials and marketing applications, to postmarketing surveillance—in order to treat the entire process as a coherent whole and thereby significantly increase its overall efficiency.

The scope of the new procedures (§ 312.81) will apply to new drugs, antibiotics, and biological products that are being studied for their safety and effectiveness in treating life-threatening or severely-debilitating illnesses. Within the context of these procedures, the term "life-threatening" is defined to include diseases where the likelihood of death is high unless the course of the disease is interrupted (e.g., AIDS and cancer), as well as diseases or conditions with potentially fatal outcomes where the end point of clinical trial analysis is survival (e.g., increased survival in persons who have had a stroke or heart attack). The term "severely-debilitating" refers to diseases or conditions that cause major irreversible morbidity (e.g., blindness or neurological degeneration).

A key component of the procedures is early consultation between FDA and drug sponsors (§ 312.82) to seek agreement on the design of necessary preclinical and clinical studies needed to gain marketing approval. Such consultation is intended to improve the efficiency of the process by preventing false starts and wasted effort that could otherwise result from studies that are flawed in design. Most important, at the end of early (phase 1) clinical testing, FDA and the sponsor will seek to reach agreement on the proper design of phase 2 controlled clinical trials, with the goal that such research will be adequate to provide sufficient data on the product's safety and effectiveness to support a decision on its approvability for marketing. Where appropriate, FDA will invite to such meetings one or more outside expert scientific consultants or advisory committee members.

If the preliminary analysis of test results appears promising, FDA may ask the sponsor (§ 312.83) to submit a treatment protocol to be reviewed under the treatment IND regulations. Such a treatment protocol, if submitted and granted, would serve as a bridge between the completion of early stages of clinical trials and final marketing approval.

Once phase 2 testing and analysis is completed by the sponsor and a marketing application is submitted, FDA will evaluate the data utilizing a medical risk-benefit analysis (§ 312.84). As part of this evaluation, FDA will consider whether the benefits of the drug outweigh the known and potential risks of the drug and the need to answer remaining questions about risks and benefits of the drug, taking into consideration the severity of the disease and the absence of satisfactory alternative therapy. In making decisions on whether to grant marketing approval for products that have been the subject of an end-of-phase 1 meeting under this rule, FDA will usually seek the advice of outside expert scientific consultants or advisory committees.

As a conforming amendment, a new paragraph (c) is being added to § 314.125 of FDA's NDA regulations. This paragraph is designed to make clear that FDA's evaluation of marketing applications for drugs to treat life-threatening and severely-debilitating diseases will incorporate the criteria being added to § 312.84. These criteria include the adoption of a medical risk-benefit analysis when assessing the safety and effectiveness of these drugs.

Finally, when approval or licensing of a product is being granted, FDA may seek agreement from the sponsor (§ 312.85) to conduct certain postmarketing (phase 4) studies to delineate additional information about the drug's risks, benefits, and optimal use. These studies could include, but would not be limited to, studying different doses or schedules of administration than were used in phase 2 studies, use of the drug in other patient populations or other stages of the disease, and use of the drug over a longer period of time.

These procedures are modeled after the highly successful development, evaluation, and approval of zidovudine, the first drug approved to treat the AIDS virus. Close consultation between FDA, the sponsor, and the National Institutes of Health resulted in efficient preclinical animal testing (2 to 4 weeks in duration), focused phase 1 clinical testing, and a well-designed and conducted multi-center phase 2 clinical trial that provided dramatic evidence of increased survival in patients with advanced cases of AIDS. Given such evidence, FDA approved a treatment protocol in 5 days, and marketing approval in 107 days. Concurrent with approval, the sponsor agreed to conduct phase 4 research studying the effects of zidovudine in patients at an earlier stage of the disease. In total, the drug development and evaluation process, which takes an average of 8 years from initial human testing under an IND to final marketing approval, took only 2 years for zidovudine. Although the total development time will vary with different drugs, FDA believes that the approach contained in these new procedures has great potential for increasing significantly the efficiency of the drug development and evaluation process for the drugs affected.

Moreover, to the extent that the Commissioner determines that clinical trials to treat life-threatening or severely-debilitating diseases are already underway and are consistent with the requirements of these rules, upon his own initiative and in cooperation with the drug sponsor, he may recommend that a marketing application be submitted under the new procedures.

In conjunction with these procedures, FDA may, in certain circumstances, undertake focused regulatory research (§ 312.86) addressing critical rate-limiting aspects of the preclinical, chemical/manufacturing, and clinical phases of drug development and evaluation. The FDA Commissioner and other agency officials will also actively monitor (§ 312.87) the progress of the conduct and evaluation of clinical trials for products covered by these procedures, and will be involved in facilitating their appropriate progress.

The final provision of these procedures (§ 312.88) references applicable safeguards inherent in existing FDA regulations to ensure patient safety during clinical testing and the safety of products following marketing approval. These safeguards include FDA requirements regarding informed consent and institutional review boards. These safeguards further include the review of animal studies prior to initial human testing, and the monitoring of adverse drug experiences during the IND, marketing application, and postmarketing phases.

FDA believes that this program, taken as a whole, establishes a new and innovative approach to stimulating the development of particularly important drugs, while at the same time building on past practices that have proven to be successful.

II. Effective Date and Opportunity for Public Comment

For the reasons described below, FDA is issuing these procedures as an interim rule, with an opportunity for public comment. Because of the urgency associated with life-threatening illnesses, the agency intends to begin implementation of these procedures immediately, but will consider modifications to them based on issues raised during the comment period and experience gained under the interim rule.

The program established in this interim rule is intended to bring about a significant improvement in the efficiency of the development, evaluation, and marketing of new therapies for life-threatening and severely-debilitating illnesses, while preserving appropriate quarantees for safety and effectiveness. Although the program is important, it

builds upon managerial and regulatory options available under existing practices and procedures. The opportunity for early consultation with sponsors on the design of clinical trials, for example, is permissible under the existing investigational new drug review provisions of FDA's regulations. Because the new program represents a fundamental commitment to expediting the development of innovative products, it is appropriate to identify and describe the components of that program and to codify them for ready reference by affected persons. Moreover, the amendment to Part 314, requiring consideration of risk-benefit criteria in decisions to approve or disapprove these drugs, is consistent with the flexibility granted to the Agency under the statute in determining whether substantial evidence of safety and effectiveness has been demonstrated.

To the extent that the elements of the program announced today are regarded as new rules, they are within the exception to the Administrative Procedure Act notice-and-comment requirement for general statements of policy and rules of agency organization, procedure, and practice (5 U.S.C. 553(b)(A)). Moreover, if the new program is regarded as substantive rulemaking, the Commissioner hereby finds good cause for not providing notice and an opportunity to comment prior to its effectiveness. The importance of developing new therapies for life-threatening diseases has been highlighted in recent years by the AIDS crisis. In addition, the sustained search by drug researchers for treatments for many other diseases, including Alzheimer's disease and cancer, merits immediate attention. FDA believes that, as promising new therapies for these diseases are identified, they must be developed by sponsors and evaluated by the agency as expeditiously as possible. It would therefore be contrary to the public interest to delay the implementation of this program pending the time necessary to engage in the APA's notice-and-comment procedures, and such delay would also be unnecessary because the program derives from existing regulations that have already been the subject of notice and an opportunity for comment (5 U.S.C. 553(b)(B); 21 CFR 10.40(e)).

FDA believes, however, that it should invite and consider public comment on its practices and procedures for reviewing investigational new drug, new drug approval, and biologics license applications, including those described in this notice.

III. Contents of the Program

A. Purpose

The drug development process is generally thought of, in simplified terms, as consisting of three phases of human testing to determine if a drug is safe and effective: Phase 1 with 10 to 50 patients to study how the drug is tolerated, metabolized, and excreted; phase 2 with 50 to 200 patients in which the safety and efficacy of the drug are first evaluated in controlled trials; and phase 3 with 200 to 1,000 or more patients to confirm and expand upon the safety and efficacy data obtained from the first two phases. (For purposes of this discussion, the word "drug" is meant to include new drugs, antibiotic drugs, and biological products.)

A recent study of new drug development has documented the percentage of drugs whose development is discontinued after each of these phases. Of the 174 new chemical entities that entered phase 1 testing under U.S. IND's between 1976 and 1978, 70 percent successfully completed phase 1 and moved on to phase 2, while 33 percent successfully completed phase 2 and moved on to phase 3. At this point the dropout rate slowed considerably, as 27 percent successfully completed phase 3 and were submitted to FDA in the form of a marketing application, and 20 percent actually received marketing approval from the agency (Ref. 9).

The three phases describe the usual process of drug development, but they are not statutory requirements. The basis for marketing approval is the adequacy of the data available; progression through the particular phases is simply the usual means the sponsor uses to collect the data needed for approval. The statute itself focuses on the standard of evidence needed for approval, as derived from adequate and well-controlled clinical investigations, with no mention of phases 1, 2, and 3. FDA believes that if sufficient attention is paid to the quality and amount of data obtained in phase 2, it should be possible to identify early those drugs that represent safe and effective treatments for life-threatening and severely-debilitating diseases—and to develop the evidence needed for their marketing—in the course of carrying out the first controlled trials.

This program is based on that premise. For drugs intended to treat life-threatening and severely debilitating illnesses, it should be possible to reduce the total premarket drug development time by designing and conducting phase 2 controlled trails that are capable of providing necessary data on the drug's safety and effectiveness. FDA would analyze data from such studies utilizing medical risk-benefit considerations appropriate for drugs intended to treat life-threatening or severely-debilitating illnesses. The treatment IND, as appropriate, could continue to serve as a bridge between phase 2 trials and the point of marketing approval. Drug sponsors might also conduct postmarketing (phase 4) studies to delineate additional information about the drug's risks, benefits, and optimal use. The FDA Commissioner and other agency officials would actively monitor the process to ensure that such products are developed by the sponsor and analyzed by the agency as expeditiously as possible.

Section 312.80 of the rule summarizes the program's purpose: to expedite the development, evaluation, and marketing of new therapies intended to treat persons with life-threatening or severely-debilitating illnesses, especially where no satisfactory alternative therapy exists. As stated in FDA's new drug application regulations (§ 314.105(c)), while the statutory standards of safety and effectiveness apply to all drugs, the many kinds of drugs that are subject to them, and the wide range of uses for those drugs, demand flexibility in applying the standards. In promulgating this interim rule, FDA has determined that it is appropriate to exercise the broadest flexibility in applying the statutory standards, while preserving appropriate guarantees for safety and effectiveness. The procedures contained in this rule reflect the recognition that physicians and patients are generally willing to accept greater risks or side effects from products that treat life-threatening and severely-debilitating illnesses, than they would accept from products that treat less serious illnesses. These procedures also reflect the recognition that the benefits of the drug need to be evaluated in light of the severity of the disease being treated. The procedures outlined in this notice should be interpreted consistent with this statement of purpose.

B. Scope

Section 312.81 of the rule outlines the scope of this rule. The rule applies to new drug, antibiotic, and biological products being studied for their safety and effectiveness in treating life-threatening or severely-debilitating diseases.

A "life-threatening" disease is defined as one in which the likelihood of death is high unless the course of the disease is interrupted (e.g., progression from asymptomatic HIV infection to

symptomatic HIV infection, or further progression to a later stage of AIDS; metastatic cancer; amyotrophic lateral sclerosis). This use of the term "life-threatening" plainly includes any disease whose progression is likely to lead to death, especially in a short period of time (e.g., 6 months to 1 year). This section also applies to any condition in which a study is to be carried out to determine whether the treatment has a beneficial effect on survival (e.g., increased survival after a stroke or heart attack).

The term "severely-debilitating" is defined as a disease or condition that leads to major irreversible morbidity (e.g., severe functional deficits in multiple sclerosis, Alzheimer's disease or progressive ankylosing spondylitis; prevention of blindness due to cytomegalovirus infection in AIDS patients).

With respect to "severely-debilitating" illnesses, the procedures contained in this rule are applicable to those instances where the studies proposed will examine the treatment's capacity to prevent or reverse what would otherwise be irreversible damage, such as putting ankylosing spondylitis into remission and stopping joint damage and deformity, or preventing blindness. It is in such studies that excellence in study design and an early answer to key questions on safety and effectiveness are especially critical. The agency notes that there are many other studies that examine symptomatic relief (e.g., pain of ankylosing spondylitis) rather than irreversible morbidity. While products being studied for symptomatic relief of a serious disease would likely qualify for treatment IND consideration under § 312.34(b)(2), they would not be covered by the procedures contained in this interim rule.

In all of the cases covered by these new procedures, when the end points of clinical study relate to survival or prevention of major disability, they are of such great importance that it is imperative that the first controlled clinical trials be designed and conducted as well as possible. If this is not done, preliminary reports of success from poorly designed studies might make it difficult ever to carry out the proper trials. FDA believes it is clearly in the public interest to assure in such situations, to the extent possible, that the first clinical trials be designed so that the true merit of the drug or biologic can be evaluated as promptly as possible. FDA will also expedite the designation of eligible orphan products to provide additional incentive for their development.

The agency recognizes that the scope of these procedures is subject to interpretation, and the examples given above are illustrative only. FDA intends to be flexible in its implementation of this program and, subject to available resources, provide early advice when it is sought. The agency encourages sponsors to consult with FDA on the program's applicability to particular products.

C. Elements of the Program

1. Early consultation. A key component to be addressed is early consultation, which is covered in § 312.82 of the rule. In 1987, FDA codified the practice that, upon request of a drug's sponsor, FDA medical staff will hold a conference with the sponsor at the end of phase 2 testing. (See § 312.47(b)(1).) The goal of this conference is to reach agreement on a plan of phase 3 testing that will provide the needed remaining evidence of the drug's safety and efficacy to gain marketing approval. If, however, the evidence obtained from well-planned and well-executed phase 2 research is sufficient under the statute for marketing approval, there may be no need for additional phase 3 premarket testing, and the drug can become available much more rapidly than usual.

This is most likely to occur for drugs to treat life-threatening illnesses where the relatively small amount of data available at this stage may nevertheless be sufficient for approval. For example, phase 2 research was sufficient for approval of zidovudine the only drug approved thus far to treat the AIDS virus. Zidovudine was developed and approved in record time, largely because further premarketing (phase 3) studies were not needed to support safety and effectiveness following completion of a highly successful well-controlled multi-center phase 2 study that demonstrated dramatic effects on survival.

There have been other circumstances, particularly in the oncology area, where early (phase 2) results were such that additional studies were not needed to conclude that the drug was effective and that its benefits outweighed its risks. For example, the licensing of alpha interferons to treat hairy cell leukemia was based on phase 2 trials that showed partial or complete remission of the disease in 75 to 90 percent of patients.

To build upon these successes, FDA is instituting a process for conferences to be held at the end of phase 1 (rather than waiting until the end of phase 2) with the sponsors of drugs and biologics intended to treat life-threatening and severely-debilitating illnesses, especially where there are no satisfactory alternative therapies. The purpose of these conferences will be to review the product's phase 1 test results and phase 2 plans for clinical testing. If enough is known about the drug at that time, agreement would be reached on a phase 2 testing program (e.g., the design of the studies, the number of patients to be tested, the end points to be used, and the proposed mode of replication), that would be sufficient to establish the drug's safety and effectiveness. Where the data resulting from these phase 2 studies prove sufficient to allow a determination that, on the basis of risk-benefit considerations detailed further below, the drug is safe and effective, FDA will approve the drug without further preapproval studies. In this case, phase 2 thus obviates the need for further research in phase 3, if the phase 2 trials prove successful. Of course, when the results of phase 2 research do not provide evidence that fulfills the statutory criteria for approval, further preapproval studies will be necessary.

Because the end-of-phase 1 conference server the same function (except earlier in the process) as an end-of-phase 2 conference would otherwise serve, FDA will apply the same procedures to both meetings, as codified in § 312.47(b)(1). This includes provision for documenting the agreements reached at the meeting. In order to provide the broadest possible expertise available, FDA may invite to the meeting one or more of its advisory committee members or other scientific consultants. The sponsor may, of course, also bring scientific consultants to the meeting.

With respect to study design, the agency recognizes that there has been some confusion about the role of placebo-controlled studies in patients with a life-threatening disease. FDA believes that a requirement for placebo-controlled studies is *not* appropriate in those situations where there is known to be an effective therapy, for the stage of disease or condition under investigation, that can improve survival or prevent irreversible morbidity. For example, in the case of symptomatic AIDS or advanced AIDS-related complex (ARC), where zidovudine is known to improve survival, it would not be appropriate to compare a new drug with placebo. Rather, the new drug should be compared with zidovudine. It would also be possible to compare the new drug plus zidovudine with zidovudine alone, but in neither case would it be necessary to deny patients therapy with zidovudine which is known to improve survival. In contrast, where no therapy has been shown to be effective, it is scientifically and ethically appropriate

to randomize patients to test drug and placebo. This was done with zidovudine and, by providing early and clear evidence of benefit in terms of improved survival, enabled FDA to confer the rapid approval that made the drug widely available to AIDS patients.

The Institute of Medicine, in its recent report entitled, "Confronting AIDS: Update 1988," emphasized the importance of controlled clinical trials as the "fastest, most efficient way to determine what treatments work" (Executive Summary at page 19; Report at page 139) (Ref. 10). As the report continues, "Conducting well-designed trials from the beginning will benefit more patients, sooner, than any other approach. Poorly designed trials, or administering drugs without controls and 'observing' the course of the disease, risk being inconclusive or drawing incorrect conclusions." (Report at page 139) (Ref. 10). FDA fully supports the early initiation of well-designed phase 2 controlled clinical trials as the most efficient mechanism of evaluating treatments for the desperately ill.

When planning phase 2 studies, it will be particularly important to make optimal use of pharmacokinetic/pharmacodynamic studies carried out in phase 1. Such phase 1 data are particularly useful in selecting the best dose(s) and dosing intervals for phase 2 testing. Therefore, FDA input should be helpful in the design of phase 1 studies also.

FDA can also make the drug development process more efficient by interacting with the drug sponsor, even before phase 1 testing begins, to help identify the animal studies necessary to assess the toxicity of the new drug and assure that clinical studies can be initiated with reasonable assurance of safety. In consulting with sponsors on animal studies, FDA takes into account the seriousness of the disease to be treated and the nature of the clinical studies planned. In this way, FDA involvement can facilitate the initiation of trials in human patients as early as the safety studies in animals permit, thereby reducing potential barriers to innovation at this early but important stage of new pharmaceutical development.

For example, using this process, some new AIDS drugs have been able to enter clinical testing after animal studies that were 4 weeks long or less in duration, and the preclinical animal studies completed before initial human use of zidovudine were 2 to 4 weeks long. By working closely with the sponsor, FDA can suggest the minimum amount of preclinical testing needed to go forward without compromising the safety of clinical study paricipants. Unnecessary animal studies can be avoided, animal lives can be spared, and the sponsor can move the drug into clinical testing in the shortest possible time. Moreover, early FDA involvement can also shorten the time it takes the agency to review and IND submission and lessen the likelihood of FDA placing the application on clinical hold.

2. Treatment IND's. Section 312.83 of the rule outlines the role of the treatment IND in the context of this overall program. As codified in §§ 312.34 and 312.35, treatment IND's are intended to permit the wider use of promising experimental drugs for serious and immediately life-threatening illnesses in patients who lack satisfactory alternative therapy. Within the drug development process, treatment IND's can provide a bridge between the completion and initial analysis of promising phase 2 studies and the point of marketing approval. Thus, when early evidence from phase 2 indicates that a drug for a life-threatening or severely-debilitating illness is promising, FDA will actively work with the sponsor to evaluate the appropriateness of a treatment protocol. This approach was used during the development of zidovudine, and allowed wide availability of the drug to over 4,000 patients while the marketing application was being assembled by the sponsor and reviewed by FDA. In addition, FDA will continue to work actively to educate physicians and drug sponsors on how to utilize the treatment IND process most effectively.

3. Risk-benefit analysis. Section 312.84(a) of the rule provides that FDA's application of the statutory standards for marketing approval shall recognize the need for a medical risk-benefit judgment in making the final decision on approvability. As part of this evaluation, consistent with the statement of purpose in § 312.80, FDA will consider whether the benefits of the drug outweigh the known and potential risks of the drug and the need to answer remaining questions about risks and benefits of the drug, taking into consideration the severity of the disease and the absence of satisfactory alternative therapy.

While the statute uses the terms safety and effectiveness, rather than risks and benefits, the decision on whether to approve a drug inherently represents a medical risk-benefit judgment. The agency recognizes that safety and effectiveness are not absolute (i.e., not all drugs are free of risk or have unequivocal benefits), but must be assessed in light of what condition the drug treats. This is particularly true in the case of drugs to treat life-threatening diseases, where drugs that are quite toxic may nevertheless be considered safe under the circumstances.

In carrying out the statutory mandate, FDA will consider the seriousness of the disease being treated in balancing risks and benefits. For example, as a class, oncologic drugs are highly toxic, but this is acceptable when they are used to treat illnesses for which they represent the only available method of treatment and when they can have a favorable influence on survival or on intractable symptoms. Moreover, dramatic responses (i.e., great benefit), especially on significant end points like survival or progression to an inevitably fatal stage of illness, make it easier to conclude that the benefits of treatment outweigh its risks, even if not all important questions about the drug are answered. Clearly, for a life-threatening illness, a relatively high level of known risk and some uncertainty about potential risk from the drug can be acceptable in exchange for the improved survival provided by effective drug treatment for a condition that, left untreated, would result in death. Similarly, for the same life-threatening illnesses, evidence of effectiveness must be weighed against risks of the drug and the knowledge that death would result in the absence of treatment.

Section 312.84(b) of the rule provides that the agency will usually seek the advice of outside expert consultants or advisory committees in reaching its conclusions. That section also provides that FDA will notify the members of the relevant standing advisory committee of the filing of a marketing application covered by this rule, and its availability for review.

In seeking to utilize phase 2 data for final decisionmaking, FDA would be trying to increase the likelihood that a safe and effective drug, especially one that affects mortality or major irreversible morbidity, would be shown safe and effective in the shortest possible time by assuring that the initial studies are adequate to do this—i.e., to provide evidence, even though derived from a limited data base, that would be sufficient to reach a benefit-risk judgment. FDA's goal is to be able to reach a scientifically defensible decision based on the results of well-designed phase 2 controlled clinical trials. If, on the basis of phase 2 testing, a therapy is found to effectively treat a life-threatening disease for which no other therapy exists, it would not be appropriate to continue premarketing research into phase 3. However, poorly

designed phase 2 studies serve to retard the drug development process.

If FDA concludes that the data presented are not sufficient for marketing approval, § 312.84(b) of the rule provides that FDA will issue a letter to the sponsor describing the deficiencies in that application, including why the results of the research design agreed to under § 312.82 of this rule, or in subsequent meetings, did not provide sufficient evidence for marketing approval. Such letter will also describe any recommendations made by the advisory committee regarding the application.

To increase the likelihood that phase 2 testing can provide sufficient results, sponsors could need to plan phase 2 studies that are somewhat larger and more extensive than is currently the norm, including a mode for replication of key findings. Moreover, to avoid missing an effect by using too little drug, or to avoid studying a dose that proves toxic, it may be necessary to study several doses in the first formal trials, an approach that may require a larger study but can plainly save time, thereby enabling physicians to treat patients with life-threatening illnesses more rapidly. However, it should be appreciated that is a drug has only minor or inconsistent therapeutic benefits, its positive effects may be missed in this stage of clinical testing, even if the drug ultimately proves to be beneficial following more extensive phase 3 trials.

The issue of replication requires careful consideration. The requirement in the statute for adequate and well-controlled "clinical investigations" (21 U.S.C. 355(d) (emphasis added)) has long been interpreted to mean that the effectiveness of a drug should be supported by more than one well-controlled clinical trial and carried out by independent investigators. This interpretation is also consistent with the general scientific demand for replicability to ensure reliability of study results. Therefore, as a general requirement, the clinical trials submitted in a marketing application—including trials on products covered by this rule—must include studies by more than one independent investigator, each of whom has studied a number of patients adequate to generate statistically reliable results.

When applying the statutory requirement of "adequate and well-controlled investigations" to a drug for a life-threatening or severely-debilitating disease, FDA will consider the quality of the data submitted, including the assurance of the data's consistency, reliability, and reproducibility. There have been a few unusual instances in which a particularly persuasive multi-center study has been accepted in support of a claim of increased survival because the study was, due to its design and dramatic and reliable results, considered highly persuasive; therefore, replication was not required for ethical reasons. One such example was the approval of zidovudine to treat AIDS patients (discussed earlier in this preamble). A second example involved the approval of timolol for reduction of post-infarction mortality, where a major effect on mortality was demonstrated in a large multi-center study. The timolol study was very persuasive because of excellent design, minimal or no problems during execution of the study, and a high degree of statistical significance associated with the critical finding.

In both these instances, the sufficiency of a multi-center study for marketing approval was based on the research being well-designed and well-conducted, and a dramatic increase in survival of the patients using the drug. Under these circumstances, FDA believed it would be unethical to repeat the trial. FDA would consider applying the same principle to other such cases in which the outcome of a multi-center study demonstrated a consistently dramatic increase in survival among independently evaluable study sites and where repetition of the study would be unethical. However, the agency cautions that persuasively dramatic results are rare and that two entirely independent studies will generally be required. Sponsors should therefore plan in advance a strategy for replication of key findings through a second well-controlled study. Such replication need not delay approval where a sponsor carries out all necessary clinical studies concurrently.

Finally, § 312.84(d) of the rule provides that marketing applications submitted under the procedures contained in this section will be subject to the requirements and procedures contained in 21 CFR Part 314 or Part 600, as well as those in this interim rule. FDA has also added a conforming amendment to § 314.125 of the new drug application regulations, noting that for drugs intended to treat life-threatening or severely-debilitating illnesses that are developed in accordance with §§ 312.80 through 312.88, the criteria contained in paragraphs (b)(3), (4), and (5) of § 314.125 shall be applied according to the considerations contained in § 312.84.

While FDA can contribute to the design of the controlled clinical trials, and actively urge that such trials be pursued, the agency has no direct control over the pace at which trials are initiated and completed. Success of drug development depends on the willingness of the sponsor and clinical investigators to devote the necessary time and resources to complete the studies expeditiously.

4. Phase 4 studies. Section 312.85 of the rule describes the role of phase 4 studies in this program. If FDA approval is gained on the basis of limited, but sufficient, clinical trials, it will usually be important to conduct postmarketing (phase 4) clinical studies that will extend the knowledge about the drug's safety and efficacy and allow physicians to optimize its use. For example, in the case of zidovudine, early appearance of a dramatic improvement in survival of the treated patients was taken as clear evidence that, for the relatively advanced HIV-infected patients treated, the benefits clearly outweighed the risks. Although significant side effects of zidovudine were found, the clinically demonstrated benefit of prolonged survival clearly outweighed those risks.

This does not mean that all important questions were answered at the time of approval of zidovudine and that research into its use could end. It was critical to examine—after marketing—its use in earlier stages of the disease, where its toxicity might outweigh its benefit (i.e., in earlier stages of the disease, survival is much greater without treatment so that there is less improvement possible, but toxicity might be just as severe). It was also important to explore dosing regimens that might be less toxic and equally effective. In addition, as with any drug, it is important to consider whether there are long-term adverse effects that might "take away" the early gain. As with zidovudine, FDA has generally been able to obtain a voluntary agreement with drug sponsors about the need to do such followup studies and the nature of their design, because sponsors also recognize important gaps in the data base and believe they need to be filled. Section 312.85 of the rule codifies this practice.

5. Focused FDA regulatory research. The responsibility for conducting the preclinical and clinical testing needed to gain marketing approval clearly rests with the drug's sponsor. This rule does not alter that responsibility. Recognizing the lack of available therapy for certain life-threatening and severely-debilitating illnesses, § 312.86 of the rule provides that in certain circumstances FDA may, in its discretion, undertake research on critical rate-limiting aspects of the preclinical, chemical/manufacturing,

and clinical phases of drug development and evaluation. For example, FDA often needs specific information upon which critical regulatory decisions are made—e.g., manufacturing standards and assays for vaccine or biotechnology products. Recent examples include FDA potency testing of vaccines and development of assay methods for drug bioavailability. FDA is prepared to intensify this practice on a limited basis as a means of meeting a public health need in facilitating the development of therapies to treat life-threatening illnesses, rather than merely waiting passively.

6. Active monitoring of conduct and evaluation of clinical trials. Section 312.87 of the rule provides that the Commissioner and other agency officials will actively monitor the progress of the conduct and evaluation of clinical trials and be involved in stimulating their appropriate progress. Recognizing that people with life-threatening diseases face a catastrophic condition that requires special attention, it is imperative that the conduct of clinical trials and FDA's evaluation of them proceed as expeditiously as possible. FDA actions would include, for example, contacting the sponsor directly when clinical trials are not proceeding on schedule. FDA may also convene special meetings of its advisory committees, as necessary, rather than waiting for the next scheduled periodic meeting.

Finally, FDA, in conjunction with other Public Health Service agencies, will utilize, to the extent possible, clearinghouse mechanisms for informing physicians and patients of investigational therapies for life-threatening illnesses. Existing mechanisms of this type will be augmented, as appropriate.

7. Safeguards for patient safety. If successfully implemented, this program will expedite the availability and approval of new therapies for life-threatening and severely-debilitating illnesses while assuring that the products are shown safe and effective under the law. Section 312.88 of the rule references safeguards inherent in FDA regulations that ensure the safety of clinical testing and the safety of products following marketing approval. These include the requirements for informed consent (21 CFR Part 50) and institutional review boards (21 CFR Part 56). These safeguards further include the review of animal studies prior to initial human testing (§ 312.23); IND safety reports during the conduct of clinical trials and treatment IND protocols (§ 312.32); safety update reports during the review of marketing applications (§ 314.50); and adverse drug reaction reports after products are approved for marketing (§ 314.80).

In addition to these regulatory safeguards designed to assure patient safety, FDA's practices and procedures provide additional safeguards to assure the quality and integrity of the drug development and review process. These include conducting on-site audits of key studies and/or clinical investigators to assure authenticity of the data submitted to FDA, and inspections of manufacturing facilities before marketing approval is granted to assure that manufacturers are able to produce properly formulated compounds.

D. Environmental Impact

The agency has determined under 21 CFR 25.24(a)(8) 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.

E. Economic Impact

FDA has considered the economic impacts of this interim rule and concludes that additional costs resulting from this rule will be negligible, and to the limited extent that they may occur, they will likely be more than off-set by the societal benefits of this rule.

The compression of the drug development process set forth in this rule for life-threatening and severely-debilitating illnesses presents a trade-off for affected sponsors. They would be relieved of conducting the customary phase 2/phase 3 clinical studies if they participate in early study design consultation with FDA, conduct a sufficiently comprehensive phase 2 study, and stand ready to conduct any necessary phase 4 studies. Considering the probable time savings of this process, it is expected that the net cost of clinical development and regulatory review for a sponsor will remain constant or possibly decrease. Even if costs were to increase slightly, the societal benefits would more than likely compensate for any added costs since a considerable patient population would be receiving the life-saving benefits of the expedited therapy over an extended period of time that would not otherwise be realized.

Accordingly, FDA concludes that this interim rule is not a major rule as defined by Executive Order 12291, which would require a regulatory flexibility analysis. Furthermore, this rule is not expected to impose substantial impacts on a significant number of small entities which would require a regulatory flexibility analysis under the requirements of the Regulatory Flexibility Act of 1980.

F. Paperwork Reduction Act of 1980

This interim rule does not contain new collection of information requirements. Section 312.88 does refer to regulations that contain collection of information requirements that were previously submitted for review to the Director of the Office of Management and Budget (OMB) under section 3504 of the Paperwork Reduction Act of 1980. Sections 312.23 and 312.32 were approved under OMB control number 0910–0014. Section 314.50 was approved under OMB control number 0910–0001. Section 314.80 was approved under OMB control number 0910–0230.

References

The following references have been placed on display in the Dockets Management Branch (address above) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. Young, Frank E., and Stuart L. Nightingale, "FDA's Newly Designated Treatment IND's," "Information on Treatment IND's as They Become Available to the Practitioner," *Journal of the American Medical Association*, 260:224–225, 247, 1988.

2. Young, Frank E., John A. Norris, Joseph A. Levitt, and Stuart L. Nightingale, "The FDA's New Procedures for the Use of Investigational Drugs in Treatment," *Journal of the American Medical Association*, 259:2267–2270, 1988.

3. "Drugs Hold Hope for Parkinson's Obsessive-Compulsive Patients," *FDA Consumer*, September 1988:31.

4. Young, Frank E., "Experimental Drugs for the Desperately Ill: A Progress Report," *FDA Consumer*, May 1988:2–3.

5. "Updates," *FDA Consumer*, February 1988:2–3.

6. Young, Frank E., "New Drug Development in the United States," *FDA Consumer*, November 1987:4–5.

7. "Updates," *FDA Consumer*, September 1987:5–6.

8. Young, Frank E., "Experimental Drugs for the Desperately Ill," *FDA Consumer*, June 1987:2–3.

9. Office of Planning and Evaluation Study 77, "The Outcome of Research on New Molecular Entities Commencing Clinical Research in the Years 1976–78," FDA, May 1988.

10. "Confronting AIDS: Update 1988," Institute of Medicine, 1988.

List of Subjects

21 CFR Part 312

Drugs, Exports, Imports, Investigations, Labeling, Medical research, Reporting and recordkeeping requirements, Safety.

21 CFR Part 314

Administrative practice and procedure, Drugs, Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act and the Public Health Service Act, Parts 312 and 314 are amended as follows:

PART 312—INVESTIGATIONAL NEW DRUG APPLICATION

1. Subparts E and F are redesignated as Subparts F and G, respectively, and new Subpart E is added consisting of §§ 312.80 through 312.88 to read as follows:

Subpart E—Drugs Intended To Treat Life-threatening and Severely-debilitating Illnesses

Sec.

312.80 Purpose.
312.81 Scope.
312.82 Early consultation.
312.83 Treatment protocols.
312.84 Risk-benefit analysis in review of marketing applications for drugs to treat life-threatening and severely-debilitating illnesses.
312.85 Phase 4 studies.
312.86 Focused FDA regulatory research.
312.87 Active monitoring of conduct and evaluation of clinical trials.
312.88 Safeguards for patient safety.

Authority: Secs. 501, 502, 503, 505, 506, 507, 701, 52 Stat. 1049–1053 as amended, 1055–1056 as amended, 55 Stat. 851, 59 Stat. 463 as amended (21 U.S.C. 351, 352, 353, 355, 356, 357, 371); sec. 351, 58 Stat. 702 as amended (42 U.S.C. 262); 21 CFR 5.10, 5.11.

Subpart E—Drugs Intended To Treat Life Threatening and Severely-debilitating Illnesses

§ 312.80 Purpose.

The purpose of this section is to establish procedures designed to expedite the development, evaluation, and marketing of new therapies intended to treat persons with life-threatening and severely-debilitating illnesses, especially where no satisfactory alternative therapy exists. As stated § 314.105(c) of this chapter, while the statutory standards of safety and effectiveness apply to all drugs, the many kinds of drugs that are subject to them, and the wide range of uses for those drugs, demand flexibility in applying the standards. The Food and Drug Administration (FDA) has determined that it is appropriate to exercise the broadest flexibility in applying the statutory standards, while preserving appropriate guarantees for safety and effectiveness. These procedures reflect the recognition that physicians and patients are generally willing to accept greater risks or side effects from products that treat life-threatening and severely-debilitating illnesses, than they would accept from products that treat less serious illnesses. These procedures also reflect the recognition that the benefits of the drug need to be evaluated in light of the severity of the disease being treated. The procedure outlined in this section should be interpreted consistent with that purpose.

§ 312.81 Scope.

This section applies to new drug, antibiotic, and biological products that are being studied for their safety and effectiveness in treating life-threatening or severely-debilitating diseases.

(a) For purposes of this section, the term "life-threatening" means:

(1) Diseases or conditions where the likelihood of death is high unless the course of the disease is interrupted; and

(2) Diseases or conditions with potentially fatal outcomes, where the end point of clinical trial analysis is survival.

(b) For purposes of this section, the term "severely debilitating" means diseases or conditions that cause major irreversible morbidity.

(c) Sponsors are encouraged to consult with FDA on the applicability of these procedures to specific products.

§ 312.82 Early consultation.

For products intended to treat life-threatening or severely-debilitating illnesses, sponsors may request to meet with FDA-reviewing officials early in the drug development process to review and reach agreement on the design of necessary preclinical and clinical studies. Where appropriate, FDA will invite to such meetings one or more outside expert scientific consultants or advisory committee members. To the extent FDA resources permit, agency reviewing officials will honor requests for such meetings

(a) *Pre-investigational new drug (IND) meetings.* Prior to the submission of the initial IND, the sponsor may request a meeting with FDA-reviewing officials. The primary purpose of this meeting is to review and reach agreement on the design of animal studies needed to initiate human testing. The meeting may also provide an opportunity for discussing the scope and design of phase 1 testing, and the best approach for presentation and formatting of data in the IND.

(b) *End-of-phase 1 meetings.* When data from phase 1 clinical testing are available, the sponsor may again request a meeting with FDA-reviewing officials. The primary purpose of this meeting is to review and reach agreement on the design of phase 2 controlled clinical trials, with the goal that such testing will be adequate to provide sufficient data on the drug's safety and effectiveness to support a decision on its approvability for marketing. The procedures outlined in § 312.47(b)(1) with respect to end-of-phase 2 conferences, including documentation of agreements reached, would also be used for end-of-phase 1 meetings.

§ 312.83 Treatment protocols.

If the preliminary analysis of phase 2 test results appears promising, FDA may ask the sponsor to submit a treatment protocol to be reviewed under the procedures and criteria listed in §§ 312.34 and 312.35. Such a treatment protocol, if requested and granted, would normally remain in effect while the complete data necessary for a marketing application are being assembled by the sponsor and reviewed by FDA (unless grounds exist for clinical hold of ongoing protocols, as provided in § 312.42(b)(3)(ii)).

§ 312.84 Risk-benefit analysis in review of marketing applications for drugs to treat life-threatening and severely-debilitating illnesses.

(a) FDA's application of the statutory standards for marketing approval shall recognize the need for a medical risk-benefit judgment in making the final decision on approvability. As part of this evaluation, consistent with the statement of purpose in § 312.80, FDA will consider whether the benefits of the drug outweigh the known and potential risks of the drug and the need to answer remaining questions about risks and benefits of the drug, taking into consideration the severity of the disease and the absence of satisfactory alternative therapy.

(b) In making decisions on whether to grant marketing approval for products that have been the subject of an end-of-phase 1 meeting under § 312.82, FDA will usually seek the advice of outside expert scientific consultants or advisory committees. Upon the filing of such a marketing application under § 314.101 or Part 601 of this chapter, FDA will notify the members of the relevant standing advisory committee of the application's filing and its availability for review.

(c) If FDA concludes that the data presented are not sufficient for marketing approval, FDA will issue (for a drug) a not approvable letter pursuant to § 314.120 of this chapter, or (for a biologic) a deficiencies letter consistent with the biological product licensing procedures. Such letter, in describing the

deficiencies in the application, will address why the results of the research design agreed to under § 312.82, or in subsequent meetings, have not provided sufficient evidence for marketing approval. Such letter will also describe any recommendations made by the advisory committee regarding the application.

(d) Marketing applications submitted under the procedures contained in this section will be subject to the requirements and procedures contained in Part 314 or Part 600 of this chapter, as well as those in this subpart.

§ 312.85 Phase 4 studies.

Concurrent with marketing approval, FDA may seek agreement from the sponsor to conduct certain postmarketing (phase 4) studies to delineate additional information about the drug's risks, benefits, and optimal use. These studies could include, but would not be limited to, studying different doses or schedules of administration than were used in phase 2 studies, use of the drug in other patient populations or other stages of the disease, or use of the drug over a longer period of time.

§ 312.86 Focused FDA regulatory research.

At the discretion of the agency, FDA may undertake focused regulatory research on critical rate-limiting aspects of the preclinical, chemical/manufacturing, and clinical phases of drug development and evaluation. When initiated, FDA will undertake such research efforts as a means for meeting a public health need in facilitating the development of therapies to treat life-threatening or severely debilitating illnesses.

§ 312.87 Active monitoring of conduct and evaluation of clinical trials.

For drugs covered under this section, the Commissioner and other agency officials will monitor the progress of the conduct and evaluation of clinical trials and be involved in facilitating their appropriate progress.

§ 312.88 Safeguards for patient safety.

All of the safeguards incorporated within Parts 50, 56, 312, 314, and 600 of this chapter designed to ensure the safety of clinical testing and the safety of products following marketing approval apply to drugs covered by this section. This includes the requirements for informed consent (Part 50 of this chapter) and institutional review boards (Part 56 of this chapter). These safeguards further include the review of animal studies prior to initial human testing (§ 312.23), and the monitoring of adverse drug experiences through the requirements of IND safety reports (§ 312.32), safety update reports during agency review of a marketing application (§ 314.50 of this chapter), and postmarketing adverse reaction reporting (§ 314.80 of this chapter).

PART 314—APPLICATIONS FOR FDA APPROVAL TO MARKET A NEW DRUG OR AN ANTIBIOTIC DRUG

2. The authority citation for 21 CFR Part 314 continues to read as follows:

Authority: Secs. 501, 502, 503, 505, 506, 507, 701, 52 Stat. 1049–1053 as amended, 1055–1056 as amended, 55 Stat. 851, 59 Stat. 463 as amended (21 U.S.C. 351, 352, 353, 355, 356, 357, 371); 21 CFR 5.10, 5.11.

3. Section 314.125 is amended by adding paragraph (c) to read as follows:

§ 314.125 Refusal to approve an application.

* * * * *

(c) For drugs intended to treat life-threatening or severely-debilitating illnesses that are developed in accordance with §§ 312.80 through 312.88 of this chapter, the criteria contained in paragraphs (b) (3), (4), and (5) of this section shall be applied according to the considerations contained in § 312.84 of this chapter.

Otis R. Bowen,

Secretary of Health and Human Services.

Dated: October 18, 1988.

[FR Doc. 88–24457 Filed 10–19–88; 10:18 am]

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federal register

Friday
October 21, 1988

Part VII

Department of Defense
General Services Administration
National Aeronautics and Space Administration

48 CFR Part 31

Federal Acquisition Regulation (FAR); Public Relations Costs; Proposed Rule

Federal Register

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 31

Federal Acquisition Regulation (FAR); Public Relations Costs

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulatory Council are considering changes to FAR 31.205–1 to delete paragraph (h) which deals with the relationship between the cost principle entitled "Public Relations and Advertising Costs" and the other cost principles.

DATE: Comments should be submitted to the FAR Secretariat at the address shown below on or before December 20, 1988 to be considered in the formulation of a final rule.

ADDRESS: Interest parties should submit written comments to: General Services Administration, FAR Secretariat (VRS), 18th & F Street NW., Room 4041, Washington, DC 20405.

Please cite FAR Case 88–33 in all correspondence related to this issue.

FOR FURTHER INFORMATION CONTACT: Margaret A. Willis, FAR Secretariat, Room 4041, GS Building, Washington, DC 20405, (202) 523–4755.

SUPPLEMENTARY INFORMATION:

A. Background

Federal Acquisition Circular (FAC) 84–37 revised FAR 31.204 to provide guidelines on determining the allowability of costs to which more than one cost principle is relevant. The Councils are now proposing to delete the current coverage at FAR 31.205–1(h) as inconsistent with the new coverage at FAR 31.204.

B. Regulatory Flexibility Act

The proposed change to FAR 31.205–1 is not expected 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.) because most contract awarded to small entities are awarded on a competitive fixed-price basis and the cost principles do not apply.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed change does not impose recordkeeping information collection requirements or collection of information from offerors, contractors, or members of the public which require the approval of OMB under 44 U.S.C. 3501, et seq.

List of Subjects in 48 CFR Part 31

Government procurement.

Dated: October 13, 1988.

Harry S. Rosinski,

Acting Director, Office of Federal Acquisition and Regulatory Policy.

Therefore, it is proposed that 48 CFR Part 31 be amended as set forth below:

PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES

1. The authority citation for 48 CFR Part 31 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2453(c)

31.205–1 [Amended]

2. Section 31.205–1 is amended by removing paragraph (h).

[FR Doc. 88–24413 Filed 10–20–88; 8:45 am]

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federal register

Friday
October 21, 1988

Part VIII

Department of Defense
General Services Administration
National Aeronautics and Space Administration

48 CFR Part 31

Federal Acquisition Regulation (FAR); Professional and Consulting Service Costs; Proposed Rule

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 31

Federal Acquisition Regulation (FAR); Professional and Consulting Service Costs

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulatory Council are considering revision to FAR 31.205–33 to clarify and strengthen the current cost principle to provide a sufficient basis to adequately question consultant costs.

Comments: Comments should be submitted to the FAR Secretariat at the address shown below on or before December 5, 1988 to be considered in the formulation of a final rule.

ADDRESS: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (VRS), 18th and F Streets NW., Room 4041, Washington, DC 20405.

Please cite FAR Case 88–54 in all correspondence related to this issue.

FOR FURTHER INFORMATION CONTACT: Margaret A. Willis, FAR Secretariat, Room 4041, GS Building, Washington, DC 20405, (202) 523–4755.

SUPPLEMENTARY INFORMATION:

A. Background

Recent allegations of improprieties involving numerous defense contractors and their outside consultants have caused the Civilian Agency Acquisition Council and the Defense Acquisition Regulatory Council to evaluate the adequacy of the current cost principle on professional and consultant service costs (FAR 31.205–33). The Councils have concluded that the current cost principle needs to be clarified and strengthened because the lack of specificity of the current cost principle does not provide a sufficient basis to adequately question consultant costs. Therefore, the Councils are proposing the following changes to (a) include examples of the types of services covered by the cost principle, (b) strengthen and clarify the unallowability of costs for certain activities described by FAR 31.205–33, and (c) require a contractor to provide specific documentation supporting consultant costs.

B. Regulatory Flexibility Act

The proposed rule will not have a substantial cost or administrative effect on a significant number of small businesses. Small businesses generally do not have cost or incentive contracts where allowability of costs is a major concern. Therefore, the Regulatory Flexibility Act does not apply and an Initial Regulatory Flexibility Analysis has not been prepared. However, comments from small entities concerning the affected FAR 31.205–33 will be considered in accordance with section 610 of the Act. Such comments must be submitted separately and cite FAR Case 88–610 in correspondence.

C. Paperwork Reduction

The Paperwork Reduction Act (Pub. L. 96–511) does not apply because the proposed rules do not require or impose any change in reporting or recordkeeping requirements or collection of information from offerors, contractors, or members of the public which require the approval of OMB under 44 U.S.C. 3501, et seq. Under the current rules of the FAR, particularly the clauses at 52.215–2, Audit-Negotiation, and 52.216–7, Allowable Cost and Payment, offerors and contractors are required to maintain, and provide access to, records sufficient to permit the Government to determine the allowability and reasonableness of costs.

List of Subjects in 48 CFR Part 31

Government procurement.

Dated: October 13, 1988.

Harry S. Rosinski,

Acting Director, Office of Federal Acquisition and Regulatory Policy.

Therefore, it is proposed that 48 CFR Part 31 be amended as set forth below:

PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES

1. The authority citation for Part 31 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

2. Section 31.205–33 is revised to read as follows:

31.205–33 Professional and consultant service costs.

(a) Definition. "Professional and consultant services", as used in this subpart, are those services rendered by persons who are members of a particular profession or possess a special skill and who are not officers or employees of the contractor. Examples include those services acquired by contractors or subscontrators in order to enhance their legal, economic, financial, or technical positions. Professional and consultant services are generally acquired to obtain information, advice, opinions, alternatives, conclusions, recommendations, training, or direct assistance, such as studies, analyses, evaluations, liaison with Government officials, or other forms of representation.

(b) Costs of professional and consultant services are allowable subject to this paragraph (b) and paragraphs (c) through (h) of this subsection when reasonable in relation to the services rendered and when not contingent upon recovery of the costs from the Government (but see 31.205–30).

(c) Costs of professional and consultant services performed under any of the following circumstances are expressly unallowable:

(1) Services to obtain, distribute, or use information or data protected by law or agency regulation (e.g., see FAR 52.215–12, Restriction on Disclosure and Use of Data) unless the data or information was commonly available (e.g., news article or public testimony).

(2) Service that are intended to improperly influence the contents of solicitations, the evaluation of proposals or quotations, the selection of sources for contract award, whether award is by the Government, or by a prime contractor or subcontrator.

(3) Any other services obtained, performed, or otherwise resulting in violation of any statute or regulation prohibiting improper business practices or conflicts of interest, or similar misconduct.

(4) Services performed which are not consistent with the purpose and scope of the services contracted for or otherwise agreed to.

(d) Costs of legal, accounting, and consultant services and directly associated costs incurred in connection with organization and reorganization (also see 31.205–27), defense of antitrust suits, defense against Government claims or appeals, or the prosecution of claims or appeals against the Government (see 33.201) are unallowable (but see 31.205–47). Such costs incurred in connection with patent infringement litigation are unallowable unless otherwise provided for in the contract.

(e) Cost of legal, accounting, and consultant services and directly associated costs incurred in connection with the defense or prosecution of lawsuits or appeals between contractors

arising from either (1) an agreement or contract concerning a teaming arrangement, a joint venture, or similar arrangement of shared interest; or (2) dual sourcing, co-production, or similar programs, are unallowable, except when (i) incurred as a result of compliance with specific terms and conditions of the contract or written instructions from the contracting officer, or (ii) when agreed to in writing by the contracting officer.

(f) In determining the allowability of costs (including retainer fees) in a particular case, no single factor or any special combination of factors is necessarily determinative. However, the contracting officer shall consider the following factors, among others.

(1) The nature and scope of the service rendered in relation to the service required.

(2) The necessity of contracting for the service, considering the contractor's capability in the particular area.

(3) The past pattern of such costs, particularly in the years prior to the award of Government contracts.

(4) The impact of Government contracts on the contractor's business.

(5) Whether the proportion of Government work to the contractor's total business is such as to influence the contractor in favor of incurring the cost, particularly when the services rendered are not of a continuing nature and have little relationship to work under Government contracts.

(6) Whether the service can be performed more economically by employment rather than by contracting.

(7) The qualifications of the individual of concern rendering the service and the customary fee charged, especially on nongovernment contracts.

(8) Adequacy of the contractual agreement for the service (e.g., description of the service, estimate of time required, rate of compensation, termination provisions).

(g) Retainer fees to be allowable must be supported by evidence that—

(1) The services covered by the retainer agreement are necessary and customary;

(2) The level of past services justifies the amount of the retainer fees; (if no services were rendered, fees are not automatically unallowable); and

(3) The retainer fee is reasonable in comparison with maintaining an in-house capability to perform the covered services, when factors such as cost and level of expertise are considered.

(h) Fees for services rendered shall be allowable only when supported by evidence of the nature and scope of the service furnished. (Also see 31.205-38(g)). Such evidence may include, to the extent necessary to ensure that the work performed is proper and does not violate law or regulation:

(1) Details of all agreements (e.g., work requirements, rate of compensation, and nature and amount of other expenses, if any) with the individuals or organizations providing the services and details of actual services performed.

(2) Invoices or billings subitted by consultants, including sufficient detail as to the time expended and nature of the actual services provided.

(3) Consultants' work products and related documents such as trip reports indicating persons visited and subjects discussed, minutes of meetings, and collateral memoranda and reports.

[FR Doc. 88-24412 Filed 10-20-88; 8:45 am]

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Friday
October 21, 1988

Part IX

Department of Defense
General Services Administration
National Aeronautics and Space Administration

48 CFR Parts 14 and 15
Federal Acquisition Regulation (FAR): Master Solicitation; Proposed Rule

Part IX

Department of Defense
General Services Administration
National Aeronautics and Space Administration

48 CFR Parts 11 and 13
Federal Acquisition Regulation (FAR); Master Solicitation; Proposed Rule

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 14 and 15

Federal Acquisition Regulation (FAR); Master Solicitation

AGENCIES: Department of Defense (DoD) General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulatory Council are considering changes to FAR 14.203 and 15.408 to add coverage on the use of master solicitations.

Comments: Comments should be submitted to the FAR Secretariat at the address shown below on or before December 20, 1988, to be considered in the formulation of a final rule.

ADDRESS: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (VRS), 18th & F Streets NW, Room 4041, Washington, DC 20405.

Please cite FAR Case 88–49 in all correspondence related to this issue.

FOR FURTHER INFORMATION CONTACT: Margaret A. Willis, FAR Secretariat, Room 4041, GS Building, Washington, DC 20405, (202) 523–4755.

SUPPLEMENTARY INFORMATION:

A. Regulatory Flexibility Act

The proposed rule does not constitute a significant FAR revision within the meaning of FAR 1.501 and Pub. L. 98–577 and publication for public comment is not required. Master solicitations, in and of themselves, are nothing more than a package of provisions and clauses sent to contractors who are on bidders mailing lists and the package is referred to when an actual solicitation is issued. Therefore, the Regulatory Flexibility Act does not apply. However, comments from small entities concerning the affected FAR sections will be considered in accordance with section 610 of the Act. Such comments must be submitted separately and cite FAR Case 88–610 in correspondence.

B. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed changes do not impose any recordkeeping or information collection requirements from offerors, contractors, or members of the public which require the approval of OMB under 44 U.S.C. 3501, et seq.

List of Subjects in 48 CFR Parts 14 and 15

Government procurement.

Dated: October 12, 1988.

Harry S. Rosinski,

Acting Director, Office of Federal Acquisition and Regulatory Policy.

Therefore, it is proposed that 48 CFR Parts 14 and 15 be amended as set forth below:

1. The authority citation for Parts 14 and 15 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

PART 14—SEALED BIDDING

2. Section 14.203 is amended by adding a subsection to read as follows:

14.203–3 Master solicitation.

(a) *Definition.* "Master solicitation," as used in this subsection, means a document containing special clauses and provisions that have been identified as essential for the acquisition of a specific type of supply or service that is acquired repetitively.

(b) *Use.* The master solicitation is provided to potential sources who are requested to retain it for continued and repetitive use. Individual solicitations shall reference the date of the current master solicitation and any changes thereto. Copies of the master solicitation shall be made available on request. Cognizant contract administration activities shall be provided a current copy of the master solicitation.

PART 15—CONTRACTING BY NEGOTIATION

3. Section 15.408 is amended by adding paragraph (d) to read as follows:

15.408 Issuing solicitations.

* * * * *

(d) A master solicitation may be used for negotiated acquisitions, subject to the criteria and procedures in 14.203–3.

[FR Doc. 88–24410 Filed 10–20–88; 8:45 am]

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federal register

Friday
October 21, 1988

Part X

Department of Agriculture

Animal and Plant Health Inspection Service

7 CFR Part 301

Interstate Movement of Citrus Fruit and Calamondin and Kumquat Plants From Florida; Proposed Rule

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 301

[Docket No. 88-105]

Interstate Movement of Citrus Fruit and Calamondin and Kumquat Plants From Florida

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Proposed rule.

SUMMARY: We propose to revise the "Citrus Canker" regulations as follows:

(1) By relieving some restrictions on the interstate movement of regulated fruit produced in groves outside the area of Florida where there have been primary infestations of citrus canker caused by the Asiatic strains. This proposal is based on observations made in the field and on scientific data indicating that the Florida nursery strains are extremely unlikely to infect mature citrus trees and fruit in groves or to damage fruit. This action would remove requirements that appear to exceed what is needed to prevent the interstate spread of the form of citrus canker caused by the Florida nursery strains;

(2) By allowing calamondin and kumquat plants grown from seeds or rooted cuttings in nurseries or groves outside the area of Florida where there have been primary infestations of citrus canker caused by the Asiatic strains to be moved interstate under less stringent conditions than at present and to all areas of the United States except commercial citrus-producing areas. This proposal would relieve what appear to be unnecessary restrictions on the interstate movement of plants that are highly resistant to citrus canker;

(3) By prohibiting the interstate movement from Florida of budded or grafted calamondin and kumquat plants, which may have been grown from rootstocks of plants susceptible to and capable of transmitting citrus canker. This proposal appears necessary to prevent the interstate spread of this disease;

(4) By adding the species *Clausena lansium* (Lour.) Skeels (common name, wampi) to the list of articles regulated because of citrus canker, thereby prohibiting the interstate movement of these plants from Florida. This proposal appears necessary to prevent the interstate spread of citrus canker because wampi plants in Florida have been found infected with the form of citrus canker caused by the Florida nursery strains;

(5) By reducing the area of Florida that is under special restriction because of citrus canker caused by the Asiatic strains.

DATE: Consideration will be given only to written comments postmarked or received on or before November 21, 1988.

ADDRESSES: Send an original and three copies of written comments to Regulatory Coordination, APHIS, USDA, Room 728 Federal Building, 6505 Belcrest Rd., Hyattsville, MD 20782. Please state that your comments refer to Docket 88-105. Comments received may be inspected at USDA, 14th and Independence Ave., SW, Room 1141 South Bldg., between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays.

FOR FURTHER INFORMATION CONTACT: Eddie W. Elder, Chief Operations Officer, Domestic and Emergency Operations, PPQ, APHIS, USDA, Room 661, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, 301-436-6365.

SUPPLEMENTARY INFORMATION:

Background

Citrus canker is a plant disease caused by strains of the bacterium *Xanthomonas campestris* pv. *citri* (Hasse) Dye. The disease is known to affect plants and plant parts, including fruit, of citrus and citrus relatives (Family Rutaceae). It can cause defoliation and other serious damage to the leaves and twigs of susceptible plants. It may also make the fruit of infected plants unmarketable by causing lesions on the fruit. Infected fruit may also drop from trees before reaching maturity. Aggressive strains of *Xanthomonas campestris* pv. *citri* can infect susceptible plants rapidly and lead to extensive economic losses in commercial citrus-producing areas.

The Animal and Plant Health Inspection Service (APHIS) established the citrus canker regulations (contained in 7 CFR 301.75 and referred to below as the regulations) in 1984 after plants at several central Florida citrus nurseries were found to be infected with previously undescribed strains of *Xanthomonas campestris* pv. *citri*. These strains have come to be known as the Florida nursery strains. Because little was known about these strains at that time, and because some strains of *Xanthomonas campestris* pv. *citri* are known to cause a very serious plant disease, the regulations placed severe constraints on the interstate movement of potential host material from Florida. Later, when trees infected with the Asiatic strains of *Xanthomonas campestris* pv. *citri* were detected on citrus trees on residential properties and in a commercial grove near Bradenton, in Manatee County, Florida, the same regulations applied.

Over time, both research and observations made in the field yielded data suggesting that there were important differences between the Florida nursery strains and the Asiatic strains of *Xanthomonas campestris* pv. *citri* and the diseases caused by these strains.These differences were summarized as follows in a final rule published in the **Federal Register** on February 11, 1988 (53 FR 3999-4006, Docket No. 88-001):

> The Florida nursery strains of the bacterium *Xanthomonas Campestris* pv. *citri* are associated primarily with outbreaks of citrus canker in plant nurseries. They have been found only in Florida. Current information suggests that this form of citrus canker is pathogenetically and genetically different from the disease caused by Asiatic strains of citrus canker, and never has been found on fruit in a commercial grove.

Because of these differences, we amended the regulations, by the final rule cited above, to reduce restrictions on the interstate movement of fruit from all areas of Florida except the area where there have been primary infestations of citrus canker caused by the Asiatic strains.

At the same time, recognizing that many questions about the Florida nursery strains remained unanswered, APHIS invited a blue-ribbon panel of plant pathologists to review all of the research pertaining to the Florida nursery strains and to consider specific questions concerning the taxonomy and biology of these strains. The panel met last March in Gainesville, Florida, and delivered its report to APHIS in April. The report was published in the **Federal Register** on June 28, 1988 (53 FR 24296-24298, Docket No. 88-100) as part of an advance notice of proposed rulemaking that solicited public comment on whether and how, as a result of the panel's report, we should revise the regulations. Following are the options we asked the public to consider:

1. Reduce the quarantined area in Florida to include only that area where within the past 2 years, there have been infestations of citrus canker caused by the Asiatic strains.

2. Reduce the restrictions on the interstate movement of regulated articles from all areas of Florida except that area where, within the past 2 years, there have been infestations of citrus canker caused by the Asiatic strains.

3. Maintain the current regulations.

We received 34 comments concerning these options from individual growers, nursery owners, grower and packing associations, other representatives of the citrus industry, and state government officials in Arizona, California, Florida, Louisiana, and Texas. Nine commenters supported Option 1; 14 supported Option 2; and 11 supported Option 3.

Based on the report by the blue-ribbon panel and a review of the current citrus canker eradication program, and after considering all the comments we received concerning the advance notice of proposed rulemaking, we are proposing to revise the regulations in line with Option 2. We do not support Option 1 because we know that the Florida nursery strains can, in some cases, seriously damage nursery plants, and because we believe that further research may be necessary to finally resolve the question of whether the Florida nursery strains can infect and damage mature trees and fruit in commercial groves. Nonetheless, we believe the current regulations, designed to prevent the spread of virulent forms of citrus canker such as that caused by the Asiatic strains, go beyond what is necessary to prevent the spread of the form of citrus canker caused by the Florida nursery strains. Four years after the form of citrus canker caused by the Florida nursery strains was first detected in Florida, we still have not found it in commercial groves, except in three instances where infected transplants had been moved to groves from infested nurseries. (In two of these instances, there was no evidence that the disease had spread from these plants to other plants in the grove. In the third case, the grove was not well maintained, and inspection revealed some local spread to sprouts from Swingle rootstock. In none of these instances was infected fruit found, and, after the infected plants were removed, no additional infections were observed.) Research and observations made in the field over the last four years suggest that the Florida nursery strains cause a form of citrus canker disease that is different from and less serious than the form of citrus canker disease caused by the Asiatic strains. Option 2 would continue to provide protection against the interstate spread of the form of citrus canker caused by the Florida nursery strains while relieving what appear to be unnecessary burdens on those involved in the interstate movement of regulated articles.

Specific proposed changes to the regulations are discussed below.

Certificates for Interstate Movement of Regulated Fruit

Current Requirements

Regulated fruit from any area of Florida where a primary infestation caused by Asiatic strains has occurred is not eligible for interstate movement with a certificate until 2 years after the last infested plant in the area has been destroyed. Regulated fruit produced in other areas of Florida may be moved interstate with a certificate to any area of the United States, including commercial citrus-producing areas, if the following conditions are met:

(1) The fruit is harvested from a grove of 10 or more regulated trees;

(2) The grove producing the fruit has not contained any infested or exposed plants or plant parts within the past 2 years;

(3) The grove producing the fruit has been found free of citrus canker on two surveys, which must be conducted as follows:

(i) Between one year and 90 days before harvest begins, an inspector must: examine all trees on the perimeter of the grove while driving by the trees at a speed of not more than 2 m.p.h.; examine, while on foot, at least 12 trees in high-risk areas of the grove (such as the grove entrance, the perimeter of the grove, and areas where the movement of people and equipment is concentrated); and examine, while on foot, a minimum of four mature trees or eight young trees in one randomly selected location in every 10 acres of the grove, or, if the grove is less than 10 acres, examine, while on foot, a minimum of four mature trees or eight young trees in one randomly selected location; and

(ii) No more than 90 days before harvest begins, an inspector must walk through the grove and examine: all trees on either side of the first middle (between the first two rows) and every fourth middle thereafter throughout the grove; and at least 12 trees in high-risk areas of the grove (such as the grove entrance, the perimeter of the grove, and areas where the movement of people and equipment is concentrated); and

(iii) At least one of the two surveys must be conducted between 4 to 12 weeks after a period of high temperatures and frequent rainfall likely to cause a flush of growth on the trees to be inspected;

(4) The grove producing the fruit is at least one-half mile from any property that has contained infested or exposed plants or plant parts during the past 2 years;

(5) Within one-half to 5 miles of the grove producing the fruit, the following plants have been destroyed:

(i) All infested plants; and

(ii) Any exposed plants at high risk for developing citrus canker. Identification of plants at high risk for developing citrus canker will be based on an evaluation all of the circumstances related to their exposure, including, but not limited to, the following:

(A) The stage of maturity of the exposed plants at the time of exposure;

(B) The size and degree of infestation to which the plants were exposed;

(C) The proximity of the exposed plants to the infested plants at the time of exposures;

(D) The length of time the plants were exposed to the infestation; and

(E) The strain of the bacterium to which the plants were exposed;

(6) During the past 2 years, any shipments of regulated plants received by the grove producing the fruit have come only from nurseries found free of citrus canker on three surveys conducted by an inspector approximately 30 days apart and not more than 90 days before each shipment, and every regulated plant in the nursery must be examined on each survey. In addition, all regulated plants at all nurseries in Florida that contain regulated plants must be examined by an inspector approximately every 30 days;

(7) Properties within 5 miles of the grove producing the fruit were surveyed and found free of citrus canker by an inspector at least one time during the past year as follows:

(i) All properties that contain 10 or more regulated plants and that are within 5 milies of the grove;

(ii) All properties that contain one to nine regulated plants and that are within one-half mile of the grove; and

(iii) Twenty percent of the properties that contain one to nine regulated plants and that are within one-half to 5 miles of the grove. The 20-percent sample must be distributed as evenly as possible over the area, with different samples inspected each year in a 5-year inspection cycle;

(8) All personnel, vehicles, and equipment are treated in accordance with § 301.75–12 (c) and (d) of this subpart upon entering the grove producing the fruit;

(9) The identity of the fruit is maintained during picking, hauling to the packing house, and packing;

(10) The fruit is treated in accordance with § 301.75–12(a) of this subpart and then waxed;

(11) The fruit is free of leaves, twigs, and other plant litter, except stems less than one-inch long that are attached to the fruit;

(12) The fruit is packed in containers marked with a United States Department of Agriculture stamp that says "Certified under all applicable Federal or State cooperative domestic plant quarantines";

(13) The fruit is to be moved under any additional emergency conditions that may be imposed by the Administrator under the Federal Plant Pest Act to prevent the spread of citrus canker; and

(14) The fruit is eligible for movement under all other federal domestic plant quarantines and regulations applicable to the fruit.

Proposed Changes

We propose to continue to require that properties surrounding a producing grove be free from the form of citrus canker caused by the Asiatic strains, but not necessarily from the form of citrus canker caused by the Florida nursery strains. Thus, the grove producing the fruit must be at least one-half mile from any property that has contained plants

or plant parts during the past 2 years that were infested with or exposed to the Asiatic strains; and, within one-half to 5 miles of the grove producing the fruit, all plants infested with the Asiatic strains and all exposed plants at high risk for developing the form of citrus canker caused by the Asiatic strains must have been destroyed. These requirements provide additional assurance that fruit moved interstate with a certificate have not been exposed to the Asiatic strains, which can infect mature trees and fruit and lead to extensive economic losses in commercial citrus-producing areas.

However, because we have never found a primary infestation caused by the Florida nursery strains in any commercial grove, similar requirements do not appear necessary to prevent the interstate spread of the form of citrus canker caused by the Florida nursery strains. If the grove producing fruit for interstate movement with a certificate has not contained any plants or plant parts during the past 2 years that were infested with or exposed to the Florida nursery strains, and if the grove has been adequately surveyed and found free of this disease, it is highly unlikely that fruit produced in the grove would be infested with the Florida nursery strains. The presence on surrounding properties of plants or plant parts infested with or exposed to the Florida nursery strains could result, at most, in possible surface contamination of the fruit. Treating and waxing of the fruit would render these surface bacteria incapable of infecting susceptible plants. Therefore, we propose to remove the requirement that properties surrounding a producing grove be free from the form of citrus canker caused by the Florida nursery strains.

To clarify that groves producing fruit for interstate movement with a certificate must continue to be free of all strains of the bacterium that causes citrus canker, we propose to specify "citrus canker (caused by any strain)" in applicable provisions. Thus, the grove producing the fruit must not have contained any plants or plant parts, during the past 2 years, that were infested with or exposed to citrus canker (caused by any strain); the grove producing the fruit must have been found free of citrus canker (caused by any strain) on two surveys; and during the past 2 years, any shipments of regulated plants received by the grove producing the fruit must have come only from nurseries found free of citrus canker (caused by any strain) on the specified surveys.

We also propose to discontinue requiring surveys of properties within 5 miles of a producing grove. Records kept by grove owners and nursery owners have provided satisfactory information on the location of exposed and potentially infested plants. These records would allow inspectors to determine whether properties within 5 miles of a producing grove meet our requirements.

In addition, we propose to change the procedure for the first grove survey by requiring that it be conducted between May 1 and December 31, inclusive, during the year before harvest and not less than 90 days before harvest begins. The period between May 1 and December 31, inclusive, is the most likely time of year for outdoor plants to express symptoms of citrus canker. Furthermore, because weather conditions by this time of year would have produced at least one flush of growth on the trees to be inspected, it does not appear necessary to retain the separate requirement that either the first or second grove survey must be conducted 4–12 weeks after weather likely to cause a flush of growth on the trees. Therefore, we propose to remove this requirement.

The prescribed surveys are the minimum level of inspection that must be done; more intensive surveys would be acceptable.

Finally, we propose to discontinue requiring the treatment of personnel, vehicles, and equipment entering the grove. This requirement does not appear to be necessary outside the area of Florida where primary infestations caused by the Asiatic strains have occurred within the past 2 years. Although we know that the Asiatic strains are capable of being spread by personnel, vehicles, and equipment entering a grove after being on a property infested with this form of citrus canker, there is no evidence that bacteria of the Florida nursery strains are spread in this manner. Moreover, there are no groves or residential properties known to be infested with bacteria of the Florida nursery strains.

Other requirements pertaining to the interstate movement of regulated fruit with a certificate would remain the same.

Limited Permits for the Interstate Movement of Regulated Fruit

Current Requirements

At present, regulated fruit may be moved interstate with a limited permit, from any area of Florida, to any area of the United States, *except* commercial citrus-producing areas, if the following conditions are met:

(1) The grove producing the fruit has not contained any infested plants or plant parts within the past year;

(2) In the grove producing the fruit, any exposed plants at high risk for developing citrus canker have been destroyed. Identification of plants at high risk for developing citrus canker will be based on an evaluation of all the circumstances related to their exposure, including, but not limited to, the following:

(i) The stage of maturity of the exposed plants at the time of exposure;

(ii) The size and degree of infestation to which the plants were exposed;

(iii) The proximity of the exposed plants to the infested plants at the time of exposure;

(iv) The length of time the plants were exposed to the infestation; and

(v) The strain of the bacterium to which the plants were exposed;

(3) The grove producing the fruit has been found free of citrus canker on surveys, which must be conducted as follows:

(i) For groves of 10 or more regulated trees, an inspector must:

(*A*) Between one year and 90 days before harvest begins: examine all trees on the perimeter of the grove while driving by the trees at a speed of not more than 2 m.p.h.; examine, while on foot, at least 12 trees in high-risk areas of the grove (such as the grove entrance, the perimeter of the grove, and areas where the movement of people and equipment is concentrated); and examine, while on foot, a minimum of four mature trees or eight young trees in one randomly selected location in every 10 acres of the grove, or, if the grove is less than 10 acres, examine, while on foot, a minimum of four mature trees or eight young trees in one randomly selected location; and

(*B*) No more than 90 days before harvest begins: Examine all trees in the outer two rows of the grove while driving by the trees at a speed of not more than 2 m.p.h.; examine, while on foot, at least 12 trees in high-risk areas of the grove (such as the grove entrance, the perimeter of the grove, and areas where the movement of people and equipment is concentrated); and examine, while on foot, a minimum of four mature trees or eight young trees in each of two randomly selected locations in every 10 acres of the grove, or, if the grove is less than 10 acres, examine, while on foot, a minimum of four mature trees or eight young trees in each of two randomly selected locations:

(*C*) At least one of the two surveys must be conducted 4 to 12 weeks after a period of high temperatures and frequent rainfall likely to cause a flush of growth on the trees to be inspected;

(ii) For groves of fewer than 10 regulated trees, an inspector must walk through the grove and examine every tree no more than 30 days before the beginning of harvest;

(4) The fruit is treated in accordance with § 301.75–12(a) of this subpart;

(5) The fruit is free of leaves, twigs, and other plant litter, except stems less than one-inch long that are attached to the fruit;

(6) The fruit is to be moved under any additional emergency conditions that may be imposed by the Administrator under the Federal Plant Pest Act to prevent the spread of citrus canker; and

(7) The fruit is eligible for movement under all other federal domestic plant quarantines and regulations applicable to the fruit.

(8) Determines that fruit harvested from a grove of fewer than 10 trees is to be moved interstate directly to a household, with the intent that the fruit be consumed at, or by members of, that household.

Proposed Changes

To clarify that groves producing fruit for interstate movement with a limited permit must continue to be free of all strains of the bacterium that causes citrus canker, we propose to specify "citrus canker (caused by any strain)" in applicable provisions. Thus, during the past 1 year, the grove producing the fruit must not have contained any plants or plant parts that were infested with citrus canker (caused by any strain); all exposed plants in the grove that are at high risk for development citrus canker (caused by any strain) must have been destroyed; and the grove producing the fruit must have been surveyed and found free of citrus canker (caused by any strain).

For groves of 10 or more regulated trees, we propose to add a requirement that, during the past 1 year, any shipments of regulated plants received by the grove producing the fruit must have come only from nurseries found free of citrus canker (caused by any strain). The nurseries would have to be found free of citrus canker on three surveys conducted by an inspector approximately 30 days apart and not more than 90 days before each shipment. Every regulated plant in the nursery would have to be examined on each survey. This requirement, which already applies to groves producing fruit for interstate movement with a certificate, would help ensure that groves producing fruit for interstate movement with a limited permit are kept free of plants that may be infested with or exposed to citrus canker.

We propose to require only one survey of a grove of 10 or more regulated trees if the grove is outside the area of Florida where primary infestations caused by the Asiatic strains have occurred. The survey would have to be conducted in the manner now prescribed for the initial grove survey and between May 1 and December 1, inclusive, during the year before harvest. This period is the most likely time of year for outdoor plants to express symptoms of citrus canker. Furthermore, because weather conditions by this time of year would have produced at least one flush of growth on the trees to be inspected, it does not appear necessary to retain the separate requirement that the grove must be surveyed at least once within 4–12 weeks after weather likely to cause a flush of growth on the trees. Therefore, we propose to remove this requirement. If a grove is outside the area of Florida where primary infestations caused by the Asiatic strains have occurred, is found free of citrus canker on the single survey proposed, and meets the other requirements pertaining to groves, it is very unlikely to yield fruit that would present a risk of spreading citrus canker interstate.

We propose to continue to require two surveys of a grove of 10 or more trees if the grove is located within the area of Florida where a primary infestation caused by the Asiatic strains has occurred. However, we propose to require that the first survey be conducted between May 1 and December 31, inclusive, during the year before harvest and not less than 90 days before harvest begins. We would continue to require that the second survey be conducted no more than 90 days before harvest begins. Survey procedures in each case would remain unchanged. As explained above, the proposal to conduct the first survey between May 1 and December 31, inclusive, rather than between 1 year and 90 days before harvest begins, is based on this time of year being most favorable for detection of citrus canker. Again, and for the reasons given above, we propose to remove the requirement that at least one of the two surveys be conducted within 4–12 weeks after weather likely to cause a flush of growth on the trees.

The prescribed surveys are the minimum level of inspection that must be done; more intensive surveys would be acceptable.

In addition, we propose to prohibit the interstate movement of regulated fruit produced in groves that are within one-half mile of any property where a primary infestation caused by the Asiatic strains has occurred within the past 2 years. This prohibition would apply to any size grove. Practically, however, it would affect only those groves within the area of Florida where there have been primary infestations caused by the Asiatic strains, since groves outside this area are more than one-half mile from any property where a primary infestation caused by the Asiatic strains has occurred. This prohibition appears necessary to prevent the interstate spread of citrus canker.

We propose to allow fruit produced in a grove of 10 or more regulated trees to be treated with soap and water rather than with chlorine or sodium o-phenyl phenate (SOPP) if the grove is outside the area of Florida where primary infestations caused by the Asiatic strains have occurred. Specifically, this fruit would have to be thoroughly wetted and brush scrubbed for one minute in a solution of water and soap, or water and detergent, sufficient to cause a visible foaming action. This treatment would be effective in reducing surface bacteria, if any were present on the fruit, to the extent that the fruit would present a negligible risk of spreading citrus canker if moved interstate to parts of the United States that are not commercial citrus-producing areas. Fruit produced in the area of Florida where there has been a primary infestation caused by the Asiatic strains would not be eligible for interstate movement unless treated with chlorine or SOPP.

We propose to stop requiring treatment of fruit produced in groves of fewer than 10 trees if the grove is outside the area of Florida where a primary infestation caused by the Asiatic strains has occurred. These groves must be inspected, tree by tree, within 30 days of harvest. With only a few trees being individually examined, inspectors are able to look at the fruit itself, the actual commodity to be shipped. Fruit found free of citrus canker on this survey could, at most, have only very low levels of bacteria on its surface. Most growers with groves of fewer than 10 trees wash fruit before shipping it, which would make the bacteria count even lower. Even without the washing, however, any surface bacteria present would not be likely to survive long. Given that this fruit may not be sold in commercial channels, but must be moved interstate directly to a household, there would be almost no risk of the fruit spreading citrus canker interstate.

Treatment with chlorine or SOPP would continue to be required for fruit produced in groves within the area of Florida where a primary infestation caused by the Asiatic strains has occurred.

Also, we propose to require all personnel, vehicles, and equipment to be treated upon entering any grove of 10 or more regulated trees within the area of Florida where there has been a primary infestation caused by the Asiatic strains. Several infestations caused by the Asiatic strains have been traced to contaminated vehicles and equipment, and the form of citrus canker caused by

these strains can be spread by people who have handled contaminated material. Therefore, we believe this requirement is necessary to prevent new infestations of citrus canker caused by Asiatic strains.

Other requirements pertaining to the interstate movement of fruit with a limited permit would remain the same.

Fruit Treatments

We have already discussed our proposal to allow an alternative treatment for certain fruit. (See the discussion under "Limited Permits for the Interstate Movement of Regulated Fruit".)

We also propose to specify that the 200 ppm chlorine solution prescribed as a treatment for fruit, seed, and vehicles and equipment is a 200 ppm solution of sodium hypochlorite. Sodium hypochlorite is the active ingredient in the chlorine solution labeled for this use.

In addition, we propose to require that fruit treatments be applied either at a facility owned by a person operating under a compliance agreement with Plant Protection and Quarantine or in the presence of an inspector. This requirement is necessary to ensure that fruit is treated as required before being moved interstate.

Limited Permits for Interstate Movement of Calamondin and Kumquat Plants

We propose to relieve some restrictions on the interstate movement of certain calamondin and kumquat plants from Florida and to impose other restrictions.

When the regulations were established in 1984, they did not allow the interstate movement of plants from Florida, except with a permit for scientific or experimental purposes.

In March 1987, however, based on research and field observations showing calamondin and kumquat plants to be highly resistant to citrus canker, we amended the regulations (52 FR 7562–7564, Docket No. 86–361) to allow the interstate movement of these plants, under certain conditions, to areas of the United States that are not commercial citrus-producing areas.

The regulations distinguish between calamondin and kumquat plants that are "greenhouse-grown" and those that are "container-grown." Under § 301.75–7(f), "greenhouse-grown" calamondin nursery plants that are individually sealed in plastic bags before leaving the nursery may be moved interstate with a limited permit to all areas of the United States except American Samoa, Arizona, California, Hawaii, Louisiana, Puerto Rico, Texas, and the Virgin Islands of the United States. Under § 301.75–7(g), "container-grown" calamondin and kumquat nursery plants may be moved interstate with a limited permit only to that area of the United States east of the Mississippi River and north of an imaginary line formed by the southernmost borders of Illinois, Indiana, Ohio, Pennsylvania, and New Jersey.

Proposed Changes

(1) We propose to eliminate the distinction between "greenhouse-grown" and "container-grown" plants and to allow all calamondin and kumquat plants that have been grown entirely from seeds or cuttings to be moved interstate to all areas of the United States except commercial citrus-producing areas. These calamondin and kumquat plants would be referred to as "own-root-only" plants.

In the current regulations, "greenhouse-grown" calamondin plants refer to calamondin plants that are grown in sterile medium on raised benches in greenhouses. These are own-root-only plants. "Container-grown" calamondin and kumquat plants are plants that are grown outdoors and that may be own-root-only or budded or grafted to other varieties of rootstock. The different rules for greenhouse-grown and container-grown plants were established as an added precaution against the spread of citrus canker, based on the premise that measures to control and monitor citrus canker are less effective in open fields than in greenhouses. However, research and observations made in the field since these rules were established have confirmed that all own-root-only calamondin and kumquat plants, including field-grown plants, are highly resistant to citrus canker. (For further information, contact Domestic and Emergency Operations, PPQ, APHIS, USDA, Room 661, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782.)

(2) As noted above, calamondin and kumquat plants may be budded or grafted onto other varieties of rootstock. Because the rootstock may be a variety susceptible to citrus canker, and because it is impossible to determine visually what type of rootstock has been used, we propose to prohibit the interstate movement from quarantined areas of calamondin or kumquat plants that have been budded or grafted, regardless of the variety of rootstock.

(3) We propose to clarify our requirements concerning attached fruit by specifying that calamondin and kumquat plants may be moved interstate with or without fruit attached.

Calamondin and kumquat plants with attached fruit are no more susceptible to citrus canker than calamondin and kumquat plants without fruit. Therefore, any calamondin or kumquat plants that otherwise qualify for interstate movement under our regulations would present an extremely remote chance of spreading citrus canker through infected fruit. The current provision stating that "greenhouse-grown" calamondin plants "will have no fruit attached" is intended to ensure that plants moved interstate as "individually packaged calamondin nursery plants" are the small, immature plants that current § 301.75–7(f) is intended to cover. There is no similar restriction for container-grown calamondin or kumquat nursery plants, which are valued as ornamentals because of their fruit. Under our proposal, plants with or without attached fruit would be handled in the same manner, and attached fruit would require no special handling or treatment beyond that required for the plants.

(4) We propose to remove the requirement that calamondin and kumquat plants must come from a nursery that has had no citrumelo or *Poncirus trifoliata* plants since May 1, 1985. This requirement was established in March 1987 as a safeguard against the spread of the form of citrus canker caused by the Florida nursery strains. At that time, we thought that citrumelo and *Poncirus trifoliata* were much more susceptible than other plants to infection by the Florida nursery strains, and that keeping citrumelo and *Poncirus trifoliata* out of nurseries was essential to preventing the spread of citrus canker. Since then, we have determined through research and observations made in the field that many other plants are as susceptible. However, we have found that, in nurseries where susceptible plants are grown, we have been able to detect citrus canker, when it was present, within 90 days and at very low levels—only a few plants out of tens of thousands, sometimes millions. Thus, it does not appear that allowing citrumelo and *Poncirus trifoliata* to be grown in nurseries with calamondin and kumquat plants would present any additional risk of spreading citrus canker interstate.

(5) We propose to allow cuttings for propagation to be taken from plants located either: (a) On the same premises; or (b) on another premises under the same ownership; or (c) at a nursery owned by another person operating under a compliance ageement in accordance with the regulations.

The regulations currently require that cuttings be taken only from plants located on the same premises. This

requirement ensures that we can locate potential sources of infection if citrus canker is detected either on the cutting or on the plant from which it was taken. However, we have determined that tracing could also be accomplished if cuttings are taken from plants located on another property under the same ownership.

In order to qualify for interstate movement with a limited permit, calamondin and kumquat plants must come from nurseries that have not received material from properties infested with or exposed to citrus canker. One of the primary ways we determine whether a nursery meets this condition is by reviewing records that the State of Florida requires nurseries to keep on the movement of plants and plant material to and from nurseries and on the location of plants within nurseries. When adequately maintained, these records would allow us to trace potential sources of infection, if necessary, even if cuttings were moved to a nursery from another property owned by the same person. We believe, therefore, that in nurseries where calamondin and kumquat plants otherwise qualify for interstate movement with a limited permit, we would have adequate means of tracing potential sources of infection, if necessary, even if cuttings were moved to the nursery from another property owned by the same person.

Nursery owners sometimes wish to move cuttings to their nursery from a nursery owned by someone else. If the nursery from which the cuttings were taken also met our requirements for moving calamondin and kumquat plants interstate with a limited permit, the cuttings would present an extremely remote risk of causing the interstate spread of citrus canker. Nurseries owned by persons operating under a compliance agreement with us in accordance with § 301.75–8 have agreed to comply with our regulations. Noncompliance would result in cancellation of the compliance agreement. Therefore, we believe that nurseries producing calamondin and kumquat plants for interstate movement may receive cuttings from another nursery owned by a person operating under a compliance agreement with us without increasing the risk of the calamondin and kumquat plants causing the interstate spread of citurs canker.

(6) We propose to require that, within the past 2 years, nurseries where the plants are grown must not have contained any plants or plant parts infested with or exposed to citrus canker (caused by any strain). Currently, the regulations state that nurseries must not have received any exposed material from any infested or exposed property. Because no time period is specified, this restriction applies to nurseries that may have received exposed material at any time in the past. In light of the comprehensive and successful nursery inspection program in Florida, we believe this restriction can be eased.

The regulations already require nurseries where regulated plants, including calamondin or kumquat plants, are grown to have three negative inspections for citrus canker. The inspections must be conducted at approximately 30-day intervals and not more than 90 days before the plants may be shipped interstate. These surveys have been conducted since 1984 at all nurseries in Florida that contain regulated plants. Our experience has been that, when citrus canker has been present in a nursery, inspectors have found the disease by the third survey, that is, within 90 days. We have found this to be an adequate inspection safeguard in connection with our requirements concerning the interstate movement of regulated fruit. Nursery plants, however, may present somewhat more risk than fruit of spreading citrus canker. Therefore, to remove even the slightest chance that exposed or infested calamondin or kumquat plants could be moved interstate, we propose to require nurseries where these plants are grown to be free of plants or plant parts infested with or exposed to citrus canker (caused by any strain) for at least 2 years before the plants may be moved interstate. We chose 2 years because this is generally considered to be the time during which citrus canker may remain dormant.

In addition to specifying 2 years, our proposal changes the word "received" to "contained" to cover any infestations that originate in a nursery. Also, the proposal requires that the nursery must not have contained any "infested," as well as "exposed" plants or plant parts. The term "infested" was inadvertently omitted from the current regulations.

(7) The regulations require calamondin and kumquat plants moved interstate to display a waterproof, boldface-type statement that the plants are not for distribution in certain areas of the United States, which are commercial citrus-producing areas.

We propose to require that the list of commercial citrus-producing areas shown on the statement include Guam and the Northern Mariana Islands, as well as American Samoa, Arizona, California, Hawaii, Louisiana, Puerto Rico, Texas, and the Virgin Islands of the United States. In accordance with the restrictions on moving regulated articles interstate with a limited permit, calamondin and kumquat plants are prohibited in all commercial citrus-producing areas of the United States. These areas are listed in § 301.75–4 of the regulations, and include Guam and the Northern Mariana Islands. These two areas were inadvertently omitted from the current list of areas required on the waterproof, boldface-type statement.

Also, we propose to require that the waterproof, boldface-type statement required on each individual package or plant also appear on shipping containers. When individual packages or plants are enclosed in shipping containers, the statement on the packages or plants is not visible. Requiring the statement to be displayed on shipping containers would help ensure that distribution restrictions are observed and enforced.

(8) We propose to prohibit the interstate movement of calamondin and kumquat plants from any area of Florida where a primary infestation caused by the Asiatic strains has occurred until 2 years after the last infested plant in that area has been destroyed. These areas are listed in current § 301.75–7(h)(2) (paragraph (b)(3) in our proposal). This prohibition is necessary because of the aggressiveness of the Asiatic strains.

(9) We propose to require that calamondin and kumquat plants, other than those sealed hermetically in plastic bags at the nursery where they were produced, be completly enclosed in containers or in compartments of vehicles during movement through Florida. This would prevent accidental surface contamination of the plants after they have left the nursery.

(10) We propose to add a definition for the term "own-root-only."

The Area of Florida Affected by the Asiatic Strains

Currently, the area of Florida where a primary infestation caused by the Asiatic strains has occurred within the past 2 years is identified as: All of Manatee, Pinellas, and Sarasota counties, and Hillsborough County south of State Road 60. Hillsborough County has never had an infestation caused by the Asiatic strains, and neither have most of Manatee, Pinellas, and Sarasota counties. When this area was originally identified, intensive walking surveys had not been completed, and the boundaries were drawn to include a fairly large buffer area around the infestations. This was necessary, until the infested area could be accurately

defined and the infestations brought under control, to ensure that fruit moved interstate to commercial citrus-producing areas of the country did not present a risk of spreading citrus canker.

Since 1986, when the Asiatic strains were first detected in this area, the number of new infestations has dropped from 266 residential properties and one grove in 1986, to 13 residential properties in 1987, to only 2 residential properties as of August 1988, and these have been confined to Anna Maria Island and a grove near the city of Palmetto (both in Manatee County). It is clear that the eradication program for the Asiatic strains is succeeding and that the affected area is relatively small. Therefore, we propose to reduce the area under special restriction because of the Asiatic strains. The proposed area would be comprised of:

(a) *Pinellas County:* South of a line formed by State Highway 694, from Redington Shores to the intersection of State Highway 694 and Interstate 92, then along Interstate 92 to the eastern shore of Old Tampa Bay;

(b) *Manatee County:* West of a line formed by Interstate 301 and Interstate 75, then along Interstate 75 to the Sarasota county line; and

(c) *Sarasota County:* The area south of the Manatee County line, west of Interstate 75, and north of State Highway 72 and County Road 789 to the beach.

This area is proposed based on the following considerations: the size and nature of the infestations; the distance that bacteria might naturally move from the site of the infestations; and the proximity of citrus groves and contiguous, residential properties on which citrus is grown and through which citrus canker could be spread by people, vehicles, and equipment (such as lawn services) moving from one property to another.

Addition of Wampi to the List of Regulated Articles.

We propose to add the species *Clausena lansium* (Lour.) Skeels (common name, wampi) to the list of regulated articles. Wampi plants in Florida have been found infected with the form of citrus canker caused by the Florida nursery strains, and, because wampi is a member of the *Rutaceae* family, which includes many known hosts of the Asiatic strains, there is good reason to believe that wampi may also be susceptible to infection by these strains as well. Adding this species to the list of regulated articles appears necessary to prevent the interstate spread of citrus canker.

Certificates for the Interstate Movement of Seed

Currently, the regulations state that seeds may be moved interstate with a certificate only if, among other things, no infestation has been found in the grove or nursery from which the seed originates.

We propose to require that the grove or nursery be free of plants or plant parts infested with or exposed to citrus canker (caused by any strain) for at least 2 years. Seed produced in a nursery or grove that has been free of plants or plant parts infested with or exposed to citrus canker for at least 2 years would present an extremely small risk of spreading this disease interstate.

Miscellaneous

Under the current regulations pertaining to interstate movement of fruit with a certificate is a provision stipulating that all regulated plants at all nurseries in the State of Florida that contain regulated plants must be examined by an inspector approximately every 30 days. These nursery inspections are important because nurseries are where we have found plants infested with the Florida nursery strains. The surveys have proven to be extremely effective in detecting citrus canker, and we have then been able to trace transplants to groves and take immediate action to protect the groves. These inspections also provide information necessary for us to determine whether regulated fruit, seed, and calamondin and kumquat plants meet requirements for interstate movement with a limited permit. Therefore, we propose to make issuance of any certificate or limited permit contingent on these inspections being conducted.

We propose to define "United States" as "all of the states of the United States, the District of Columbia, Guam, the Northern Mariana Islands, Puerto Rico, the Virgin Islands of the United States, and all other territories and possessions of the United States."

We also propose to make a number of editorial changes to improve the clarity of the regulations.

Executive Order 12291 and Regulatory Flexibility Act

We are issuing this proposed rule in conformance with Executive Order 12291, and we have determined that it is not a "major rule." Based on information compiled by the Department, we have determined that this proposed rule would have an effect on the economy of less than $100 million; would not cause a major increase in costs or prices for consumers, individual industries, federal, state or local government agencies, or geographic regions; and would not cause a significant adverse effect 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.

Regulated Fruit

We have proposed several changes that would increase the amount of regulated fruit that could be eligible for interstate movement to commercial citrus-producing areas of the United States: (1) Groves producing fruit for interstate movement with a certificate would no longer have to be at least one-half mile from properties that have contained, during the past 2 years, plants or plant parts infested with or exposed to the Florida nursery strains; (2) within one-half to 5 miles of these groves, the presence of plants infested with or at high risk of developing the form of citrus canker caused by the Florida nursery strains would no longer disqualify fruit for interstate movement with a certificate; and (3) the area of Florida designated as having had primary infestations caused by the Asiatic strains would be reduced. As a result, we estimate that all but about 10,080 of Florida's 600,000 acres of fruit-bearing citrus trees could produce fruit eligible for interstate movement with a certificate, an increase of about 6 percent over the 1987–1988 shipping season. Only a relatively small amount of the regulated fruit produced on these acres would be moved interstate to commercial citrus-producing areas, however. Most regulated fruit grown in Florida is used to make juice at processing plants in the state. Less than 20 percent is consumed as fresh fruit, and much of this is consumed in the state or is exported to foreign countries. Figures from the State of Florida Department of Citrus show that in 1983–1984, the last complete season before Florida was quarantined for citrus canker, the amount of fresh fruit shipped to commercial citrus-producing areas of the United States was 4.3 percent of the fresh citrus fruit shipped to all states combined, or about 3 million ⅘ bushel cartons. Furthermore, most of the regulated fruit that could become eligible for interstate movement with a certificate if our proposed rule is adopted is now eligible for interstate movement with a limited permit.

We also have proposed several changes in survey requirements. As a result, some groves would need only one

survey rather than two, and surveys of properties within 5 miles of groves producing fruit for interstate movement with a certificate would be eliminated. In addition, the timing of some grove surveys would be changed from between 1 year and 90 days before harvest to between May 1 and December 31, inclusive, during the year before harvest. The reduction in the number of surveys would decrease the regulatory burden on state and federal offices responsible for conducting surveys of residential properties and commercial groves. Although the May through December timing proposed for some surveys would reduce the amount of time inspectors have to complete the surveys, this should not present a problem since the overall number of surveys would be greatly reduced. The proposed changes in survey requirements would have very little, if any, economic impact on persons involved in growing, handling, or shipping regulated fruit interstate, or on the amount of regulated fruit moved interstate.

We have proposed to remove the requirement that personnel, vehicles, and equipment be treated upon entering a grove producing fruit for interstate movement with a certificate. However, we have proposed to add a requirement that personnel, vehicles, and equipment be treated upon entering any grove of 10 or more regulated trees located within the area of Florida where there have been primary infestations caused by the Asiatic strains. These actions affect production expenses for those grove owners. However, the cost of disinfecting personnel, vehicles, and equipment is minor when compared to overall production expenses, and adding or removing this requirements should have little economic impact on persons producing fruit for interstate movement.

We have proposed to require that groves of 10 or more regulated trees producing fruit for interstate movement with a limited permit obtain regulated plants during the year before the interstate movement only from nurseries inspected and found free of citrus canker. This change would have little economic impact on persons moving regulated fruit interstate with a limited permit since all nurseries in the State of Florida are already being surveyed as proposed, and Florida law restricts the movement of plants from nurseries found to be infested.

We have proposed to prohibit the interstate movement of regulated fruit from any grove that is within one-half mile of any property where a primary infestation caused by the Asiatic strains has occurred within the past 2 years. This provision would apply to one commercial grove (the site of a primary infestation in Manatee County) and 24,000 residential properties. However, no fruit is being moved from these properties now because Florida law already prohibits the intrastate movement of fruit from these properties. Therefore, our proposal would have no economic impact on persons moving regulated fruit interstate.

We have proposed to allow a soap (or detergent) and water treatment for fruit produced in groves of 10 or more regulated trees located outside the area of Florida where primary infestations caused by the Asiatic strains have occurred if the fruit is to be moved interstate with a limited permit. Washing citrus fruit with soap (or detergent) and water is standard practice in packing houses. Eliminating the need for chemical treatment with chlorine or SOPP would reduce the cost of processing this fruit. However, expenses associated with fruit treatment are not a significant deterrent to the interstate movement of regulated fruit produced in commercial groves. Therefore, we do not anticipate that the change in this requirement woud have any significant economic impact on persons moving regulated fruit interstate with a limited permit.

When fruit must be treated as a condition of interstate movement, we have proposed to require that treatments be applied either in the presence of an inspector or at a facility owned by a person operating under a compliance agreement. This action would not pose any additional economic burden on persons moving regulated fruit interstate since all fruit treatments now are applied at packing houses operating under compliance agreements.

We have proposed to allow certain regulated fruit to be moved interstate without treatment to parts of the United States that are not commercial citrus-producing areas. This provision would apply only to regulated fruit produced in groves of fewer than 10 trees located outside the area of Florida where there have been primary infestations caused by the Asiatic strains. This action would reduce the cost to many small entities of moving regulated fruit interstate with a limited permit. At present, these entities take their fruit to a packing house for treatment. Often, the cost of treatment makes it too expensive for them to send the fruit to friends or relatives in other states. We anticipate that more small entities will move regulated fruit interstate as gifts to friends or relatives if treatement is not required. Other individuals and businesses would be affected, however, since regulated fruit from groves of fewer than 10 trees may be moved interstate only if it is sent directly to a household for consumption. Also, the amount of regulated fruit that would be shipped interstate in this manner would continue to be extremely small when compared to the amount of regulated fruit shipped interstate in commercial channels.

We have proposed to allow the interstate movement of regulated seed from nurseries or groves that have not contained plants or plant parts exposed to or infested with citrus canker for at least 2 years. This action would have very little economic impact on persons moving regulated seed interstate since an insignificant amount of this seed is produced in Florida for interstate movement. Furthermore, most of that is obtained from groves, which have, with few exceptions, been free of citrus canker.

Wampi

We have proposed to add the species Clausena lansium (Lour.) Skeels (common name, wampi) to the list of regulated articles. This action should have little or no economic impact on persons who move regulated articles interstate since very little wampi is grown in Florida, and at this time, we are not aware of any wampi being moved interstate.

Calamondin and Kumquat Plants

We have proposed to reduce restrictions on the interstate movement of own-root-only calamondin and kumquat plants grown outside the area of Florida where there has been a primary infestation caused by the Asiatic strains. We also have proposed to prohibit the interstate movement of grafted or budded calamondin and kumquat plants and all calamondin and kumquat plants grown in areas of Florida where a primary infestation caused by the Asiatic strains has occurred.

We are not aware of any nurseries that grow calamondin and kumquat plants in the area of Florida where a primary infestation caused by the Asiatic strains has occurred.

Approximately six nurseries produce container-grown calamondin or kumquat plants, nearly all of which are own-root-only. These plants are seasonal, specialty commodities sold as decorative house plants and for use as indoor landscaping at shopping malls, office buildings, and other establishments. Although we expect sales of the container-grown plants to

increase if this proposal is adopted, we do not expect the increased sales to have a significant economic impact on nurseries or other businesses involved in the sale of these plants. This is because calamondin and kumquat plants account for only a small percentage of these businesses' activities.

Individually packaged calamondin plants are own-root-only plants. They are sold at many gift shops and roadside fruit stands as decorative indoor house plants. Primary purchasers are tourists buying souvenirs before returning home from the quarantined area. The overwhelming majority of gift shops and roadside stands selling individually packaged calamondin plants are small entities. Sales may increase if this proposal is adopted, but the economic impact would be minor as calamondin plants are a very small part of the inventory of these small entities.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determine that this action would not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

This proposed rule contains no new information collection or recordkeeping requirements under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with state and local officials. (See 7 CFR Part 3015, Subpart V.)

List of Subjects in 7 CFR Part 301

Agricultural commodities, Citrus canker, Plants (Agriculture), Plant diseases, Plant pests, Quarantine, Transportation.

Accordingly, 7 CFR Part 301 would be amended as follows:

PART 301—DOMESTIC QUARANTINE NOTICES

1. The authority citation for Part 301 would continue to read as follows:

Authority: 7 U.S.C. 150bb, 150dd, 150ee, 150ff, 161, 162, and 164–167; 7 CFR 2.17, 2.51, and 371.2(c).

2. Section 301.75–1 would be amended by revising the definitions of "Citrus canker" and "Nursery"; by adding, in alphabetical order, definitions for "Own-root-only" and "United States"; and by removing the definition for "Container plant," as follows:

§ 301.75–1 Definitions.

* * * * *

Citrus canker. A plant disease caused by all strains of the bacterium *Xanthomonas campestris* pv. *citri* (Hasse) Dye, including the Asiatic strains and the Florida nursery strains.

* * * * *

Nursery. Any premises, including greenhouses, at which plants are grown or maintained for propagation or for replanting for ornamental purposes, but not including any grove on the premises.

* * * * *

Own-root-only. Plants grown entirely from seeds or cuttings.

* * * * *

United States. All of the states of the United States, the District of Columbia, Guam, the Northern Mariana Islands, Puerto Rico, the Virgin Islands of the United States, and all other territories and possessions of the United States.

3. In § 301.75–2, paragraph (a) would be revised to read as follows:

§ 301.75–2 Regulated articles.

(a) Plants or plant parts, including fruit and seeds, of any of the following:

All species, clones, cultivars, strains, varieties, and hybrids of the genera *Citrus* and *Fortunella*, and all clones, cultivars, strains, varieties, and hybrids of the species *Clausena lansium* and *Poncirsu trifoliata*. The most common of these are: lemon, pummelo, grapefruit, key lime, persian lime, tangerine, satsuma, tangor, citron, sweet orange, sour orange, mandarin, tangelo, ethrog, kumquat, limequat, calamondin, trifoliate orange, and wampi.

* * * * *

§ 301.75–2 [Amended]

4. In §301.75–2, paragraph (b), "comveyance" would be revised to read "conveyance".

§ 301.75–6 [Amended]

5. In § 301.75–6, paragraph (e) would be amended by revising "§ 301.75–7(e) or § 301.75–7(f)" to read "§ 301.75–7 of this subpart".

6. Section 301.75–7 would be revised to read as follows:

§301.75–7 Certificates and limited permits.

(a) *Issuance and withdrawal.* (1) The issuance of certificates and limited permits for the interstate movement of regulated articles from Florida is contingent upon every nursery in Florida that contains regulated plants being inspected for citrus canker approximately every 30 days. The inspections must be conducted by an inspector, and every regulated plant in the nurseries must be examined.

(2) Certificates and limited permits may be issued for the interstate movement of regulated articles only by an inspector or by persons operating under a compliance agreement.

(3) Any certificate or limited permit that has been issued may be withdrawn by an inspector if the inspector determines that any of the applicable requirements of this subpart are not being met. The decision of the inspector and the reasons for the withdrawal must be confirmed in writing as promptly as circumstances allow. Any person whose certificate or limited permit is withdrawn may appeal the decision in writing to the Administrator within 10 days after receiving the written notification. The appeal must state all of the facts and reasons upon which the person relies to show that the certificate or limited permit was wrongfully withdrawn. The Administrator must grant or deny the appeal, in writing, stating the reasons for the decision, as promptly as circumstances allow. If there is a conflict to any material fact, a hearing will be held to resolve the conflict. Rules of practice concerning the hearing will be adopted by the Administrator.

(b) *Restrictions on interstate movement of regulated articles produced in an area of Florida where a primary infestation caused by the Asiatic strains has occurred.* (1) Regulated fruit produced in any area of Florida where a primary infestation of citrus canker caused by the Asiatic strains has occurred will not be eligible for interstate movement with a certificate until 2 years after the destruction in that area of the last plant infested with citrus canker caused by the Asiatic strains.

(2) Calamondin and kumquat plants grown in any area of Florida where a primary infestation of citrus canker caused by the Asiatic strains has occurred will not be eligible for interstate movement with a limited permit until 2 years after the destruction in that area of the last plant infested with citrus canker caused by the Asiatic strains.

(3) The area of Florida where a primary infestation of citrus canker caused by the Asiatic strains has occurred is comprised of:

(i) *Pinellas County*: South of a line formed by State Highway 694, from Redington Shores to the intersection of State Highway 694 and Interstate 92, then along Interstate 92 to the eastern shore of Old Tampa Bay;

(ii) *Manatee County*: West of a line formed by Interstate 301 and Interstate 75, then along Interstate 75 to the Sarasota County line; and

(iii) *Sarasota County*: The area south of the Manatee County line, west of Interstate 75, and north of State Highway 72 and County Road 789 to the beach.

(c) *Certificates for interstate movement of seed.* A certificate will be issued for the interstate movement of regulated seed to any area of the United States, including commercial citrus-producing areas, only if all of the following conditions are met:

(1) In the grove or nursery producing the fruit from which the seed is extracted, there have been no plants or plant parts infested with or exposed to citrus canker (caused by any strain) for at least 2 years; and

(2) The seed has been treated in accordance with § 301.75–12(b) of this subpart.

(d) *Certificates for interstate movement of fruit.* A certificate will be issued for the interstate movement of regulated fruit to any area of the United States, including commercial citrus-producing areas, only if the fruit is eligible for a certificate in accordance with paragraph (b) of this section and all of the following conditions are met:

(1) The fruit is harvested from a grove of 10 or more regulated trees;

(2) The grove producing the fruit has not, within the past 2 years, contained any plants or plant parts infested with or exposed to citrus canker (caused by any strain);

(3) The grove producing the fruit has been found free of citrus canker (caused by any strain) on two surveys, conducted as follows:

(i) The first survey must have been conducted by an inspector between May 1 and December 31, inclusive, during the year before harvest, and not less than 90 days before the beginning of harvest. The inspector must have: Examined all trees on the perimeter of the grove while driving by the trees at no more than 2 m.p.h.; examined, while on foot, at least 12 trees in high-risk areas of the grove (such as the grove entrance, the perimeter of the grove, and areas where the movement of people and equipment is concentrated); and examined, while on foot, a minimum of four nature trees or eight young trees in one randomly selected location in every 10 acres of the grove, or, for groves less than 10 acres, examined, while on foot, a minimum of four mature trees or eight young trees in one randomly selected location;

(ii) The second survey must have been conducted by an inspector not more than 90 days before the beginning of harvest. The inspector must have walked through the grove and examined all trees on either side of the first middle (between the first two rows) and every fourth middle thereafter, and at least 12 trees in high-risk areas of the grove (such as the grove entrance, the perimeter of the grove, and areas where the movement of people and equipment is concentrated);

(4) The grove producing the fruit is at least one-half mile from any property that, within the past 2 years, has contained plants or plant parts infested with or exposed to citrus canker caused by the Asiatic strains;

(5) In the area between one-half and 5 miles from the grove producing the fruit, the following plants have been destroyed:

(i) All plants infested with citrus canker caused by the Asiatic strains; and

(ii) All exposed plants at high risk for developing the form of citrus canker caused by the Asiatic strains. Identification of expose plants at high risk for developing the form of citrus canker caused by the Asiatic strains will be based on an evaluation of all of the circumstances related to their exposure, including, but not limited to, the following:

(A) The stage of maturity of the exposed plants at the time of exposure;

(B) The size and degree of infestation to which the plants were exposed;

(C) The proximity of the exposed plants to the infested plants at the time of exposure; and

(D) The length of time the plants were exposed to the infestation;

(6) During the past 2 years, all shipments of regulated plants received by the grove producing the fruit have come only from nurseries found free of citrus canker (caused by any strain) on three surveys conducted by an inspector approximately 30 days apart and not more than 90 days before each shipment. Every regulated plant in the nursery must be examined on each survey.

(7) The identity of the fruit is maintained during picking, hauling to the packing house, and package;

(8) The fruit is treated in accordance with § 301.75–12(a) of this subpart and then waxed;

(9) The fruit is free of leaves, twigs, and other plant litter, except stems less than one-inch long that are attached to the fruit;

(10) The fruit is packed in containers marked with a United States Department of Agriculture stamp that says "Certified under all applicable Federal or State cooperative domestic plant quarantines".

(e) *Limited permits for interstate movement of fruit.* A limited permit will be issued for the interstate movement of regulated fruit to any area of the United States, except commercial citrus-producing areas, only if the following conditions are met:

(1) The grove producing the fruit has not, within the past 1 year, contained any plants or plant parts infested with citrus canker (caused by any strain);

(2) In the grove producing the fruit, any exposed plants at high risk for developing citrus canker (caused by any strain) have been destroyed. Identification of exposed plants at high risk for developing citrus canker will be based on an evaluation of all of the circumstances related to their exposure, including, but not limited to, the following:

(i) The stage of maturity of the exposed plants at the time of exposure;

(ii) The size and degree of infestation to which the plants were exposed;

(iii) The proximity of the exposed plants to the infested plants at the time of exposure;

(iv) The length of time the plants were exposed to the infestation; and

(v) The strain of the bacterium to which the plants were exposed;

(3) The grove producing the fruit is at least one-half mile from any property where a primary infestation of citrus canker caused by the Asiatic strains has occurred within the past 2 years;

(4) The grove producing the fruit has been surveyed and found free of citrus canker (caused by any strain) as follows:

(i) Groves of 10 or more trees located outside the area designated in paragraph (b) of this section as having had a primary infestation of citrus canker caused by the Asiatic strains have been surveyed one time. The survey must have been conducted by an inspector between May 1 and December 31, inclusive, during the year before the beginning of harvest. The inspector must have examined all trees on the perimeter of the grove while driving at no more than 2 m.p.h.; examined, while on foot, at least 12 trees in high-risk areas of the grove (such as the grove entrance, the perimeter of the grove, and areas where the movement of people and equipment is concentrated); and examined, while on foot, a minimum of four mature trees or eight young trees in one randomly selected location in every 10 acres of the grove, or, for groves less than 10 acres, examined, while on foot, a minimum of four mature trees or eight young trees in one randomly selected location;

(ii) Groves of 10 or more trees located within the area designated in paragraph (b) of this section as having had a primary infestation of citrus canker caused by the Asiatic strains must have been surveyed two times, as follows:

(A) The first survey must have been conducted by an inspector between May 1 and December 31, inclusive, during the year before harvest, and not less than 90 days before the beginning of harvest. The inspector must have: examined all trees on the perimeter of the grove while driving by the trees at no more than 2 m.p.h.; examined, while on foot, at least 12 trees in high-risk areas of the grove (such as the grove entrance, the perimeter of the grove, and areas where the movement of people and equipment is concentrated); and examined, while on foot, a minimum of four mature trees or eight young trees in one randomly selecteed location in every 10 acres of the grove, or, for groves of less than 10 acres, examined, while on foot, a minimum of four mature trees or eight young trees in one randomly selected location; and

(B) The second survey must have been conducted by an inspector not more than 90 days before the beginning of harvest. The inspector must have examined all trees in the outer two rows of the grove while driving by the trees at no more than 2 m.p.h.; examined, while on foot, at least 12 trees in high-risk areas of the grove (such as the grove entrance, the perimeter of the grove, and areas where the movement of people and equipment is concentrated); and examined, while on foot, a minimum of four mature trees or eight young trees in each of two randomly selected locations in every 10 acres of the grove, or, for groves less than 10 acres, examined, while on foot, a minimum of four mature trees or eight young trees in each of two randomly selected locations:

(iii) Groves of fewer than 10 regulated trees, whether located within or outside the area designated in paragraph (b) of this section as having had a primary infestation of citrus canker caused by the Asiatic strains, must have been surveyed one time. An inspector must walk through the grove and examine every tree no more than 30 days before the beginning of harvest;

(5) If the grove producing the fruit has 10 or more regulated trees, all shipments of regulated plants received by the grove during the past 1 year have come only from nurseries found free of citrus canker (caused by any strain) on three surveys conducted by an inspector approximately 30 days apart and not more than 90 days before each shipment. Every regulated plant in the nursery must have been examined on each survey;

(6) If the grove producing the fruit has 10 or more regulated trees, and is located within the area designated in paragraph (b) of this section as having a primary infestation of citrus canker caused by Asiatic strains, all personnel, vehicles, and equipment are treated in accordance with § 301.75–12 (c) and (d) of this subpart upon entering the grove;

(7) If the grove producing the fruit has 10 or more regulated trees, or if the grove, regardless of size, is located within the area designated in paragraph (b) of this section as having had a primary infestation of critrus canker caused by the Asiatic strains, the fruit is treated in accordance with § 301.75–12(a) of this subpart. No treatment is required for fruit produced in groves of fewer than 10 regulated trees located outside the area designated in paragraph (b) of this section as having had a primary infestation of citrus canker caused by the Asiatic strains;

(8) The fruit is free of leaves, twigs, and other plant litter, except stems less than one-inch long that are attached to the fruit; and

(9) Fruit produced in a grove of fewer than 10 regulated trees is to be moved interstate directly to a household, with the intent that the fruit be consumed at, or by members of, that household.

(f) *Limited permits for interstate movement of own-root-only calamondin and kumquat plants.* A limited permit will be issued for the interstate movement of own-root-only calamondin and kumquat plants, with or without fruit attached, to any area of the United States except commercial citrus-producing areas, only if the plants are eligible for a limited permit in accordance with paragraph (b) of this section and all of the following conditions are met:

(1) The plants have always been located on the premises from which they will be moved interstate:

(2) Cuttings used to propagate the plants were taken only from plants located on the same premises; or on other premises under the same ownership; or at a nursery owned by another person operating under a compliance agreement;

(3) The nursery where the plants were grown has not, within the past 2 years, contained any plants or plant parts infested with or exposed to citrus canker (caused by any strain);

(4) In the nursery where the plants were grown, all regulated plants were examined by an inspector and found free of citrus canker (caused by any strain) on three surveys conducted approximately 30 days apart and within the past 90 days;

(5) Except for plants hermetically sealed in plastic bags before leaving the nursery, the plants are completely enclosed in containers or in compartments of vehicles during movement through Florida; and

(6) A statement that the plants are not for distribution within American Samoa, Arizona, California, Guam, Hawaii, Louisiana, the Northern Mariana Islands, Puerto Rico, Texas, or the Virgin Islands of the United States is displayed in waterproof, boldface type on the package of each plant hermetically sealed in plastic, or on durable, waterproof tags attached to all other plants, and on the outside of all shipping containers used for these plants.

7. In § 301.75–12, paragraph (a) would be revised to read as follows:

§ 301.75–12 Treatments.

(a) *Fruit.* Fruit for which treatment is required by this subpart must be treated in accordance with this paragraph in the presence of an inspector or at a facility whose owner operates under a compliance agreement.

(1) Fruit produced in groves located within the area of Florida designated in § 301.75–7(b) of this subpart as having had primary infestations of citrus canker caused by the Asiatic strains: Thorough wetting with a solution containing 200 parts per million sodium hypochlorite for at least 2 minutes; or thorough wetting with a solution containing sodium o-phenyl phenate (SOPP) at a concentration of 1.86 to 2 percent of the total solution for 45 seconds if the solution has sufficient soap or detergent to cause a visible foaming action or for 1 minute if the solution does not contain sufficient soap or detergent to cause a visible foaming action.

Note: Sodium hypochlorite and SOPP must be applied in accordance with label directions.

(2) Fruit produced in groves of 10 or more regulated trees located outside the area of Florida designated in § 301.75–7(b) of this subpart as having had primary infestations caused by the Asiatic strains: Treatment as prescribed in paragraph (a)(1) of this section; or thorough wetting and brush scrubbing for one minute with a solution of water and soap (or water and detergent) sufficient to cause a visable foaming action.

* * * * *

§ 301.75–12—[Amended]

8. In § 301.75–12, paragraph (b) would be amended by revising "active chlorine" to read "sodium hypochlorite".

9. In § 301.75–12, paragraph (d) (1) would be amended by revising "chlorine solution" to read "solution of sodium hypochlorite".

Done at Washington, DC, this 19th day of October 1988.

W.F. Helms,
Acting Administrator, Animal and Plant Health Inspection Service.

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